COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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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

ORAL COMPENDIUM OF GOOGLE CANADA CORPORATION AND GOOGLE LLC

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Consumer and Corporate Affairs Canada

Consommation et Corporations Canada

Found at **Tab H(13), Volume 10** of Google's Motion Record.

Competition Law Amendments

A Guide

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C36
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Canada

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COMPETITION LAW AMENDMENTS

A GUIDE

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Minister of Consumer and Corporate Affairs
The Honourable Michel Côté

December 1985

NEED FOR REFORM

Much has changed since the 1960s. The country has gone from a period of steady-state economic growth, through a period of double-digit inflation, to a period of uneven economic growth and pervasive unemployment. During this time, the world economy has become intensely competitive. Thus, the need for a comprehensive reform of Canada's outmoded competition law has become even more pressing.

Recent jurisprudence under the present merger and conspiracy provisions has created an undesirable degree of uncertainty in the law and has raised very real questions about the enforceability of these provisions. In addition, the Supreme Court of Canada decision in the Southam case found that the search and seizure power under the Act was of no force and effect because it infringed the Canadian Charter of Rights and Freedoms' protection against unreasonable search and seizure. The Southam case has also raised questions regarding the constitutionality of both the other investigatory powers under the Act and the multiple roles of the Restrictive Trade Practices Commission (RTPC) as investigator and adjudicator. These developments dictate the urgent need to reassess the role of the RTPC and to bring the investigatory powers under the Act in line with the rights embodied in the Charter while maintaining their effectiveness.

One of the long standing weaknesses in the basic structure of the Act is the assessment of complex economic activity in a criminal law setting. The treatment of mergers and monopolies in the context of criminal law has long been considered inappropriate. Under the amendments, these matters will henceforth be adjudicated under a civil law framework where the adjudicator can issue remedial orders that will maintain or restore competition in a market. Under the current criminal jurisdiction, although order making powers are available in extraordinary circumstances, the normal penal powers of fine and imprisonment are ill-suited to the Act's objective of maintaining and restoring competition. The adjudication of civil matters by a specialized Competition Tribunal will permit more sophisticated judgement, a better understanting of the business reality, a more flexible process, and, above all, timely decision-making, which is consistent with the policy underlying the Act. Removing the criminal burden of proof should also improve the enforceability of the merger and dominance provisions.

Also, consistent with the Government's policy of improving the efficiency of Crown corporations either by privatization or by exposing them to market forces on the same basis as firms in the private sector, the application of the Act will be broadened to include Crown corporations, agents of Her Majesty, which engage in commercial activity in competition with other firms.

In the interest of rationalizing the Government's overall competition enforcement effort, the responsibility for investigating anti-competitive agreements and mergers among banks will be transferred from the Inspector General of Banks to the Director of Investigation and Research.

This Bill changes the name of Canada's competition law from the Combines Investigation Act to the Competition Act. It also clearly establishes the role of economic efficiency and international competition in competition policy in Canada. These important considerations are recognized at the outset in the purpose clause of the new legislation. The Bill takes account of the importance of international trade by removing certain impediments in the law which discourage the formation of export consortia. There is also widespread recognition of the need to consider the implications of international trade in the assessment of mergers that may have anti-competitive effects.

The relatively small size of the Canadian market and the overall importance of international trade to the economy dictates that certain industries have to be concentrated in order to achieve scale or other efficiencies necessary to compete in world markets. However, the trend toward increasing concentration historically has been a cause for concern, and many industries are protected from competition by high economic and institutional barriers to entry, such as high tariffs. The Bill brings the law into focus with current economic realities so that it is better able to deal with the implications for Canadian industry of foreign competition in Canada and competition in world markets.

Consumers and small business are among the prime beneficiaries of an effective competition policy. These two groups are afforded little protection from anti-competitive conduct on the part of large, dominant firms under the existing legislation. The Bill strengthens the law and makes it more effective, thus ensuring fairness in the marketplace. This will benefit consumers and will maintain and encourage the drive and initiative of the small business sector, which has the greatest potential for job creation.

ABUSE OF DOMINANT POSITION

Role of the Provision

To remain competitive in the increasingly integrated world market, Canada must continue to develop world class corporations. In some industries this will involve firms becoming very large relative to the small domestic market. While large corporate enterprises can harness economies of scale in areas such as production, distribution and research and development, their size relative to the size of the market can sometimes reflect market power which may be used to lessen competition.

Anti-competitive behaviour on the part of dominant firms imposes artificial restraints on the competitive process, impeding the market from efficiently allocating resources. In a healthy, dynamic economy, goods and services are supplied by the firms which can produce them most efficiently and adapt to the ever-changing demands of the marketplace. The proposed abuse of dominance provision will ensure that dominant firms compete with other firms on merit, not through the abuse of their market power. The provision is of particular importance for the protection of consumers, new entrants and, in particular, the small business community.

Need for Reform

It is proposed to replace the criminal offence of monopoly in section 33 of the existing legislation with a civil abuse of dominance provision. The monopoly provision has proved to be unsatisfactory for several reasons. First, like merger, the conduct the section seeks to proscribe is not generally considered criminal in nature. This problem is compounded by the prospective nature of many of the effects associated with monopolistic behaviour.

Second, the existing monopoly provision is not clearly aimed at the heart of the problem: anti-competitive conduct. The definition of monopoly in the Act describes a situation where one or more firms control a market and operate, or are likely to operate, such business to the detriment of the public. Unfortunately, public detriment is an extremely vague standard which gives the courts little guidance as to what conduct Parliament intended to censure. In addition, this standard allowed arguments to be made which were totally unrelated to competition and abuse of market power. By focussing on anti-competitive conduct, as opposed to the notions of monopoly and public detriment, the law will become clearer, more effective and enforceable.

Third, the normal sanctions available under criminal law are not appropriate to deal with abuses of market power. Under civil law, the adjudicator can tailor its orders to the specific conduct of the offending firm. These are likely to be the most effective methods for correcting the firm's behaviour and restoring competition in the market.

New Provision

The proposed abuse of dominance provision creates a civil reviewable matter which provides for remedies when dominant firms are engaging in anti-competitive conduct. This provision places greater emphasis on behavioural considerations. The provision is structured to ensure that it does not create an impediment to aggressive, pro-competitive behaviour. In particular, the practices under scrutiny must have an anti-competitive object. However, a defence based on superior competitive performance has been included.

The elements to be proved are as follows. First, "one or more persons" must substantially or completely control a class or species of business in Canada or any area thereof. This is based on the definition of monopoly in the existing legislation. The Bill, by retaining the words "one or more", will continue to allow the application of the law to behaviour engaged in by unaffiliated persons. This means that in some circumstances the section would apply to so-called "joint dominance" situations.

Consideration was given to restricting the application of the law to a single firm with an appropriately lower threshold of market power such as "dominant market position". During the course of consultations, support was expressed for both alternatives. However, there are very few industries in Canada in which only one firm controls its market. Consequently, it was determined that "joint dominance" combined with a "substantial or complete control" test would provide greater protection for small business and consumers.

Second, the dominant firm must engage in a practice of anti-competitive acts. Moreover, the practice must have as its object the lessening of competition. A list of acts is provided to illustrate the type of conduct which may be considered by the Tribunal to be anti-competitive, such as: the squeezing of profit margins of vertically integrated customers, the use of fighting brands and freight equalization. The list is non-exhaustive so that acts of like character can be held to be anti-competitive by the Tribunal. All of the listed acts include consideration of the purpose, object or design of the dominant firm to ensure that the censured conduct is not, in fact, reasonable competitive behaviour.

Third, the practice of anti-competitive acts must have had, be having or be likely to have the effect of preventing or lessening competition substantially in a market. This test is used elsewhere in the existing legislation and in the new merger proposal.

In addition, a defence is provided ensuring that no order will be made when the lessening of competition occurs as a result of superior competitive performance of the dominant firm or firms. The consumer benefits when product innovation or improved distribution systems result in a firm outdistancing its rivals in the marketplace. If competitors

fall from the market because a dominant competitor is more effective in meeting consumers needs, this is not an abuse of market power, but rather a natural consequence of the competitive process. The defence is included to ensure that only abuses of market power are subjected to the law.

The discretion available to the Tribunal in respect of abuse of dominance will be restricted to remedies sufficient to overcome the effects of the anti-competitive practices and restore competition in the marketplace. This will ensure that competitive forces are efficiently allocating resources to their proper and most effective use. In many cases, the Tribunal may choose simply to prohibit continuation of the practices in respect of which the Director has brought an action. However, if this is considered to be insufficient, provision is also made for orders requiring partial divestiture or any other remedial measures necessary to restore competition in the market when the effect on competition has already occurred.

CONSPIRACY AND RELATED MATTERS

The law against conspiracy in restraint of trade is the cornerstone of Canada's competition law. Agreements to fix prices, divide up markets, restrict the entry of new firms or lessen competition by other means contradict the most basic tenets of the free market system and impair the efficiency and performance of the economy. When firms are acting independently of one another in the face of market forces, the most socially beneficial outcomes in terms of prices, output, choice and innovation prevail. However, when players in the economy remove the discipline of market forces and attempt to enrich themselves at the expense of consumers and other firms through anti-competitive agreements, both the public and economy as a whole suffer. Prices exceed the competitive norm, and efficiency and innovation suffer as discipline and initiative is removed by administrative arrangements which block the free and competitive flow of market forces.

Need for Reform

In general, the present conspiracy provision has worked reasonably well. However, a number of recent Court decisions have created considerable uncertainty in the law and weakened its effectiveness. Also, there is widespread agreement that recent fines under the provision have not been sufficient to deter the formation of anti-competitive agreements and ensure that firms do not profit from their criminal conduct. It is the position of the Government that, in the interest of strengthening and clarifying the law, Parliament should restate its intention with respect to the appropriate application of, and sanctions under the provision. Finally, given the increasing importance of international trade to the Canadian economy, the exemption for export agreements needs to be clarified and expanded.

New Provision

To clarify the conspiracy provision, two subsections will be added. One will deal with evidence needed to prove the existence of an agreement. Conspiracies, by their nature, are generally secretive, clandestine arrangements. Therefore, there often tends to be little documentary evidence of such agreements.

The courts have recognized this reality and until recently they could infer the existence of an agreement from circumstantial evidence. This line of reasoning developed over many years through a consistent body of jurisprudence. However, the 1980 decision of the Supreme Court of Canada in the Atlantic Sugar case has created some uncertainty. This judgement could be read as rejecting the use of circumstantial evidence to prove an agreement unless direct evidence of communication is available.

It is proposed to add a subsection to the existing conspiracy provision clearly stating that the existence of an agreement may be proven from circumstantial evidence with or without direct evidence of

communication among or between the parties. This should remove the ambiguity that currently exists in the law. It is important to emphasize that this subsection in no way affects the onus on the prosecution to prove the existence of an agreement beyond a reasonable doubt.

The other new subsection addresses the issue of the requisite intent. Since the Supreme Court of Canada decisions in the Aetna Insurance and Atlantic Sugar cases, it has been possible to argue that the Crown must not only prove that the parties intended to enter the agreement found to exist, but that they also intended to lessen competition unduly. This interpretation of the law places an extremely onerous burden on the Crown. Previously, it had been assumed the Crown was required to prove only that the accused intended to enter the agreement. This so called "single intent" requirement is consistent with the principle that the offence of conspiracy lies in the agreement itself.

It is proposed to add a subsection to the existing conspiracy provision that would specifically phrase the law in terms of a single intent requirement. The proposed subsection states that it is necessary to prove that the parties intended to and did enter into a conspiracy. It would not, however, be necessary to prove that the parties intended the conspiracy to lessen competition unduly even though the Crown would still be required to prove that the agreement, if carried into effect, would unduly lessen competition.

It is also proposed to increase the maximum fine for conspiracy convictions from $1 million to $5 million. This will send a clear signal to the courts that Parliament considers conspiracy to be a very serious criminal offence and that offenders should be dealt with by a firm hand.

The Government believes that the individual drive and enterprise of Canadians will lead to economic renewal if their energies are harnessed by a free and competitive marketplace. Agreements and arrangements to restrict competition can only serve to stifle initiative and efficiency and to harm consumers. These proposals will strengthen and clarify the law on anti-competitive agreements and will send a clear message to the business community and the courts that their existence will not be tolerated.

Export Agreements Since 1961, the Combines Investigation Act has provided a specific exemption for export agreements in recognition of the importance of world trade to the Canadian economy. Many observers, however, have expressed the view that the present construction of the export exemption is unclear, too restrictive and may inhibit the formation of export consortia. Amendments to clarify and broaden this exemption are clearly needed for Canada to maintain and extend its position as a leading trading nation. This change is consistent with the Government's commitment to increase Canadian involvement and competitiveness in international markets.

CONCLUSION

The Government is committed to placing greater reliance on market forces and the private sector for economic renewal and, in furtherance of this objective, to passing amendments to strengthen and modernize Canada's competition law. Over the past year, the Government has conducted an intensive review of competition policy legislation in consultation with groups and individuals representing most facets of Canadian society. The result of this process is a package of amendments that contains new proposals as well as substantial improvements to proposals in previous Bills. The report of the Macdonald Royal Commission on the economy has identified the need to reform Canada's competition laws and the basic thrust of this Bill is consistent with the recommendation of the Commission.

Competition, however, is not an end in itself. Rather, it is the best impartial allocator of resources in the economy and therefore promotes economic efficiency and fairness in the marketplace. Competition policy legislation provides an institutional framework that allows the forces of the market to be the main regulator of economic activity. The change of name to the Competition Act, highlights the importance of this law as a framework for competition policy in Canada. An effective competition law also reduces the need for direct government intervention. As the trend toward deregulation continues, effective competition law takes on added importance.

An effective competition law can have a significant impact on the ability of Canadian business to maintain existing, and penetrate new, export markets abroad and compete with import competition at home. This reform will enhance Canada's international competitiveness by promoting efficiency and strengthening market forces and by removing impediments in the existing law that discourage the formation of export consortia. Moreover, an effective competition law should increase the overall flexibility and responsiveness of the economy. As the global economy becomes increasingly competitive and the long-run decline in the effective rate of tariff protection continues, there is a very real need to reassess the provisions of Canadian competition law that could deter the rationalization and restructuring of certain industries. In furtherance of this objective, the implications of international competition will be explicitly considered in the new law.

Consumers and small business are among the prime benificiaries of an effective competition policy. Anti-competitive conduct which increases prices and restricts output or the number of competitors, or otherwise restrains or injures competition, clearly can have a very damaging effect on existing small businesses, new entrants and consumers. There is a clear need to strengthen the legislation to ensure fairness in the marketplace and maintain the drive and initiative of the small business sector which has enormous potential for job creation. The Bill will address this long-standing concern in a number of fundamental respects.

In keeping with the Government's priority on fairness, Crown corporations, agents of Her Majesty, engaged in commercial activities in competition with other firms will be brought under the Competition Act. In addition, the responsibility for investigating bank agreements and amalgamations will be transferred from the Inspector General of Banks to the Director of Investigation and Research. Rationalizing these aspects of competition policy enforcement will enhance the efficiency of the Government's overall enforcement effort.

Finally, the Supreme Court in the Southam case spoke quite clearly on the inconsistency of the search and seizure provisions of the Combines Investigation Act with the Canadian Charter of Rights and Freedoms. This decision also raised important questions regarding the constitutionality of the other investigatory powers under the Act. The investigatory powers proposed in the Competition Act more than meet the minimum standards for constitutionality articulated by the Supreme Court and yet will ensure effective enforcement of the law.

In an area of law requiring complex economic and business judgements, ensuring that the adjudicator has the necessary expertise to deal with competition issues is fundamental to the long term success of this reform. The Bill creates a new judicial body, the Competition Tribunal, to adjudicate the non-criminal provisions under the Competition Act. This Tribunal combines the best features of both the courts and tribunals to ensure that issues are throughly assessed, by knowledgeable decision makers, in a fair and impartial manner, with suitable rights of appeal.

The Government is committed to ending the competition policy debate and getting on with the job of modernizing our competition law. Competition law reform has dragged on far too long. This reform is far too important to the long-term health of our economy to allow the existing, outmoded legislation to languor in its current ineffectual state. After considerable discussion and consultation, there is substantial agreement on the reforms that are now required. This Bill represents a significant step toward economic renewal and should have a lasting impact on the efficiency and international competitiveness of the Canadian economy.

PUBLIC

311 3315

Found at **Tab H(14), Volume 11** of Google's Motion Record.



Acts of the Parliament of Canada

Assented to in the year
1986

During the thirty-fourth
and thirty-fifth years
of the Reign of Her Majesty
QUEEN ELIZABETH II

These Acts were assented to during that portion of the First Session of the Thirty-third Parliament and that portion of the Second Session of the Thirty-third Parliament that included the 1986 calendar year

Her Excellency the Right Honourable
JEANNE SAUVÉ
Governor General

Lois du Parlement du Canada

sanctionnées en
1986

pendant les trente-quatrième
et trente-cinquième années
du règne de Sa Majesté
LA REINE ELIZABETH II

au cours de la période 1986 de la première session de la trente-troisième législature et de la deuxième session de la trente-troisième législature

Son Excellence la très honorable
JEANNE SAUVÉ
Gouverneur général

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CHAPTER 26

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

[*Assented to 17th June, 1986*]

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

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" «*juge*»

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

"lay member" «*autre membre*»

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

"Minister" «*ministre*»

"Minister" means the Minister of Consumer and Corporate Affairs;

"Tribunal" «*Tribunal*»

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

Tribunal Established

Tribunal

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

CHAPITRE 26

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

[*Sanctionnée le 17 juin 1986*]

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

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» "lay member"

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

«juge» "judicial..."

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

«ministre» "Minister"

«ministre» Le ministre de la Consommation et des Corporations.

«Tribunal» "Tribunal"

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

Constitution du Tribunal

Tribunal

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

PUBLIC 313 3357

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 trade mark 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.

Cas où les personnes sont réputées être affiliées

(6) Pour l'application du paragraphe (4) en ce qui concerne la limitation du marché, aux fins 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.

Abuse of Dominant Position

Abus de position dominante

Definition of "anti-competitive act"

50. For the purposes of section 51, "anti-competitive act", without restricting the generality of the term, 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 him from, a market;

(*c*) freight equalization on the plant of a competitor for the purpose of impeding or preventing his entry into, or eliminating him 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;

Définition d'«agissement anti-concurrentielle»

50. Aux fins de l'article 51, «agissement anti-concurrentiel» s'entend notamment des 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;

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

(*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.

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.

Prohibition where abuse of dominant position

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

(*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.

Ordonnance d'interdiction dans les cas d'abus de position dominante

51. (1) Lorsque le Tribunal, à la suite d'une demande du directeur, conclut :

a) 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,

b) que cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels, et

c) que la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

Additional or alternative order

(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

Ordonnance supplémentaire ou substitutive

(2) Dans les cas où à la suite d'une demande en vertu du paragraphe (1) le Tribunal conclut qu'une pratique d'agissements anti-concurrentiels a eu ou a pour effet d'empêcher ou de diminuer sensible-

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.

ment la concurrence dans un marché et qu'une ordonnance rendue aux termes du paragraphe (1) n'aura 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 l'une ou l'autre ou 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, celle de se départir d'éléments d'actifs ou d'actions.

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.

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.

Superior competitive performance

(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.

Efficience économique supérieure

(4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.

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*, *Patent Act*, *Trade Marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Exception

(5) Aux fins 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 desseins industriels*, de la *Loi sur le droit d'auteur*, de la *Loi sur les marques de commerce* ou de toute autre loi du Parlement relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

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.

Prescription

(6) Une demande ne peut pas être présentée en application du présent article à l'égard d'une pratique d'agissements anti-concurrentiels si la pratique en question a cessé depuis plus de trois ans.

Where proceedings commenced under section 32 or 64

(7) No application may be made under this section against a person

Procédures en vertu de l'article 32 ou 64

(7) Une demande ne peut être présentée en application du présent article à l'endroit d'une personne :

(*a*) against whom proceedings have been commenced under section 32, or

(*b*) against whom an order is sought under section 64

on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 32 or 64, as the case may be.

a) contre laquelle des procédures ont été entreprises en vertu de l'article 32, ou

b) contre laquelle une ordonnance est demandée en vertu de l'article 64,

si les faits qui seraient allégués dans la demande en application du présent article sont en substance les mêmes que ceux qui sont allégués dans les affaires visées à l'article 32 ou 64.

Delivered Pricing

Prix à la livraison

Definition of "delivered pricing"

52. (1) For the purposes of section 53, "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 his 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.

Définition de «prix à la livraison»

52. (1) Aux fins de l'article 53, «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.

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.

Définition de «conditions de commerce»

(2) Pour l'application du paragraphe (1), l'expression «conditions de commerce» désigne les conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

Delivered pricing

53. (1) Where, on application by the Director, 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.

Prix à la livraison

53. (1) Dans les cas où, à la suite d'une demande du directeur, 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 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.

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.

Found at **Tab H(28), Volume 15** of Google's Motion Record.

First Session, Thirty-seventh Parliament,
49-50-51 Elizabeth II, 2001-2002

STATUTES OF CANADA 2002

CHAPTER 16

An Act to amend the Competition Act and the Competition Tribunal Act

BILL C-23

ASSENTED TO 4th JUNE, 2002

Première session, trente-septième législature,
49-50-51 Elizabeth II, 2001-2002

LOIS DU CANADA (2002)

CHAPITRE 16

Loi modifiant la Loi sur la concurrence et la Loi sur le Tribunal de la concurrence

PROJET DE LOI C-23

SANCTIONNÉ LE 4 JUIN 2002

stimulate competition in relation to the product.

(3) Section 77 of the Act is amended by adding the following after subsection (6):

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.

11.3 Section 77 of the Act is amended by adding the following after subsection (3):

Damage awards

(3.1) For greater certainty, the Tribunal may not make an award of damages under this section to a person granted leave under subsection 103.1(7).

11.4 Section 79 of the Act is amended by adding the following after subsection (3):

Administrative monetary penalty

(3.1) Where the Tribunal makes an order under subsection (1) or (2) against an entity who operates a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, it may also order the entity to pay, in such manner as the Tribunal may specify, an administrative monetary penalty in an amount not greater than $15 million.

Aggravating or mitigating factors

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

(*a*) the frequency and duration of the practice;

(*b*) the vulnerability of the class of persons adversely affected by the practice;

(*c*) injury to competition in the relevant market;

(*d*) the history of compliance with this Act by the entity; and

(*e*) any other relevant factor.

avis, pour rétablir ou favoriser la concurrence à l'égard de ce produit.

(3) L'article 77 de la même loi est modifié par adjonction, après le paragraphe (6), de ce qui suit :

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.

11.3 L'article 77 de la même loi est modifié par adjonction, après le paragraphe (3), de ce qui suit :

Dommages-intérêts

(3.1) Il demeure entendu que le présent article n'autorise pas le Tribunal à accorder des dommages-intérêts à la personne à laquelle une permission est accordée en vertu du paragraphe 103.1(7).

11.4 L'article 79 de la même loi est modifié par adjonction, après le paragraphe (3), de ce qui suit :

Sanction administrative pécuniaire

(3.1) Si l'entité qui fait l'objet d'une ordonnance en vertu des paragraphes (1) ou (2) exploite un service intérieur, au sens du paragraphe 55(1) de la *Loi sur les transports au Canada*, le Tribunal peut aussi prononcer à son égard une sanction administrative pécuniaire maximale de 15 000 000 $, à payer selon les modalités qu'il peut préciser.

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) la fréquence et la durée du comportement;

b) la vulnérabilité des catégories de personnes qui souffrent du comportement;

c) le tort causé à la concurrence sur le marché pertinent;

d) le comportement antérieur de l'entité, en ce qui a trait au respect de la présente loi;

e) toute autre circonstance pertinente.

Purpose of order

(3.3) The purpose of an order under subsection (3.1) is to promote practices that are in conformity with this section, not to punish.

11.5 The Act is amended by adding the following after section 79:

Unpaid monetary penalty

79.1 The amount of an administrative monetary penalty imposed on an entity 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 in a court of competent jurisdiction.

12. The Act is amended by adding the following before section 104:

Leave to make application under section 75 or 77

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.

Notice

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75 or 77 is sought.

Certification by Commissioner

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(*a*) is the subject of an inquiry by the Commissioner; or

(*b*) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75 or 77 is sought.

Application discontinued

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(*a*) or (*b*) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75 or 77.

Notice by Tribunal

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

But de la sanction

(3.3) La sanction prévue au paragraphe (3.1) vise à encourager l'entité à adopter un comportement compatible avec les objectifs du présent article et non à la punir.

11.5 La même loi est modifiée par adjonction, après l'article 79, de ce qui suit :

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.

12. La même loi est modifiée par adjonction, avant l'article 104, de ce qui suit :

Permission de présenter une demande en vertu des articles 75 ou 77

103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75 ou 77. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

Signification

(2) L'auteur de la demande en fait signifier une copie au commissaire et à chaque personne à l'égard de laquelle une ordonnance en vertu des articles 75 ou 77 pourrait être rendue.

Certificat du commissaire

(3) Quarante-huit heures après avoir reçu une copie de la demande, le commissaire remet au Tribunal un certificat établissant si les questions visées par la demande :

a) soit font l'objet d'une enquête du commissaire;

b) soit ont fait l'objet d'une telle enquête qui a été discontinuée à la suite d'une entente survenue entre le commissaire et la personne à l'égard de laquelle une ordonnance en vertu des articles 75 ou 77 pourrait être rendue.

Rejet

(4) Le Tribunal ne peut être saisi d'une demande portant sur des questions visées aux alinéas (3)*a*) ou *b*) ou portant sur une question qui fait l'objet d'une demande présentée au Tribunal par le commissaire en vertu des articles 75 ou 77.

Avis du Tribunal

(5) Le plus rapidement possible après avoir reçu le certificat du commissaire, le Tribunal avise l'auteur de la demande, ainsi que toute personne à l'égard de laquelle une ordonnance pourrait être rendue, du fait qu'il pourra ou non entendre la demande.

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to September 1, 2025

Last amended on September 30, 2023

À jour au 1 septembre 2025

Dernière modification le 30 septembre 2023

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Spending authority

(4) The Minister may spend the amounts deposited under subsection (3) in the fiscal year in which they are paid or in the next fiscal year.

2018, c. 10, s. 14.

Dépenses

(4) Le ministre peut dépenser les sommes ainsi déposées au cours de l'exercice où elles sont versées ou de l'exercice suivant.

2018, ch. 10, art. 14.

General

Appointment of receiver not to bar jurisdiction

54 (1) The fact that a receiver, manager or other official of a carrier, or a receiver of the property of a carrier, has been appointed by a court in Canada, or is managing or operating a mode of transportation under the authority of any such court, is not a bar to the exercise of any jurisdiction granted under this Act, but every such receiver, manager or official is bound to manage and operate the mode of transportation in accordance with this Act and with the orders, regulations and directions made or issued under this Act, notwithstanding the fact that the receiver, manager, official or person has been appointed by or acts under the authority of a court.

Adaptation orders

(2) Wherever by reason of insolvency, sale under mortgage or any other cause, a transportation undertaking or a portion of a transportation undertaking is operated, managed or held otherwise than by the carrier, the Agency or the Minister may make any order it considers proper for adapting and applying the provisions of this Act.

Dispositions générales

Nomination de receveurs

54 (1) Le fait qu'un séquestre, gérant ou autre dirigeant d'un transporteur, ou un séquestre des biens d'un transporteur, a été nommé par un tribunal canadien, ou gère ou exploite un mode de transport sous l'autorité de ce tribunal, n'empêche pas l'exercice de quelque compétence attribuée par la présente loi. Il est cependant tenu de gérer et d'exploiter ce mode de transport conformément à la présente loi et aux arrêtés, règlements et directives pris en vertu de la présente loi, en dépit du fait que sa nomination a été faite par le tribunal ou que ses attributions lui ont été confiées par celui-ci.

Modification

(2) L'Office ou le ministre peut, par arrêté, adapter les dispositions de la présente loi si, notamment pour insolvabilité ou vente hypothécaire, une entreprise de transport échappe, en tout ou en partie, à la gestion, à l'exploitation ou à la possession du transporteur en cause.

PART II

Air Transportation

Interpretation and Application

Definitions

55 (1) In this Part,

aircraft has the same meaning as in subsection 3(1) of the *Aeronautics Act*; (*aéronef*)

air service means a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both; (*service aérien*)

basic fare means

(a) the fare in the tariff of the holder of a domestic licence that has no restrictions and represents the lowest amount to be paid for one-way air transportation

PARTIE II

Transport aérien

Définitions et champ d'application

Définitions

55 (1) Les définitions qui suivent s'appliquent à la présente partie.

aéronef S'entend au sens du paragraphe 3(1) de la *Loi sur l'aéronautique*. (*aircraft*)

Canadien

a) Citoyen canadien ou *résident permanent* au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*;

b) toute administration publique du Canada ou ses mandataires;

of an adult with reasonable baggage between two points in Canada, or

(b) where the licensee has more than one such fare between two points in Canada and the amount of any of those fares is dependent on the time of day or day of the week of travel, or both, the highest of those fares; (*prix de base*)

Canadian means

(a) a Canadian citizen or a *permanent resident* as defined in subsection 2(1) of the *Immigration and Refugee Protection Act*,

(b) a government in Canada or an agent or mandatary of such a government, or

(c) a corporation or entity that is incorporated or formed under the laws of Canada or a province, that is controlled in fact by Canadians and of which at least 51% of the voting interests are owned and controlled by Canadians and where

(i) no more than 25% of the voting interests are owned directly or indirectly by any single non-Canadian, either individually or in affiliation with another person, and

(ii) no more than 25% of the voting interests are owned directly or indirectly by one or more non-Canadians authorized to provide an air service in any jurisdiction, either individually or in affiliation with another person; (*Canadien*)

Canadian aviation document has the same meaning as in subsection 3(1) of the *Aeronautics Act*; (*document d'aviation canadien*)

domestic licence means a licence issued under section 61; (*Version anglaise seulement*)

domestic service means an air service between points in Canada, from and to the same point in Canada or between Canada and a point outside Canada that is not in the territory of another country; (*service intérieur*)

international service means an air service between Canada and a point in the territory of another country; (*service international*)

licensee means the holder of a licence issued by the Agency under this Part; (*licencié*)

non-scheduled international licence means a licence issued under subsection 73(1); (*Version anglaise seulement*)

c) personne morale ou entité, constituée ou formée au Canada sous le régime de lois fédérales ou provinciales et contrôlée de fait par des Canadiens et dont au moins cinquante et un pour cent des intérêts avec droit de vote sont détenus et contrôlés par des Canadiens, étant toutefois entendu :

(i) qu'au plus vingt-cinq pour cent de ses intérêts avec droit de vote peuvent être détenus directement ou indirectement par un non-Canadien, individuellement ou avec des personnes du même groupe,

(ii) qu'au plus vingt-cinq pour cent de ses intérêts avec droit de vote peuvent être détenus directement ou indirectement par un ou plusieurs non-Canadiens autorisés à fournir un service aérien dans tout ressort, individuellement ou avec des personnes du même groupe. (*Canadian*)

document d'aviation canadien S'entend au sens du paragraphe 3(1) de la *Loi sur l'aéronautique*. (*Canadian aviation document*)

licencié Titulaire d'une licence délivrée par l'Office en application de la présente partie. (*licensee*)

prix de base

a) Prix du tarif du titulaire d'une licence intérieure qui est sans restriction et qui constitue le montant le moins élevé à payer pour le transport aller, entre deux points situés au Canada, d'un adulte accompagné d'une quantité normale de bagages;

b) dans les cas où un tel prix peut varier selon le moment du jour ou de la semaine, ou des deux, auquel s'effectue le voyage, le montant le plus élevé de ce prix. (*basic fare*)

règlement Règlement pris au titre de l'article 86. (*prescribed*)

service aérien Service offert, par aéronef, au public pour le transport des passagers, des marchandises, ou des deux. (*air service*)

service intérieur Service aérien offert soit à l'intérieur du Canada, soit entre un point qui y est situé et un point qui lui est extérieur sans pour autant faire partie du territoire d'un autre pays. (*domestic service*)

service international Service aérien offert entre le Canada et l'étranger. (*international service*)

non-scheduled international service means an international service other than a scheduled international service; (*service international à la demande*)

prescribed means prescribed by regulations made under section 86; (*règlement*)

scheduled international licence means a licence issued under subsection 69(1); (*Version anglaise seulement*)

scheduled international service means an international service that is a scheduled service pursuant to

(a) an agreement or arrangement for the provision of that service to which Canada is a party, or

(b) a determination made under section 70; (*service international régulier*)

tariff means a schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental services. (*tarif*)

service international à la demande Service international autre qu'un service international régulier. (*non-scheduled international service*)

service international régulier Service international exploité à titre de service régulier aux termes d'un accord ou d'une entente à cet effet dont le Canada est signataire ou sous le régime d'une qualification faite en application de l'article 70. (*scheduled international service*)

tarif Barème des prix, taux, frais et autres conditions de transport applicables à la prestation d'un service aérien et des services connexes. (*tariff*)

texte d'application Arrêté ou règlement pris en application de la présente partie ou de telle de ses dispositions. (*French version only*)

Affiliation

(2) For the purposes of this Part,

(a) one corporation is affiliated with another corporation if

(i) one of them is a subsidiary of the other,

(ii) both are subsidiaries of the same corporation, or

(iii) both are controlled by the same person;

(b) if two corporations are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other;

(c) a partnership or sole proprietorship is affiliated with another partnership or sole proprietorship if both are controlled by the same person;

(d) a corporation is affiliated with a partnership or a sole proprietorship if both are controlled by the same person;

(e) a corporation is a subsidiary of another corporation if it is controlled by that other corporation or by a subsidiary of that other corporation;

(f) a corporation is controlled by a person other than Her Majesty in right of Canada or a province if

(i) securities of the corporation to which are attached more than 50% of the votes that may be cast

Groupe

(2) Pour l'application de la présente partie :

a) des personnes morales sont du même groupe si l'une est la filiale de l'autre, si toutes deux sont des filiales d'une même personne morale ou si chacune d'elles est contrôlée par la même personne;

b) si deux personnes morales sont du groupe d'une même personne morale au même moment, elles sont réputées être du même groupe;

c) une société de personnes ou une entreprise individuelle est du groupe d'une autre société de personnes ou d'une autre entreprise individuelle si toutes deux sont contrôlées par la même personne;

d) une personne morale est du groupe d'une société de personnes ou d'une entreprise individuelle si toutes deux sont contrôlées par la même personne;

e) une personne morale est une filiale d'une autre personne morale si elle est contrôlée par cette autre personne morale ou par une filiale de celle-ci;

f) une personne morale est contrôlée par une personne autre que Sa Majesté du chef du Canada ou d'une province si :

(i) des valeurs mobilières de la personne morale conférant plus de cinquante pour cent des votes qui peuvent être exercés lors de l'élection des administrateurs de la personne morale en question sont

Found at **Tab H(49), Volume 17** of Google's Motion Record.

C-19

C-19

First Session, Thirty-eighth Parliament,
53 Elizabeth II, 2004

Première session, trente-huitième législature,
53 Elizabeth II, 2004

HOUSE OF COMMONS OF CANADA

CHAMBRE DES COMMUNES DU CANADA

BILL C-19

PROJET DE LOI C-19

An Act to amend the Competition Act and to make consequential amendments to other Acts

Loi modifiant la Loi sur la concurrence et d'autres lois en conséquence

FIRST READING, NOVEMBER 2, 2004

PREMIÈRE LECTURE LE 2 NOVEMBRE 2004

THE MINISTER OF INDUSTRY

LE MINISTRE DE L'INDUSTRIE

Definition of "dispose"

(11) For the purposes of this section, "dispose" includes removing from the jurisdiction of the court, depleting the value of or disposing of by lease.

(11) Pour l'application du présent article, « disposer » s'entend également du fait de retirer du ressort du tribunal, d'occasionner la diminution de valeur ou de donner à bail.

Définition de « disposer »

2000, c. 15, s. 13(2)

7. (1) Subsection 78(1) of the Act is amended by adding the word "and" at the end of paragraph (*h*) and by repealing paragraphs (*j*) and (*k*).

7. (1) Les alinéas 78(1)*j*) et *k*) de la même loi sont abrogés.

2000, ch. 15, par. 13(2)

2000, c. 15, s. 13(3)

(2) Subsection 78(2) of the Act is repealed.

(2) Le paragraphe 78(2) de la même loi est abrogé.

2000, ch. 15, par. 13(3)

2002, c. 16, s. 11.4

8. Subsections 79(3.1) to (3.3) of the Act are replaced by the following:

8. Les paragraphes 79(3.1) à (3.3) de la même loi sont remplacés par ce qui suit :

2002, ch. 16, art. 11.4

Administrative monetary penalty

(3.1) Where 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 may specify, an administrative monetary penalty in an amount not greater than $10,000,000 and, for each subsequent order under either of those subsections, an amount not greater than $15,000,000.

(3.1) S'il rend une ordonnance en vertu des paragraphes (1) ou (2), il peut aussi ordonner à la personne visée de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale de 10 000 000 $ et, pour toute ordonnance subséquente rendue en application de l'un de ces paragraphes, de 15 000 000 $.

Sanction administrative pécuniaire

Aggravating or mitigating factors

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

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

Facteurs à prendre en compte

(*a*) the frequency and duration of the practice;

a) la fréquence et la durée de la pratique;

(*b*) injury to competition in the relevant market;

b) le tort causé à la concurrence sur le marché pertinent;

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

c) le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;

(*d*) the gross revenue from sales affected by the practice;

d) le revenu brut provenant des ventes sur lesquelles la pratique a eu une incidence;

(*e*) any actual or anticipated profits generated by the practice;

e) tout avantage pécuniaire réel ou envisagé découlant de la pratique;

(*f*) the financial position of the person against whom the order is made; and

f) la situation financière de la personne visée par l'ordonnance;

(*g*) any other relevant factor.

g) toute autre circonstance pertinente.

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.

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

But de la sanction

2002, c. 16, s. 11.5

9. Section 79.1 of the English version of the Act is replaced by the following:

9. L'article 79.1 de la version anglaise de la même loi est remplacé par ce qui suit :

2002, ch. 16, art. 11.5

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.

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.

2000, c. 15, s. 15; 2002, c. 16, s. 13.1

10. Section 104.1 of the Act is repealed.

10. L'article 104.1 de la même loi est abrogé.

2000, ch. 15, art. 15; 2002, ch. 16, art. 13.1

2002, c. 16, s. 14

11. Subsection 105(1) of the Act is replaced by the following:

11. Le paragraphe 105(1) de la même loi est remplacé par ce qui suit :

2002, ch. 16, art. 14

Consent agreement

105. (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3, may sign a consent agreement.

Consentement

105. (1) Le commissaire et la personne à l'égard de laquelle il a demandé ou peut demander une ordonnance en vertu de la présente partie — exception faite de l'ordonnance provisoire prévue à l'article 103.3 — peuvent signer un consentement.

2002, c. 16, s. 14

12. The portion of subsection 106(1) of the Act before paragraph (*a*) is replaced by the following:

12. Le passage du paragraphe 106(1) de la même loi précédant l'alinéa *a*) est remplacé par ce qui suit :

2002, ch. 16, art. 14

Rescission or variation of consent agreement or order

106. (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

Annulation ou modification du consentement ou de l'ordonnance

106. (1) Le Tribunal peut annuler ou modifier le consentement ou l'ordonnance visés par la présente partie, à l'exception de l'ordonnance rendue en vertu de l'article 103.3 et du consentement visé à l'article 106.1, lorsque, à la demande du commissaire ou de la personne qui a signé le consentement, ou de celle à l'égard de laquelle l'ordonnance a été rendue, il conclut que, selon le cas :

CONSEQUENTIAL AMENDMENTS

MODIFICATIONS CORRÉLATIVES

COMPETITION TRIBUNAL ACT

LOI SUR LE TRIBUNAL DE LA CONCURRENCE

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

L.R., ch. 19 (2e suppl.)

2002, c. 16, s. 19

13. Subsection 11(1) of the *Competition Tribunal Act* is replaced by the following:

13. Le paragraphe 11(1) de la *Loi sur le Tribunal de la concurrence* est remplacé par ce qui suit :

2002, ch. 16, art. 19

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 section 74.111, subsection 100(1) or section 103.1 or 103.3 of the *Competition Act* and any related matters.

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 de l'article 74.111, du paragraphe 100(1) ou des articles 103.1 ou 103.3 de la *Loi sur la concurrence* ainsi que sur toute question afférente.

blake

Found at **Tab H(56), Volume 17** of Google's Motion Record.

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Reference: 68884/2

March 8, 2005

Diane J. Brisebois
President and Chief Executive Officer
Retail Council of Canada
1255 Bay Street, Suite 800
Toronto, Ontario
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Dear Ms. Brisebois:

Bill C-19's proposals respecting Administrative Monetary Penalties

1. The opinion requested:

The Retail Council of Canada has asked for my opinion as to the constitutionality of aspects of Bill C-19, An Act to Amend the Competition Act, first reading, November 2, 2004. The request relates to the proposed amendments to the sections of the Competition Act that provide for Administrative Monetary Penalties (AMPs). I set out below my opinion that the AMPs as amended would be unconstitutional.

Bill C-19, by clause 4(2), increases the level of AMPs that can be imposed under s. 74.1(1)(c) of the Competition Act for deceptive marketing practices by a corporation from a maximum of $200,000 to a maximum of $15 million. The Bill, by clause 8, replaces an airline-specific AMP with a generally applicable AMP for abuse of dominant position by a corporation, again with a maximum amount of $15 million. Individuals are also subject to these AMPs, and the maximum penalty for an individual is increased by Bill C-19 from $100,000 to $1 million. The power to impose an AMP is conferred on "a court", which is defined to include the Competition Tribunal (s. 74.09).

The magnitude of these penalties is striking. Moreover, in the case of deceptive marketing practices (but not abuse of dominant position), Bill C-19 proposes to introduce a new "restitution" remedy, which could be imposed in addition to an AMP, and which could be as high as "the total of the amounts paid for the products that were the object of the conduct"

(s.74.1(1.1)). This opinion does not address the constitutionality of the proposed restitution remedy, but simply notes that the high maximums for the AMPs are not necessarily the limit of the financial burden that Bill C-19 would impose on a person found guilty of deceptive marketing practices.

2. Classification of AMPs as criminal penalties:

Parliament has the power to impose whatever monetary penalties it sees fit for breach of federal laws, and so the high numbers are not in themselves unconstitutional. The constitutional objection to the AMPs is that Bill C-19 ignores the safeguards guaranteed by s. 11 of the Charter of Rights for "any person charged with an offence". In my opinion, those safeguards apply to the imposition of AMPs under the Competition Act, and the AMPs are unconstitutional unless and until appropriate safeguards are added to the Act.

The Government of Canada evidently hopes that s. 11 does not apply to AMPs, because the word "fine" is never used to describe an AMP, and the Competition Act (s. 79(3.3)) even goes so far as to claim that the purpose of an AMP is "not to punish", but to promote conformity with the Act. What the Supreme Court of Canada has said, however, in *R.* v. *Wigglesworth* [1987] 2 S.C.R. 541, para. 23, is that any proceeding that may lead to a "true penal consequence" is subject to the safeguards of s. 11. In other words, regardless of how Parliament describes the AMPs, if a court decides that they involve a "true penal consequence", then the Charter will apply. In my opinion, at least after the passage of Bill C-19, a proceeding by the Commissioner of Competition to impose an AMP is for constitutional purposes not a merely civil proceeding but is a criminal proceeding to which s. 11 applies.

The Court in *Wigglesworth* held that the potential of a one year sentence of imprisonment was a true penal consequence that attracted the safeguards of s. 11, contrary to the Government's argument that the proceedings, which were to discipline an RCMP officer, were not really criminal. Imprisonment is not an issue with respect to the AMPs. However, the Court in *Wigglesworth* went on to say that a fine would also be a true penal consequence if "by its magnitude … it 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." These words would catch the AMPs, probably even the AMPs now in the Competition Act, but certainly as amended by Bill C-19. The magnitude of a penalty of $15 million is unheard of even in statutes that are avowedly criminal. Indeed, the Competition Act itself limits fines for conspiracy and bid-rigging, the two most serious avowedly criminal offences in the Act, to $10 million.

It is also important that the amount of the AMP in each case is assessed by the Competition Tribunal (or court) after taking account of a series of factors, mitigating and aggravating, that bear on the blameworthiness of the defendant. These factors are added to by Bill C-19. They include the frequency and duration of the offending practice and the history of compliance with the Act by the defendant. These kinds of factors are what would be considered by a criminal

court in imposing a sentence on a convicted accused. In contrast, administrative penalties in taxing statutes are typically assessed by a mathematical formula related to the amount of tax evaded or the value of goods on which customs duty was evaded.

For these reasons, it is my opinion that the AMPs, as modified by Bill C-19, would be classified by the courts as criminal penalties to which the protections of s. 11 of the Charter of Rights would apply.

3. Charter protections for criminal proceedings:

(a) Burden of proof:

The protections of s. 11 of the Charter or Rights apply to "any person charged with an offence". A "person" may be either a corporation or an individual. For the reasons given above, after the enactment of Bill C-19, a "person charged with an offence" would include any corporation or individual that is subject to proceedings by the Commissioner seeking an AMP for deceptive marketing practices or abuse of dominant position.

Section 11(d) constitutionalizes the presumption of innocence. The Supreme Court of Canada in *R. v. Oakes* [1986] 1 S.C.R. 103 held that s. 11(d) requires all offences to be proved beyond a reasonable doubt. But, under the Competition Act, the "reviewable practices" that include deceptive marketing practices and abuse of dominant position need only be proved to the civil standard of the balance of probabilities. An AMP can be imposed without proof of the "offence" to the rigorous criminal standard. That is unconstitutional.

In the case of "regulatory offences" (as opposed to traditional crimes), the Supreme Court of Canada in *R. v. Wholesale Travel Group* [1991] 3 S.C.R. 154 held that it is not necessary to prove a guilty mind (knowledge of the illegality or recklessness as to the illegality). But the Court required that a defence of due diligence must be provided to the defendant (the proof of which can be cast on the defendant to the civil standard of the balance of probabilities). The Competition Act provides this defence to deceptive marketing practices. In the case of abuse of dominant position, however, there is no provision for a defence of due diligence. That is unconstitutional.

(b) Disclosure of evidence:

In *R.* v. *Stinchcombe* [1991] 3 S.C.R. 326, the Supreme Court of Canada held that s. 11(d) of the Charter of Rights obliges the Crown, in advance of the trial, to make full disclosure to the defence of all relevant information in the possession of the Crown. All information, both inculpatory and exculpatory, that might be relevant to the defence must be disclosed. At the same time, the defence is under no obligation to disclose anything to the prosecution; that is part of the defendant's constitutional right to remain silent.

The Competition Tribunal Rules completely ignore these fundamental, longstanding safeguards of the fairness of the criminal process. The Rules, by s. 4.1, provide for only limited pre-trial disclosure by the Commissioner and I understand there is no informal practice of full disclosure. At the same time, the Rules, by s. 5.1, impose obligations of pre-trial disclosure on the defendant. However appropriate these rules may be for civil proceedings, in proceedings in which the defendant is liable to a multi-million dollar AMP, anything less than full pre-trial disclosure by the Commissioner and any compelled disclosure by the defendant is unconstitutional.

(c) Independence of Competition Tribunal:

Section 11(d) of the Charter of Rights requires criminal cases to be tried by an "independent and impartial tribunal". The Competition Tribunal comprises both judicial members (judges of the Federal Court) and lay members. The Tribunal sits in panels, and the statutory requirement is that there be at least one judicial member on each panel. The Quebec Court of Appeal in *Alex Couture* v. *Canada* (1991) 83 D.L.R.(4th) 577 held that both the judicial and the lay members of the Competition Tribunal have sufficient security of tenure that the Tribunal is an "independent and impartial tribunal" for the purpose of s. 11(d).

I still have an independence concern, however. It seems to me that a criminal penalty like an AMP should not be imposed by a majority of Tribunal members who are not judges. The Competition Tribunal Act, s. 11(2), requires that an AMP proceeding for deceptive marketing practices be determined by a judicial member without lay members, but this requirement does not apply to the abuse-of-dominance AMP. This means that an AMP proceeding for abuse of dominant position could be heard by a Tribunal composed of one judicial member and two lay members, and the decision could be made by a majority of two lay members with the judicial member dissenting. At the very least this seems wrong as a matter of policy, and, while I have no authority to cite in support, it is my opinion that a court might well hold it to be unconstitutional.

(d) Void for vagueness:

Perhaps the most fundamental concern about the increased AMPs is that they are to be levied for breach of provisions that do not provide clear standards of conduct for those subject to the penalties. The Supreme Court of Canada has said that any offence involving imprisonment must not be premised on a law that is too vague to provide clear standards for those who are subject to the law. Although the AMPs do not involve imprisonment, it is quite likely that a similar doctrine of "void for vagueness" would be applied by the Court in the context of a substantial monetary penalty.

The whole idea of "reviewable practices", of which deceptive marketing and abuse of dominant position are examples, is that they are objectionable only if they are harmful to competition. Deceptive marketing that is engaged in knowingly or recklessly is a criminal offence under the Competition Act, carrying a maximum fine of $200,000. Deceptive marketing that is neither knowing nor reckless may simply be the inadvertent product of an aggressive marketing campaign. Yet this may attract the "civil" sanction of an AMP, which carries a far more severe maximum penalty than the knowing or reckless criminal behaviour.

Abuse of dominant position includes much behaviour which is normal and legitimate, for example, the use of scarce facilities also required by a competitor or exclusive supply arrangements. These practices become abusive only after a detailed economic analysis of whether a firm has a dominant place in the market, and whether the practice is likely to lessen competition "substantially" in that market. If these questions are decided against the firm, what would otherwise be normal and legitimate competitive behaviour suddenly attracts a potentially huge penalty.

In the recent *Sears* case (*Commissioner of Competition v. Sears Canada*, Competition Tribunal, January 11, 2005), the Commissioner applied for an AMP of $500,000 (actually five AMPs of $100,000) against Sears for deceptive marketing practices relating to sales of tires. The case was, of course, based on the Competition Act without the Bill C-19 amendments, and Sears did not make the criminal-process constitutional arguments that we have advanced in this opinion. Sears did argue that the deceptive marketing practices provisions were a breach of s. 2(b) of the Charter, which guarantees freedom of expression. The Tribunal, sitting as a single judicial member (Eleanor R. Dawson J.) held that the Act did limit freedom of expression, but that the limit was a reasonable one under s. 1 of the Charter, and was accordingly valid. In the course of her decision, she did address the void for vagueness argument (since a vague law cannot be a reasonable limit under s. 1), and she held that the provisions relevant to the deceptive marketing practice that was alleged against Sears (misleading "sale" prices) were not void for vagueness. She left for a future hearing the question whether an AMP should be imposed and if so how large it should be. No doubt, after the AMP has been assessed, Sears will consider whether to appeal to the Federal Court of Appeal.

As a matter of policy, it is surely wrong to impose huge penalties for breach of reviewable practices that are so vaguely defined that they do not set a clear standard that persons can confidently obey. Despite the *Sears* decision (which is only the decision of a single judge), as a matter of constitutional law, the reviewable practices, when they are used as the basis for the imposition of AMPs, may well be held to be void for vagueness.

blake

4. Conclusion:

For the reasons given, the AMPs, as modified by Bill C-19, violate several provisions of the Charter. With some provisions (burden of proof, absence of due diligence defence, pre-trial disclosure), the breach is clear. With other provisions (independence of tribunal, void for vagueness), the constitutional breach is arguable rather than clear (although the policy objection is certainly clear).

Breaches of the Charter can be upheld under s. 1 of the Charter if the courts decide that the breach is a "reasonable limit" on a Charter right that can be "demonstrably justified in a free and democratic society". In order for the Government to succeed in a s. 1 justification, it must be established that the Government had an objective that was so important that it justified limiting a Charter right, and then it must be established that the limitation on the right is no greater than is necessary to accomplish the objective. I do not believe that a court could be persuaded to uphold under s. 1 the introduction of $15 million penalties into the Competition Act without the normal criminal-process protections for those who are subject to the penalties.

Yours sincerely,

Peter W. Hogg

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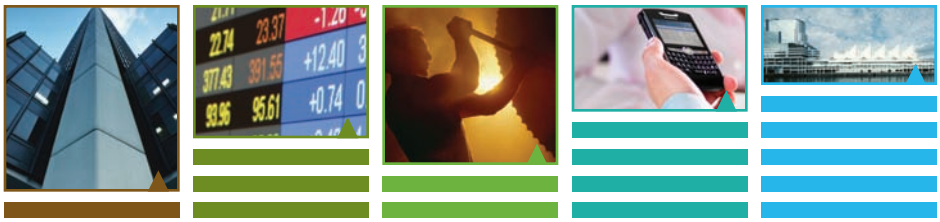
Government of Canada / Gouvernement du Canada

Found at **Tab H(70), Volume 18** of Google's Motion Record.

Compete to Win

Final Report – June 2008

Competition Policy Review Panel – Groupe d'étude sur les politiques en matière de concurrence



Executive Summary

Canada

Executive Summary

"Competition matters. It brings dynamism to our economy. It means good jobs for our citizens. It is not merely an economic concept. Being open to competition serves Canada's national interest. This is the principle that anchors our report and informs our recommendations to the government."

— From the Preface to *Compete to Win*

The Competition Policy Review Panel

- The Competition Policy Review Panel was created by the Government of Canada on July 12, 2007, and was mandated to review Canada's competition and foreign investment policies.
- The Panel is chaired by L. R. Wilson, and includes N. Murray Edwards, Isabelle Hudon, P. Thomas Jenkins and Brian Levitt.
- The Panel was tasked with conducting research, holding consultations and producing a report by June 2008.

Compete to Win

- The report is about one simple proposition: **raising Canada's overall economic performance through greater competition will provide Canadians with a higher standard of living.**
- Strong economic performance means more and better jobs and higher earnings, which in turn generate more government revenues to support the services and programs that Canadians have come to expect.
- At the centre of the Panel's report are the concepts of competitiveness and productivity. Competitiveness refers to the outcomes of economic competition, between firms and between countries.
- The key determinant of competitiveness is productivity, a measure of the efficiency with which economic resources such as labour, capital and business expertise are used to produce goods and services.
- *Compete to Win* provides the Panel's recommendations on how to strengthen Canada's competitiveness and promote the two-way flow of talent, capital and innovation between Canadian markets and world markets.

The Competition Act

- Effective competition laws and policies are key elements in ensuring the competitiveness and efficiency of the Canadian economy.
- The *Competition Act* is recognized internationally as both modern and flexible, and it does not, in the Panel's view, constitute an impediment to Canada's overall competitiveness. However, the Panel concludes that long-term improvements to Canada's productivity could be achieved by updating certain provisions of Canada's competition laws.
- In particular, the Panel believes that it is desirable to harmonize Canadian legal requirements with those of the US, to the extent feasible, with a view to minimizing unnecessary differences, given the high level of business integration between the two economies.
- The Panel is satisfied that there is no need to amend the substantive merger law in the *Competition Act*. However, procedural aspects of the merger review process should be amended to more closely conform with the US process by increasing the initial period for reviewing a proposed merger to 30 days and empowering the Commissioner of Competition to initiate "second stage" review, which would extend the review period by an additional 30 days.
- The time period within which the Commissioner may challenge a merger should be reduced to one year.
- The thresholds that trigger an obligation to notify a merger transaction as well as the creation of additional exemptions from merger notification should be examined.
- The Panel recommends amendments to repeal certain criminal provisions that are either obsolete or ineffective as criminal offences. Amendments should be introduced creating new criminal and civil provisions to address both agreements between competitors to lessen competition and resale price maintenance.
- The Panel is also recommending changes to the powers of the Competition Tribunal to order administrative monetary penalties of a limited amount for violations of the abuse of dominant position provisions.
- Many stakeholders noted the importance of competition advocacy. The Panel agrees that this aspect of competition policy in Canada needs to be strengthened.
- The Panel believes, however, that the Competition Bureau should continue to focus on its core mandate to enforce and promote compliance with the *Competition Act*.

Telecommunications and Broadcasting

11. Consistent with the *Telecommunications Policy Review Panel Final Report 2006*, the federal government should adopt a two-phased approach to foreign participation in the telecommunications and broadcast industry. In the first phase, the Minister of Industry should seek an amendment to the *Telecommunications Act* to allow foreign companies to establish a new telecommunications business in Canada or to acquire an existing telecommunications company with a market share of up to 10 percent of the telecommunications market in Canada. In the second phase, following a review of broadcasting and cultural policies including foreign investment, telecommunications and broadcasting foreign investment restrictions should be liberalized in a manner that is competitively neutral for telecommunications and broadcasting companies.

Financial Services

12. The "widely held" rule applicable to large financial institutions should be retained.

13. The Minister of Finance should remove the de facto prohibition on bank, insurance and cross-pillar mergers of large financial institutions subject to regulatory safeguards, enforced and administered by the Office of the Superintendent of Financial Institutions and the Competition Bureau.

The Competition Act

14. The Minister of Industry should introduce amendments to the *Competition Act* as follows:

    a) align the merger notification process under the *Competition Act* more closely with the merger review process in the United States; the initial review period should be set at 30 days, and the Commissioner of Competition should be empowered, in its discretion, to initiate a "second stage" review that would extend the review period for an additional period ending 30 days following full compliance with a "second request" for information;

    b) reduce to one year the three-year period within which the Commissioner of Competition currently may challenge a completed merger;

    c) repeal the price discrimination, promotional allowances and predatory pricing provisions;

d) repeal the existing conspiracy provisions and replace them with a *per se* criminal offence to address hardcore cartels and a civil provision to deal with other types of agreements between competitors that have anti-competitive effects;

e) repeal the existing resale price maintenance provisions and replace them with a new civil provision to address this practice when it has an anti-competitive effect. This new provision should be subject to the private access rights before the Competition Tribunal;

f) grant the Competition Tribunal the power to order an administrative monetary penalty of up to $5 million for violations of the abuse of dominant position provisions; and

g) repeal the "Air Canada" amendments that created special abuse of dominant position rules and penalties for a dominant air passenger service.

15. The Minister of Industry should examine whether to increase the financial thresholds that trigger an obligation to notify a merger transaction as well as whether to create additional classes of transactions that are exempt from the merger notification provisions of the *Competition Act*.

16. The responsibility for competition advocacy should be vested in the proposed Canadian Competitiveness Council. The power to undertake interventions before regulatory boards and tribunals under sections 125 and 126 of the *Competition Act* should remain with the Commissioner of Competition, unless and until such powers are granted to the proposed Council.

17. The Competition Bureau should reinforce its commitment to giving timely decisions, strengthen its economic analysis capabilities, give appropriate weight to the realities of the global marketplace and, where possible, provide "advance rulings" and other less formal advice to parties concerning prospective transactions and other arrangements on a timely basis to ensure compliance with the *Competition Act.*

Found at **Tab H(71), Volumes 18-19** of Google's Motion Record.

Second Session, Fortieth Parliament,
57-58 Elizabeth II, 2009

Deuxième session, quarantième législature,
57-58 Elizabeth II, 2009

STATUTES OF CANADA 2009

LOIS DU CANADA (2009)

CHAPTER 2

CHAPITRE 2

An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures

Loi portant exécution de certaines dispositions du budget déposé au Parlement le 27 janvier 2009 et mettant en oeuvre des mesures fiscales connexes

ASSENTED TO

12th MARCH, 2009

BILL C-10

SANCTIONNÉE

LE 12 MARS 2009

PROJET DE LOI C-10

(*b*) was making a practice of using the products not for the purpose of selling them at a profit but for the purpose of attracting customers in the hope of selling them other products;

(*c*) was making a practice of engaging in misleading advertising; or

(*d*) made a practice of not providing the level of servicing that purchasers of the products might reasonably expect.

b) de les vendre sans profit afin d'attirer les clients dans l'espoir de leur vendre d'autres produits;

c) de faire de la publicité trompeuse;

d) de ne pas assurer la qualité de service à laquelle leurs acheteurs pouvaient raisonnablement s'attendre.

Inferences

(10) 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.

Application

(10) Le Tribunal, lorsqu'il est saisi d'une demande présentée par une personne à qui il a accordé la permission de présenter une demande en vertu de l'article 103.1, ne peut tirer quelque conclusion que ce soit du fait que le commissaire a pris des mesures ou non à l'égard de l'objet de la demande.

Where proceedings commenced under section 45, 49, 79 or 90.1

(11) 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 under section 79 or 90.1.

Procédures en vertu des articles 45, 49, 79 et 90.1

(11) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits allégués 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 demandée à l'endroit de cette personne en vertu des articles 79 ou 90.1.

Definition of "trade terms"

(12) For the purposes of this section, "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Définition de « conditions de commerce »

(12) Pour l'application du présent article, « 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.

2000, c. 15, s. 13(2)

427. (1) Subsection 78(1) of the Act is amended by adding the word "and" at the end of paragraph (*h*) and by repealing paragraphs (*j*) and (*k*).

2000, ch. 15, par. 13(2)

427. (1) Les alinéas 78(1)*j*) et *k*) de la même loi sont abrogés.

2000, c. 15, s. 13(3)

(2) Subsection 78(2) of the Act is repealed.

2000, ch. 15, par. 13(3)

(2) Le paragraphe 78(2) de la même loi est abrogé.

2002, c. 16, s. 11.4

428. (1) Subsections 79(3.1) to (3.3) of the Act are replaced by the following:

2002, ch. 16, art. 11.4

428. (1) Les paragraphes 79(3.1) à (3.3) de la même loi sont remplacés par ce qui suit :

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

Sanction administrative pécuniaire

(3.1) S'il rend une ordonnance en vertu des paragraphes (1) ou (2), le Tribunal peut aussi ordonner à la personne visée de payer, selon les

Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

modalités qu'il peut préciser, une sanction administrative pécuniaire maximale de 10 000 000 $ et, pour toute ordonnance subséquente rendue en vertu de l'un de ces paragraphes, de 15 000 000 $.

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.

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;

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.

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.

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.

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

(2) Subsection 79(7) of the Act is replaced by the following:

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

(2) Le paragraphe 79(7) de la même loi est remplacé par ce qui suit :

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.

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 demandée par le commissaire à l'endroit de cette personne en vertu des articles 76, 90.1 ou 92.

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

429. Section 90 of the Act is replaced by the following:

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

429. L'article 90 de la même loi est remplacé par ce qui suit :

SCHEDULE 2
(Sections 34 and 54)

RATES OF PAY — EMPLOYEES IN THE LAW GROUP

All regions except Toronto	Minimum	Maximum
LA-DEV	$27,410	$62,155
LA-01	$54,580	$77,868
LA-02(A) or LA-02(I)	$75,622	$108,525
LA-02(B) or LA-02(II)	$94,097	$119,975
LA-03(A)	$107,300	$136,300
LA-03(B)	$124,400	$152,200
LA-03(C)	$141,700	$172,800

Toronto region	Minimum	Maximum
LA-DEV	$27,410	$62,155
LA-01	$54,585	$77,868
LA-02(A) or LA-02(I)	$75,630	$124,940
LA-02(B) or LA-02(II)	$98,840	$138,075
LA-03(A)	$113,600	$148,100
LA-03(B)	$124,400	$152,200
LA-03(C)	$141,700	$172,800

ANNEXE 2
(articles 34 et 54)

TAUX DE SALAIRE — EMPLOYÉS DU GROUPE DU DROIT

Toutes les régions sauf celle de Toronto	Minimum	Maximum
LA-DEV	27 410 $	62 155 $
LA-01	54 580 $	77 868 $
LA-02(A) ou LA-02(I)	75 622 $	108 525 $
LA-02(B) ou LA-02(II)	94 097 $	119 975 $
LA-03(A)	107 300 $	136 300 $
LA-03(B)	124 400 $	152 200 $
LA-03(C)	141 700 $	172 800 $

Région de Toronto	Minimum	Maximum
LA-DEV	27 410 $	62 155 $
LA-01	54 585 $	77 868 $
LA-02(A) ou LA-02(I)	75 630 $	124 940 $
LA-02(B) ou LA-02(II)	98 840 $	138 075 $
LA-03(A)	113 600 $	148 100 $
LA-03(B)	124 400 $	152 200 $
LA-03(C)	141 700 $	172 800 $

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CANADA

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VOLUME 144 • NUMBER 020 • 2nd SESSION • 40th PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Friday, February 27, 2009

Speaker: The Honourable Peter Milliken

As to the original question of how this will be implemented, the hon. member has already voted on that. It was in the ways and means motion and it has passed.

[*Translation*]

Ms. Nicole Demers (Laval, BQ): Mr. Speaker, I listened carefully to our colleague who gave a somewhat pretentious speech. For his information, we have received numerous emails from individuals who are not happy with the work done by the Conservatives, and not only from Quebeckers. I would like, if I may, to read short excerpts from what one of them wrote me around noon yesterday. This is a lady from Alberta who expressed great disappointment with what the Conservatives have done. Understandably, I have to read these quotes in English:

[*English*]

"I wanted you to know that out here in Alberta, I'm so pleased that at least one woman MP has the courage to stand up in Parliament and express these concerns, even though you know that there are many in the Conservative seats who will have the temerity to laugh, as I observed them doing when this came to a vote and they shouted 'no'. I also observed the Speaker actually laughing when he called for the vote in what appeared to be a mocking of the member's bill which your words were addressing".

[*Translation*]

That is something to bear in mind, Mr. Speaker. You were not the one in the chair at the time. You are therefore not to blame.

This lady was also very disappointed with the conduct of female Conservative MPs. She added, and I quote:

[*English*]

"You spoke eloquently, including your chastizing of Conservative female MPs who did not take a stand to defend the rights of women".

[*Translation*]

The member opposite needs to know that not everyone thinks that the Conservatives are right and, not only in Quebec but across Canada, many do not approve of their policies.

● (1045)

[*English*]

Mr. Ted Menzies: Perhaps, Mr. Speaker, I should allow you to answer that question first because it appeared that part of it was directed to you. I am sure that you, in your normal jovial way, were just smiling at the hon. members as they were voting. We certainly would not think you would take sides.

It is wonderful to see a member of the Bloc Québécois recognizing that Albertans matter. Usually those members spend their days bashing Albertans saying that we are huge polluters.

In fact, all Canadians recognize the difficult situation that all Canadians are in.

We stand up for women. In fact, we stand up so firmly for women that we do not think they should have to wait 15 years to get the same wage agreements that men have.

The Speaker: Frankly, the hon. parliamentary knows I do not answer questions in the House, tempting as it is sometimes, but I am pleased that he was able to respond to the comments of the hon. member for Laval.

Resuming debate. The hon. member for Markham—Unionville.

[*Translation*]

Hon. John McCallum (Markham—Unionville, Lib.): Mr. Speaker, as members know, the Liberals will support the budget for one simple reason, that Canada is in the midst of an economic crisis with job losses that we have not seen in a very long time. I think that Canadians want Parliament to take action to support the economy, and that has to be our top priority.

That having been said, we realize that there are many problems and flaws in this budget. That is why we said that the government would be under trusteeship, on probation.

[*English*]

The government is on probation, and it is for that reason that we require quarterly reports from the government: so that we can monitor it and see whether it is implementing the actions promised in the budget and so that we can see the degree to which the government is responding to the five criteria laid out by our leader, those being that the federal government must help the vulnerable, must protect the jobs of today, must support the jobs of tomorrow, must be fair from a regional point of view and must act in such a way as to not create a permanent deficit.

We will be monitoring the government to ensure the money gets out the door and to ensure that it responds to the five criteria laid out by our leader. We will also monitor the state of the economy. If the economy continues to get worse, it may be necessary for the government to take additional action. That is our overall position.

Let me comment briefly on a certain number of problems we see in the budget, both in terms of what one might call sins of omission—things we think ought to have been in the budget and are not there—and sins of commission, things that are in the budget that we do not like at all. In both categories the list is potentially endless, but in view of the time, I will select just two items in each area.

First, in terms of helping the vulnerable, if there is one single thing that we believe the government ought to have done, it would have been to ease the conditions of eligibility for employment insurance. Our current employment insurance system has not been recession-tested. I do not think it is right that somebody in my riding should have to work twice as many hours to be eligible for EI as somebody in someone else's riding. This was certainly a sin of omission in terms of helping the vulnerable.

Second, we can look to the south and compare the government's measures with those of President Obama, which form a vision for the future around the importance of science; the importance of technology; the importance of research, of innovation, of access to venture capital; and the importance of serious measures to create a sustainable economy. If one compares the billions spent in the south to the lip service, or worse, in our country, this is another area in which this visionless budget does not stand up to scrutiny.

Turning now to crimes of commission, I would argue that one of the most egregious is the Conservatives' treatment of pay equity. I believe this is an attack on the rights of women. I believe that the government's claim that it is following the Ontario model or the Manitoba model is demonstrably and patently false.

On the other hand, as I said at the very beginning, the overriding reason for our support for the government is that we must, at this time of economic crisis, provide support to save or protect jobs, and many of those jobs that need either saving or protecting are the jobs of women. The fiscal measures of the budget, providing they do indeed get out the door—and we will be monitoring that—will provide assistance to women, which in a sense is a balance against the attack on women in the area of pay equity.

I will mention a second example of things we do not like in the budget. Competition policy is framework legislation that is generally reviewed approximately once every 20 years. To slip it into a budget implementation bill to ensure that there is virtually no debate in this very important area can certainly be seen as bad process, whatever one's views on the content of the legislation may be.

Some of the colleagues in the Bloc or the NDP might ask me, given this litany of things I do not like about the budget, why I am supporting it. The answer is, as I said at the very beginning, that we are in an economic crisis in this country at this time.

● (1050)

I do not think any of us in the chamber have seen a crisis of this magnitude in our lifetimes. At least it has the potential to develop into something far worse than what we have seen in our lifetimes. That is why we have to have our focus on this single point, which is that if the government gets the billions of dollars in the budget out the door, that money will provide support for jobs. I think that has to be the number one priority for Canadians at this time.

My last point relates to a more recent development. It is this attempt by the government to spend an additional $3 billion through the estimates through what can only be described as very unusual means.

Finally, it seems, the government has found religion. It seems it finally acknowledges there is a recession, even though the Prime Minister said during the election campaign that if Canada was going to have a recession, it would have had one now. Finally the government understands the importance of getting the money out the door, which is something we have been saying for weeks and months. Had it really been serious, it would have acted with a fiscal stimulus right after the election, or at least in November, at a time when virtually every other country in the world had already acted.

The Conservatives were in denial at that point. They did not think there was a need for any stimulus. In fact, their disastrous November statement contained cuts rather than stimulus. Now at least they acknowledge that we are in recession and we need to get the money out. That is the alleged rationale for this unusual practice on the $3 billion.

However, we have not yet given our agreement to this process. Many questions have to be raised. For example, we had a briefing by Treasury Board officials on the $3 billion. At that time we were told the measures to be included in the $3 billion were budget measures specifically from chapter 3 of the budget. They gave examples such as the regional development agency for southern Ontario, and many others.

Now that we see the black and white letters of the proposed bill for the estimates, we see it is far broader than it appears. This is one of the things we will have to look into. It appears that the $3 billion can be anything the government wants to do and is not necessarily limited to measures contained in the budget.

We have been the ones arguing from the very start that it is important to get the money out the door, but we also want to make sure that the process through which the government seeks to do that does not lead to abuse. We now see the possibility that the $3 billion could include measures other than budget measures, and that possibility certainly raises questions on this side of the House.

Mr. Speaker, I reiterate our position that we support the budget because of the economic crisis in which we find ourselves embroiled, but we are deeply suspicious of the motives and the capacity of the government to deliver, which is why we have set up this monitoring mechanism. We support the budget, but with serious reservations both on what it contains and on what it does not contain. We will certainly have further questions on the mechanics and propriety of this new spending mechanism that the government proposed just yesterday.

● (1055)

Mr. Paul Dewar (Ottawa Centre, NDP): Mr. Speaker, I appreciate the critique that the member gave from the Liberal Party, but my question is about holding the government to account as well as about improving what I would argue is an ill-conceived budget.

It is one thing for the government to say it would provide stimulus. It is another thing to see a slush fund being created, with no real oversight beyond a request to just trust the government.

I am wondering why the member's party is not supporting our party in taking out facets of this budget. This is not about confidence. This is about improving a really bad budget as much as we can. Why will the member not join us in taking out those parts and facets of the budget? That is what we are debating here today. Why will the member not join us in trying to improve something that is really ill-conceived and not put together very well?

Hon. John McCallum: Mr. Speaker, contrary to what my colleague over there has just said, confidence is whatever the government and the Prime Minister say is confidence. The finance minister and the Prime Minister have made it quite clear that from their point of view, any change in the budget is a matter of confidence.

It is all very well for the NDP to behave in an irresponsible way that would likely cause an election and a delay of several months for any support to the economy or any help to those who are unemployed or who are about to become unemployed, but we in the Liberal Party believe our first responsibility is to support the economy, to support the unemployed and to support the potentially unemployed at this moment of economic crisis.

This Web page has been archived on the Web.

Version of document from 2009-03-12 to 2010-03-11:

Found at Tab H(84), Volume 20 of Google's Motion Record.

Competition Act

R.S.C. (Revised Statutes of Canada), 1985, c. C-34

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

Short Title

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.

PART I

Purpose and Interpretation

Purpose

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.

Interpretation

Definitions

2 (1) In this Act,

article means real and personal property of every description including

(a) money,

(i) the business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and

(ii) no one product dominates the business.

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 trade-mark 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.

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, 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.

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

(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.

Prohibition where abuse of dominant position

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,

(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.

Additional or alternative order

(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.

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 $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

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

(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.

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 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.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37; 2002, c. 16, s. 11.4; 2009, c. 2, s. 428.

Unpaid monetary penalty

79.1 The amount of an administrative monetary penalty imposed on an entity 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 in a court of competent jurisdiction.

2002, c. 16, s. 11.5.

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 Supp.), 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.

Exception where trade-mark used

THE HONOURABLE HOWARD WETSTON, C.M., Q.C.
SENATOR FOR ONTARIO

L'HONORABLE HOWARD WETSTON, C.M., C.R.
SÉNATEUR DE L'ONTARIO

SENATE | SÉNAT
CANADA

October 27, 2021

Re: Consultation Invitation - *Examining the Canadian Competition Act in the Digital Era*

Dear Sir, Dear Madam,

In a continuing effort to ensure Canada has an effective and impactful competition law framework, I cordially invite you to participate in a consultation to promote additional dialogue on paths forward for Canadian competition law. This consultation is intended to inform future parliamentary consideration of the *Competition Act* in which I hope to engage.

Recent years have witnessed a major digital transformation in the economy. These developments have corresponded with a greater interest in competition policy, and commentators in Canada and around the world have debated the merits of competition law reform in numerous areas. Building on this attention and focus, this consultation is intended to determine whether Canada's competition policy framework, and the *Competition Act* in particular, remain appropriate in the digital age.

Since the passage of the *Competition Act* in 1986, competition policy has generally sought to promote economic welfare. Competition policy plays a critical role in promoting economic prosperity by facilitating greater efficiency, innovation and productivity. An effective *Competition Act* is vital in establishing the proverbial rules of the game in the Canadian market.

However, with the emergence of a series of digital platforms, questions have surfaced whether Canada's competition policy framework remains effective in this new economic environment. In an effort to respond to these questions and support this consultation, I commissioned an expert in the field of competition law, Professor Edward M. Iacobucci of the University of Toronto Faculty of Law, to prepare a discussion paper that examines whether digital markets have distinctive features that invite significant changes to our competition law.

.../2

Examining the Canadian *Competition Act* in the Digital Era

Submission by the Competition Bureau

February 8, 2022

Found at **Tab H(130), Volume 24** of Google's Motion Record.

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Introduction

This submission responds to Senator Wetston's invitation to comment on Canada's competition policy framework. [1] The Competition Bureau ("Bureau") is pleased to participate in this process.

The Bureau is an independent law enforcement agency that protects and promotes competition for the benefit of Canadian consumers and businesses. It is headed by the Commissioner of Competition ("Commissioner") who is responsible for the administration and enforcement of the *Competition Act* [2] ("Act") and other federal laws. In addition to the Bureau, the Competition Tribunal ("Tribunal") and the courts adjudicate matters under the Act. Innovation, Science, and Economic Development Canada develops and coordinates government policies, laws, and regulations respecting competition. [3]

Since the Act came into force in 1986, the world has seen a revolution of technological advancement. The unbridled innovation of the past 35 years has brought the world closer together and unlocked huge economic value. However, technology has also led to increasing digitization of the economy. The new, digital economy has grown a class of so-called "digital giants". Through their actions to collect, broker, and benefit from this new wealth of data, digital giants have obtained a high degree of influence across a wide range of economic activity. Across the globe, governments and policymakers have taken note of these digital giants. They want to ensure that competition policy frameworks can keep pace as consumers and competition are challenged by a relatively small number of powerful businesses that sit at the centre of the digital economy.

Competition policy emerged, more than a century ago, in response to a prior set of "giants" who also exerted significant control over the economy. Competition policy recognizes that competition is the best way to ensure a

Recommendation 3.2 (Prevent standard): The standards established from analysis of more traditional industries are not suitable for assessing anti-competitive conduct aimed at emerging competitors in the digital economy. A more workable standard would provide additional flexibility to protect the competitive process.

3.3. Monetary penalties should deter anti-competitive behaviour

Administrative monetary penalties play an important role in ensuring the efficacy of the Act. Properly structured, these penalties can provide a strong financial incentive for businesses to comply with the Act. However, to achieve this goal, such penalties must be "...greater than the profit that the abusive firm might realize as a result of its anticompetitive conduct." [100] Otherwise, businesses may still realize profits from the conduct even after paying the monetary penalty. In such a situation, monetary penalties risk merely becoming a cost of doing business. [101]

Current maximum monetary penalties under section 79 are insufficient. The maximum penalty under subsection 79(3.1) is $10 million for an initial order, and $15 million in the case of a subsequent order. [102] It is difficult to see how such amounts would act as an effective deterrent for larger businesses that attract billions of dollars in annual revenue. [103] In such a case, the Act does not impose meaningful consequences for non-compliance.

Canada's monetary penalties for abuse of dominance are significantly out of step with international jurisdictions. For example:

- In the UK, financial penalties are determined based on a number of factors, including the duration and seriousness of the conduct, and may total up to 10% of the worldwide revenues of the business. [104] The U.K. CMA recently imposed a fine in excess of 155 million GBP (267 million

CAD) against a pharmaceutical company for abusing its dominant position. [105]

- In the EU, fines are similarly based on the duration and gravity of the conduct. They may be up to 10% of a company's annual revenues. [106] The European General Court recently upheld the European Commission's 2.42 billion EUR fine (3.5 billion CAD) imposed on Google for abusing its dominant position in online search. [107]
- In Australia, the maximum penalty for corporations for each contravention of the law is the greater of:
  i. 10 million AUD ($9.2 million CAD);
  ii. if the excess profits that the company obtained as a result of the conduct can be determined, 3 times that value; and
  iii. if those excess profits obtained cannot be determined, 10% of the company's annual revenues. [108]
- In South Korea, a penalty not exceeding 3% of revenues may be imposed, but a penalty surcharge not exceeding one billion won (1.1 million CAD) may be imposed if no relevant sales have been made, or it is impracticable to compute sales. [109] A South Korean court recently upheld a 1.03 trillion won (1.1 billion CAD) fine imposed by the Korea Fair Trade Commission on Qualcomm for abusing its dominant position in the market for modem chipsets. [110]

Effective penalty amounts must exceed the profits earned from engaging in the abusive conduct. Otherwise, firms are unlikely to be deterred from such conduct. While penalty amounts should be levied at appropriate levels given the particulars of each case, the current penalties available are small and inflexible as compared to those available to international counterparts.

Recommendation 3.3 (Penalties): Monetary penalties provided under the abuse of dominance provision are often too small to effectively deter anti-competitive conduct. These penalties should be adapted to ensure that they can achieve their intended purpose of achieving compliance with the Act.

3.4. Private access should be expanded for abuse of dominance

Only the Commissioner can bring applications to the Tribunal under the abuse of dominance provision of the Act. In some circumstances, it may be appropriate for a private litigant to bring a case.

Private access serves as a complement to public enforcement by the Commissioner. Perhaps the greatest benefit of private access is that, by having a larger number of cases heard by the Tribunal, a broader body of case law would be developed. Such case law serves to clarify aspects of the law, and removes uncertainty for the Commissioner, private litigants, and businesses who engage in potentially reviewable conduct.

Additionally, there may be cases where the litigant is better positioned to bring a case than the Commissioner. For example, businesses are typically more familiar with the facts of the industries in which they operate. Therefore, they can often act more quickly than the Bureau, which would need to conduct a thorough investigation to determine those facts. Another scenario is where conduct harms a particular firm that would therefore obtain a unique benefit from conduct being remedied.

In a resource constrained world, the Bureau must prioritize certain cases over others. Private access provides an avenue for all those with a legitimate complaint to seek relief in front of the Tribunal. Such an extension of private

Expert Report of Steven Tadelis*

Commissioner of Competition v. Google LLC and Google Canada Corporation (CT-2024-010)

July 4, 2025

* Professor of Economics, Business and Public Policy, and the Sarin Chair in Leadership and Strategy at the Haas School of Business, the University of California, Berkeley

laws in part to curb the political influence of large firms with monopoly power, the Hylton model would not recognize any such social impact.

51. My conclusion is that had Professor Hylton incorporated all the harms caused by monopolization it is likely the internalization approach would result in a much larger penalty than the penalty that results from the deterrence approach.

6 Professor Hylton Conflates the Cap and the Penalty

52. To understand why Professor Hylton is mistaken in characterizing a penalty capped at either "three times the benefit" or "three percent of global revenue" as punitive, it is helpful to consider the process by which such a penalty would be set. Under the well-established deterrence approach in economics, the optimal penalty—meaning one that promotes compliance with Section 79 of the *Competition Act*—is equal to the illicit gain divided by the probability of detection. This ensures that firms have no financial incentive to violate the law. A penalty below this level would fail to deter anticompetitive conduct, as the expected cost would remain lower than the expected gain. Conversely, a penalty that substantially exceeds this benchmark may be seen as overdeterrent, as it sets a deterrent penalty stronger than necessary.

53. I will consider two cases, which together exhaust the possibilities of this and any other monopolization case, both of which reflect the overarching economic principles set out above.

54. In the first case, sufficient information is available to determine the monopolist's benefit from the anticompetitive conduct. Assuming that the Tribunal has decided to order a firm to pay a penalty, the first step in the process would be for the Tribunal to set a penalty amount using the specific factors in Section 79(3.2) of the *Competition Act*, and "any other relevant fact"[72] and having regard to the purpose of the penalty (i.e., conformity, not punishment). Then, that penalty amount would be compared to the cap (i.e., three times the benefit, which in this case is known). If the penalty is above the cap, then the cap becomes the final penalty and is lower than the optimal penalty. However, if the penalty is below the cap, the lower (optimally calculated) penalty is the one that is implemented. I understand that this process is consistent with how the European competition authorities calculate antitrust penalties.[73]

[72] Canadian Competition Act, Section 79 (3.2.f), *Aggravating or mitigating factors*.
[73] UK Competition & Markets Authority, *CMA's guidance as to the appropriate amount of a penalty*, CMA 73, (Dec.2021), available at https://assets.publishing.service.gov.uk/media/622f73c58fa8f56c170b7274/CMA73final_.pdf; European Union, *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*, Official Journal of the European Union, 1.9.2006, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX%3A52006XC0901(01).

Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Text with EEA relevance)

Exhibit 35 Marked During Cross-Examination of Professor Tadelis. Found at **Tab A(35), Volume 4** of Google's Revised Supp. Motion Record.

OJ C 210, 1.9.2006, p. 2–5 (ES, CS, DA, DE, ET, EL, E SV)

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Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003

(2006/C 210/02)

(Text with EEA relevance)

INTRODUCTION

1. Pursuant to Article 23(2)(a) of Regulation No 1/2003 ([1]), the Commission may, by decision, impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 81 or 82 of the Treaty.

2. In exercising its power to impose such fines, the Commission enjoys a wide margin of discretion ([2]) within the limits set by Regulation No 1/2003. First, the Commission must have regard both to the

gravity and to the duration of the infringement. Second, the fine imposed may not exceed the limits specified in Article 23(2), second and third subparagraphs, of Regulation No 1/2003.

3. In order to ensure the transparency and impartiality of its decisions, the Commission published on 14 January 1998 guidelines on the method of setting fines ([3]). After more than eight years of implementation, the Commission has acquired sufficient experience to develop further and refine its policy on fines.

4. The Commission's power to impose fines on undertakings or associations of undertakings which, intentionally or negligently, infringe Article 81 or 82 of the Treaty is one of the means conferred on it in order for it to carry out the task of supervision entrusted to it by the Treaty. That task not only includes the duty to investigate and sanction individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to steer the conduct of undertakings in the light of those principles ([4]). For this purpose, the Commission must ensure that its action has the necessary deterrent effect ([5]). Accordingly, when the Commission discovers that Article 81 or 82 of the Treaty has been infringed, it may be necessary to impose a fine on those who have acted in breach of the law. Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).

5. In order to achieve these objectives, it is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine. The duration of the infringement should also play a significant role in the setting of the appropriate amount of the fine. It necessarily has an impact on the potential consequences of the infringement on the market. It is therefore considered important that the fine should also reflect the number of years during which an undertaking participated in the infringement.

6. The combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement. Reference to these factors provides a good indication of the order of magnitude of the fine and should not be regarded as the basis for an automatic and arithmetical calculation method.

7. It is also considered appropriate to include in the fine a specific amount irrespective of the duration of the infringement, in order to deter companies from even entering into illegal practices.

8. The sections below set out the principles which will guide the Commission when it sets fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

METHOD FOR THE SETTING OF FINES

9. Without prejudice to point 37 below, the Commission will use the following two-step methodology when setting the fine to be imposed on undertakings or associations of undertakings.

10. First, the Commission will determine a basic amount for each undertaking or association of undertakings (see Section 1 below).

11. Second, it may adjust that basic amount upwards or downwards (see Section 2 below).

1. Basic amount of the fine

12. The basic amount will be set by reference to the value of sales and applying the following methodology.

A. Calculation of the value of sales

13. In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly ([6]) relates in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement (hereafter 'value of sales').

14. Where the infringement by an association of undertakings relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members.

15. In determining the value of sales by an undertaking, the Commission will take that undertaking's best available figures.

16. Where the figures made available by an undertaking are incomplete or not reliable, the Commission may determine the value of its sales on the basis of the partial figures it has obtained and/or any other information which it regards as relevant and appropriate.

17. The value of sales will be determined before VAT and other taxes directly related to the sales.

18. Where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements.

    In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine.

B. Determination of the basic amount of the fine

19. The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.

20. The assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.

21. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30 % of the value of sales.

22. In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

23. Horizontal price-fixing, market-sharing and output-limitation agreements ([7]), which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.

24. In order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales (see points 20 to 23 above)

will be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year.

25. In addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15 % and 25 % of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred in point 22.

26. Where the value of sales by undertakings participating in the infringement is similar but not identical, the Commission may set for each of them an identical basic amount. Moreover, in determining the basic amount of the fine, the Commission will use rounded figures.

2. Adjustments to the basic amount

27. In setting the fine, the Commission may take into account circumstances that result in an increase or decrease in the basic amount as determined in Section 1 above. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances.

A. Aggravating circumstances

28. The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as:

— where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82: the basic amount will be increased by up to 100 % for each such infringement established;

— refusal to cooperate with or obstruction of the Commission in carrying out its investigations;

— role of leader in, or instigator of, the infringement; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement.

B. Mitigating circumstances

29. The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as:

— where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels);

— where the undertaking provides evidence that the infringement has been committed as a result of negligence;

— where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others

will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;

— where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so;

— where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation. ([8])

C. Specific increase for deterrence

30. The Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.

31. The Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount.

D. Legal maximum

32. The final amount of the fine shall not, in any event, exceed 10 % of the total turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement, as laid down in Article 23(2) of Regulation No 1/2003.

33. Where an infringement by an association of undertakings relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by that infringement.

E. Leniency Notice

34. The Commission will apply the leniency rules in line with the conditions set out in the applicable notice.

F. Ability to pay

35. In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

FINAL CONSIDERATIONS

36. The Commission may, in certain cases, impose a symbolic fine. The justification for imposing such a fine should be given in its decision.

37. Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21.

38. These Guidelines will be applied in all cases where a statement of objections is notified after their date of publication in the Official Journal, regardless of whether the fine is imposed pursuant to Article 23(2) of Regulation No 1/2003 or Article 15(2) of Regulation 17/62 ([9]).

(1) Council Regulation (EC) No 1 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

(2) See, for example, Case C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S and others v Commission* [2005] ECR I-5425, paragraph 172.

(3) Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ C 9, 14.1.1998, p. 3).

(4) See, for example, *Dansk Rørindustri A/S and others v Commission*, cited above, paragraph 170.

(5) See Joined Cases 100/80 to 103/80 *Musique Diffusion française and others v Commission* [1983] ECR 1825, paragraph 106.

(6) Such will be the case for instance for horizontal price fixing arrangements on a given product, where the price of that product then serves as a basis for the price of lower or higher quality products.

(7) This includes agreements, concerted practices and decisions by associations of undertakings within the meaning of Article 81 of the Treaty.

(8) This is without prejudice to any action that may be taken against the Member State concerned.

(9) Article 15(2) of Regulation 17/62 of 6 February 1962: First Regulation implementing Articles 85 and 86 [now 81 and 82] of the Treaty (OJ 13, 21.2.1962, p. 204).

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Guidelines for setting fines

SUMMARY OF:

Guidelines on the method of setting fines imposed further to Regulation No 1/2003

WHAT IS THE AIM OF THE GUIDELINES?

- They set out the methodology to be used by the European Commission when setting fines on undertakings* that infringe the EU's competition rules which prohibit:
  - **cartels* and other restrictive business practices** (ex Article 81 Treaty establishing the European Community (TEC), now Article 101 of the Treaty on the Functioning of the European Union — TFEU) and
  - **abuses of dominant position** (ex Article 82 TEC, now Article 102 TFEU).

KEY POINTS

Regulation (EC) No 1/2003 (see summary), based on Article 103 TFEU (ex Article 83), gives the Commission powers to enforce the competition rules and to fine companies for infringements. The guidelines, which replace previous guidelines adopted in 1998, impose tougher fines on firms that violate EU rules prohibiting cartels and other restrictive business practices.

Article 23 of Regulation (EC) No 1/2003 indicates that fines shall be set with regard to both the gravity and the duration of the infringement. Fines can reach up to 10% of the worldwide turnover of the corporate group to which the infringing company belongs in the previous business year.

To achieve its objectives of imposing fines that are sufficiently high both to **punish** the firms involved and to **deter** others from practices that flout the competition rules, the Commission takes certain factors into account such as:

- the value of the sales of goods or services to which the infringement relates;
- the duration of the infringement — the fine needs to reflect the number of years during which a firm participated in the infringement in order to appropriately account for its impact on the market;
- the gravity of the infringement, in particular by reference to the fine type and nature of the infringing conduct and certain other factors;
- factors specific to individual companies that may justify increasing or decreasing a fine.

Two-step methodology

The Commission:

1. determines a basic amount of fine for each undertaking or association of undertakings; and
2. may adjust that basic amount upwards or downwards.

Basic amount of the fine

- The basic amount is calculated as a percentage of the **value of the sales** connected with the infringement, multiplied by the number of years the infringement has been taking place.
- The percentage of the value of sales is determined according to the **gravity of the infringement** (nature, combined market share of all the parties concerned, geographic scope, etc.) and may be as much as 30%. For cartels, which are among the most harmful restrictions of competition, the gravity percentage will be set in the upper half of the range (minimum 15%).
- The Commission may add to this initial calculation **a further amount** that is applied to all cartel cases and, at the Commission's discretion, to other infringements. This will be between 15 and 25% of the value of annual sales, irrespective of the duration of the infringement. This is known as the 'entry fee' and is intended to deter firms from engaging in illegal practices even for a short period.

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- The basic amount is calculated as a percentage of the **value of the sales** connected with the infringement, multiplied by the number of years the infringement has been taking place.
- The percentage of the value of sales is determined according to the **gravity of the infringement** (nature, combined market share of all the parties concerned, geographic scope, etc.) and may be as much as 30%. For cartels, which are among the most harmful restrictions of competition, the gravity percentage will be set in the upper half of the range (minimum 15%).
- The Commission may add to this initial calculation **a further amount** that is applied to all cartel cases and, at the Commission's discretion, to other infringements. This will be between 15 and 25% of the value of annual sales, irrespective of the duration of the infringement. This is known as the 'entry fee' and is intended to deter firms from engaging in illegal practices even for a short period.

Adjustments to the basic amount of the fine

- The Commission may adjust the basic amount for individual undertakings; downwards if it finds that there are **mitigating circumstances**, or upwards in the event of **aggravating circumstances**.
- Repeat offenders are fined more heavily. **Firms that re-offend can face a 100% increase in their fine** for having committed past infringements.
- In order to ensure that fines have a sufficiently deterrent effect, the Commission may also increase a fine applied to an undertaking that has a particularly large group turnover that is unrelated to the value of sales affected by the infringement.
- The guidelines for setting fines do not affect the application of the EU's leniency rules, which can reduce, or grant immunity from, fines for undertakings reporting their participation in a cartel and cooperating with the Commission's investigation.
- Fines can be further reduced pursuant to the Commission's policy on cartel settlements or, in infringements other than cartels, on the basis of effective cooperation and acknowledgement of the infringement by the undertaking(s).
- The **maximum fine** for each firm is set at 10% of its total turnover in the preceding business year (Regulation EC No 1/2003).

FROM WHEN DO THE GUIDELINES APPLY?

They have applied since 1 September 2006.

BACKGROUND

For more information, see:

- Procedures in anticompetitive agreements (Article 101 TFEU cases) (*European Commission*)
- Abuse of dominant position (Article 102 TFEU) (*European Commission*).

KEY TERMS

Undertaking: any entity engaged in an economic activity — an activity consisting in offering goods or services on a given market — regardless of its legal status and the way in which it is financed, is considered an undertaking.
Cartel: a cartel is a group of similar, independent companies which join together to fix prices, to limit production or to share markets or customers between them.

MAIN DOCUMENT

Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C 210, 1.9.2006, pp. 2-5)

RELATED DOCUMENTS

Consolidated version of the Treaty on the Functioning of the European Union — Part Three — Union policies and internal actions — Title VII — Common rules on competition, taxation and approximation of laws — Chapter 1 — Rules on competition — Section 1 — Rules applying to undertakings — Article 101 (ex Article 81 TEC) (OJ C 202, 7.6.2016, pp. 88-89)

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Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, pp. 17-22)

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pp. 1-25)

Successive amendments to Regulation (EC) No 1/2003 have been incorporated into the original text. This consolidated version is of documentary value only.

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European Commission

Procedures in Article 102 Investigations

How a case starts

Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibits abusive conduct by companies that have a dominant position on a particular market.

An Article 102 case dealt with by the European Commission or a national competition authority can originate either:

1. upon receipt of a complaint or;
2. through the opening of an *ex officio* investigation or a sector inquiry.

Assessing dominance

The Commission's first step in an Article 102 investigation is to assess whether the undertaking concerned is dominant on any given market or not.

Before assessing dominance, the Commission defines the **product market** and the **geographic market.**

- **Product market**: the relevant product market is made of all products/services which the consumer considers to be a substitute for each other due to their characteristics, their prices and their intended use.
- **Geographic market**: the relevant geographic market is an area in which the conditions of competition for a given product are homogenous.

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Market shares are a useful first indication of the importance of each firm on the market in comparison to the others. The Commission's view is that the higher the market share, and the longer the period of time over which it is held, the more likely it is to be a preliminary indication of dominance. If a company has a market share of less than **40%**, it is unlikely to be dominant.

The Commission also takes other factors into account in its assessment of dominance, including the ease with which other companies can enter the market – whether there are any barriers to this; the existence of countervailing buyer power; the overall size and strength of the company and its resources and the extent to which it is present at several levels of the supply chain (vertical integration).

What is an abuse of dominance?

Holding a dominant position on any given market is not in itself illegal. However, a dominant company has a special responsibility to ensure that its conduct does not distort competition. Examples of behaviour that may amount to an abuse include: requiring buyers to purchase all units of a particular product only from the dominant company (exclusive purchasing); setting prices at a loss-making level (predation or predatory pricing); refusing to supply input indispensable for competition in an ancillary market, and charging excessive prices.

Investigations

The Commission's investigative powers to enforce Article 102 are detailed in Chapter V of Regulation 1/2003

Inspections: Article 20

The Commission is empowered to:

1. enter the premises of companies;
2. examine the records related to the business;
3. take copies of those records;
4. seal the business premises and records
5. ask members of staff or company representatives questions relating to the subject-matter and purpose of the inspection and record the answers

The Commission can require undertakings to provide all information necessary to an investigation via a simple request for information (RFI) or by decision.

Statements of objections and decisions

Statements of objections

The Statement of Objections (SO) details the Commission's competition concerns. It is sent to the parties concerned. The parties are entitled to see the Commission's investigative file and to an oral hearing conducted by an independent Hearing Officer.

Access to file

Access to the Commission's file takes place normally at the same time as the Statement of Objections is issued.

Decisions

A "**Prohibition Decision**" based on Article 7 of Regulation 1/2003 formally finds an infringement against the concerned parties. The Commission may require the parties concerned to stop the infringement, impose remedies and/or impose a fine.

A "**Commitment Decision**" based on Article 9 of Regulation 1/2003 allows companies to offer commitments that are intended to address the competition concerns identified by the Commission. The commitment decision makes the commitments binding on the parties without establishing an infringement. Acceptance of the commitments is at the discretion of the Commission.

Final public versions of Decisions are published in the Official Journal, along with a Decision summary the final report of the Hearing Officer and the opinion of the Advisory Committee.

Fines

A company that has participated in an anti-competitive agreement and therefore infringed competition law may have to pay a fine. the Commission's fining policy is aimed at **punishment and deterrence.** They are calculated under the framework of the 2006 Guidelines on Fines.

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More information on fines can be found here.

Judicial review

In accordance with Article 263 TFEU, the decisions adopted by the Commission are subject to legal review by the Court of Justice of the European Union, namely the General Court (formerly the Court of First Instance) and the Court of Justice.

See also:
- National Competition Authorities
- Contact Antitrust and General Correspondence
- Damages Actions
- Cooperation with National Courts

Found at Tab 25, Volume 9 of Google's Reply BOA.

Reports of Cases

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

18 September 2024 *

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

In Case T-671/19,

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

applicant,

v

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

defendant,

supported by

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

intervener,

THE GENERAL COURT (First Chamber, Extended Composition),

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

Registrar: M. Zwozdziak-Carbonne, Administrator,

having regard to the written part of the procedure,

* Language of the case: English.

389 As regards the NRE payment to ZTE being treated as a per-unit discount, it must be observed that there can be no finding of error on the part of the Commission as regards the accounting treatment of that payment to the applicable units, or as regards the calculation of the rebate or the assessment of the context.

390 First, in order to be able to quantify the size of the NRE payment to ZTE, any payment relating to the MDM6200 chipsets ordered and delivered, namely 145 775 units, must be accounted for by dividing the total amount of the payments by the total number of units ordered and purchased.

391 The fact that the NRE payment to ZTE ultimately gives rise to a per-unit rebate three times higher than that initially provided for results simply from the significant reduction in the quantity of MDM6200 chipsets ordered and purchased by ZTE compared with Qualcomm's forecast, namely [*confidential*] units. Since the amount of the incentive had been established a priori, each chipset benefited from a much larger price reduction than originally planned. In other words, that increase in the rebate applied to each chipset is no more than a by-product of Qualcomm's incorrect sales forecast regarding ZTE.

392 As regards the fact that ZTE was not aware that the NRE payment intended for it was to be treated as a per-unit rebate, it must be stated that the case-law does not require the customer of the undertaking in a dominant position to be aware of the methodology used to arrive at a price below cost being applied. It is sufficient, on the one hand, that the price-cost test reveals a price higher than the measure of cost chosen and, on the other hand, that there is an intention to eliminate the targeted competitor (see, to that effect, judgment of 3 July 1991, *AKZO* v *Commission*, C-62/86, EU:C:1991:286, paragraphs 71 and 72).

393 In addition, as regards the argument that the payment did not incentivise ZTE to purchase more chipsets, it should be noted that in the judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others* (C-377/20, EU:C:2022:379, paragraph 53 and the case-law cited), the Court of Justice held that the characterisation of a practice of a dominant undertaking as abusive does not mean that it is necessary to show that the result of a practice of such an undertaking, intended to drive its competitors from the market concerned, has been achieved and, accordingly, to prove an actual exclusionary effect on the market. The purpose of Article 102 TFEU is to penalise abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, irrespective of whether or not such abuse has proved successful.

394 In the third place, the applicant provides only a bare outline of its argument alleging inconsistencies in the contested decision, such that it is difficult to understand how such inconsistencies could affect the lawfulness of that decision, with the result that that argument must be declared inadmissible. In any event, the explanation given by the Commission, namely that the increase in the price and margin of the MDM6200 chipsets sold to ZTE during the relevant period is a consequence of the discounts stemming from NRE payments, is entirely consistent with the remainder of its reasoning. As regards the alleged anomaly in the allocation of the alleged R&D costs between the MDM6200 and MDM6600 chipsets in 2010, it is sufficient to note that recital 841 of that decision provides a detailed and credible explanation of the reasons which prompted the Commission to do so, reasons which, moreover, the applicant disputes only in generic terms.

395 In the light of the foregoing, the first part of the sixth plea must be rejected.

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

Preliminary observation

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

Determination of the basic amount of the fine

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

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

Degree of gravity of the infringement

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

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

Number of years of infringement

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

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European Convention on Human Rights



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

ARTICLE 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9

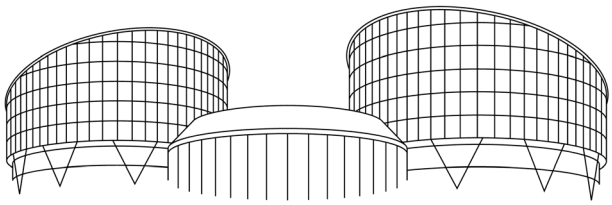
Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Unofficial Translation by Counsel.

Found in **Tab 5.1, Volume 1** of Google's Reply BOA (Official French version in Tab 5.2).



EUROPEAN COURT OF HUMAN RIGHTS

COUR EUROPÉENNE DES DROITS DE L'HOMME

SECTION TWO

CASE A. MENARINI DIAGNOSTICS S.R.L. v. ITALY

(Application No. 43509/08)

JUDGMENT

STRASBOURG

September 27, 2011

FINAL

12/27/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

37In conclusion, the AGCM's decision to impose a financial penalty of €6 million on the applicant company must, in the applicant company's view, be regarded, in the light of the Convention, as a decision on the merits of a criminal charge (see, *mutatis mutandis, Stenuit v. France,* cited above, § 65).

2. Assessment by the Court

38. The Court recalls its established case law that, in order to determine whether there has been a "criminal charge," three criteria must be taken into account: the legal classification of the measure at issue under domestic law, the nature of the measure itself, and the nature and severity of the "penalty" (*Engel, cited above*). These criteria are alternative and not cumulative: for Article 6 § 1 to apply in respect of the words "criminal charge," it is sufficient that the offense in question is, by its nature, "criminal" within the meaning of the Convention, or has exposed the person concerned to a penalty which, by its nature and degree of severity, generally falls within the scope of "criminal matters." This does not preclude the adoption of a cumulative approach if the separate analysis of each criterion does not lead to a clear conclusion as to the existence of a "criminal charge " (*Jussila v. Finland* [GC], no. 73053/01, §§ 30 and 31, ECHR 2006-XIII, and *Zaicevs v. Latvia,* no. 65022/01, § 31, ECHR 2007-IX (excerpts)).

39. The Court first notes that the anti-competitive practices alleged against the applicant company in this case do not constitute a criminal offense under Italian law. Anti-competitive conduct is not punished under criminal law, but under Law No. 287 of October 10, 1990, on competition and fair commercial practices. However, this is not decisive for the purposes of the applicability of Article 6 of the Convention, as the indications provided by domestic law are only of relative value (*Öztürk v. Germany,* February 21, 1984, § 52, Series A No. 73).

40As to the nature of the offense, it appears that the provisions which the applicant company was accused of violating were intended to preserve free competition in the market. The Court recalls that the AGCM, an independent administrative authority, has the task of monitoring agreements that restrict competition and abuses of a dominant position. It therefore affects the general interests of society normally protected by criminal law (*Stenuit v. France,* cited above, § 62). Furthermore, it should be noted that the fine imposed was essentially intended to punish and prevent the repetition of the acts in question. It can therefore be concluded that the fine imposed was based on standards pursuing both a preventive and a punitive purpose (*mutatis mutandis, Jussila,* cited above, § 38).

41As to the nature and severity of the penalty "likely to be imposed" on the applicant (*Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 120, ECHR 2003-X), the Court notes that the fine in question could not be replaced by a custodial sentence in the event of

non-payment (*a contrario*, *Anghel v. Romania*, no. 28183/03, § 52, October 4, 2007). However, it notes that in the present case the AGCM imposed a financial penalty of EUR 6 million, which was punitive in nature since it was intended to penalize an irregularity, and preventive in nature since its purpose was to deter the company concerned from repeating the offense. Furthermore, the Court notes that the applicant emphasizes that the punitive nature of this type of infringement is also apparent from the case law of the Council of State.

42In light of the above and given the high amount of the fine imposed, the Court considers that the severity of the penalty means that it falls within the scope of criminal law (*Öztürk*, cited above, § 54, and, *conversely*, *Inocêncio v. Portugal* (dec.), no. 43862/98, ECHR 2001-I).

43. Furthermore, the Court also recalls that, with regard to certain French administrative authorities competent in economic and financial law and having powers to impose sanctions, it has held that Article 6, in its criminal aspect, applies in particular to the Competition Council (*Lilly v. France* (dec.), no. 53892/00, December 3, 2002), the Financial Markets Council (*Didier v. France* (dec.), no. 58188/00, August 27, 2002) and the Banking Commission (*Dubus S.A. v. France,* no. 5242/04, § 36, June 11, 2009).

44. Taking into account the various aspects of the case and having examined their respective weight, the Court considers that the fine imposed on the applicant company is of a criminal nature, so that Article 6 § 1 applies in this case under its criminal aspect. The Government's objection that Article 6 of the Convention was inapplicable *ratione materiae* must therefore be rejected.

45The Court finds that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that there are no other grounds for declaring it inadmissible. It must therefore be declared admissible.

B. On the merits

1. Arguments of the parties

46The Government notes first of all that the national administrative courts exercise their powers in relation to legality and that the scope of their review is set out in the judgment of the Council of State filed with the registry on March 16, 2006. In the present case, the administrative courts had exclusive jurisdiction, which enabled them to hear the entire case without distinguishing between legitimate interests and subjective rights.

47The Government asserts that the domestic courts conducted a thorough examination of the merits of the case. The fact that the administrative judge's review is described as a review of "legality" does not mean that it is

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

Found at **Tab 22.1, Volume 7** of Google's Reply BOA.

26 January 2022 (*)

(Competition – Abuse of dominant position – Microprocessors market – Decision finding an infringement of Article 102 TFEU and of Article 54 of the EEA Agreement – Loyalty rebates – 'Naked' restrictions – Characterisation as abuse – As-efficient-competitor analysis – Overall strategy – Single and continuous infringement)

Affirmed on appeal (Tab 22.2 of Google's Reply BOA)

In Case T-286/09 RENV,

Intel Corporation, Inc., established in Wilmington, Delaware (United States), represented by A. Parr, Solicitor, D. Beard QC and J. Williams, Barrister,

applicant,

supported by

Association for Competitive Technology, Inc., established in Washington, DC (United States), represented by J.-F. Bellis and K. Van Hove, lawyers,

intervener,

v

European Commission, represented by T. Christoforou, V. Di Bucci, N. Khan and M. Kellerbauer, acting as Agents,

defendant,

supported by

Union fédérale des consommateurs – Que choisir (UFC – Que choisir), established in Paris (France), represented by E. Nasry, lawyer,

intervener,

APPLICATION under Article 263 TFEU seeking, primarily, the annulment of Commission Decision C(2009) 3726 final of 13 May 2009 relating to a proceeding under Article [102 TFEU] and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 – Intel) or, in the alternative, annulment or reduction of the fine imposed on the applicant,

THE GENERAL COURT (Fourth Chamber, Extended Composition),

composed of H. Kanninen, President, J. Schwarcz (Rapporteur), C. Iliopoulos, I. Reine and B. Berke, Judges,

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 10 to 12 March 2020,

gives the following

particular in proceedings for annulment of a decision imposing a fine (judgments of 8 July 2004, *JFE Engineering* v *Commission*, T-67/00, T-68/00, T-71/00 and T-78/00, EU:T:2004:221, paragraph 177, and of 12 July 2011, *Hitachi and Others* v *Commission*, T-112/07, EU:T:2011:342, paragraph 58).

162 In the latter situation, account must be taken of the principle of the presumption of innocence, which constitutes a general principle of EU law, currently laid down in Article 48(1) of the Charter of Fundamental Rights of the European Union (see judgment of 22 November 2012, *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraph 72 and the case-law cited). In addition, according to the case-law of the Court of Justice, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see judgment of 22 November 2012, *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraph 73 and the case-law cited).

163 Although the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by that institution, viewed as a whole, meets that requirement, as is stated in the case-law concerning the implementation of Article 101 TFEU (see judgment of 26 January 2017, *Commission* v *Keramag Keramische Werke and Others*, C-613/13 P, EU:C:2017:49, paragraph 52 and the case-law cited). That principle also applies in cases concerning the implementation of Article 102 TFEU (judgment of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266, paragraph 477).

164 With respect to the probative force of the evidence relied on by the Commission, a distinction should be drawn between two situations.

165 First, where the Commission finds that there has been an infringement of the competition rules based on the supposition that the facts established cannot be explained other than by the existence of anticompetitive behaviour, the EU Courts will find it necessary to annul the decision in question where those undertakings put forward arguments which cast the facts established by the Commission in a different light and which thus allow another plausible explanation of the facts to be substituted for the one adopted by the Commission in concluding that an infringement occurred. In such a case, it cannot be considered that the Commission has adduced proof of an infringement of competition law (see, to that effect, judgments of 28 March 1984, *Compagnie royale asturienne des mines and Rheinzink* v *Commission*, 29/83 and 30/83, EU:C:1984:130, paragraph 16, and of 31 March 1993, *Ahlström Osakeyhtiö and Others* v *Commission*, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraphs 126 and 127).

166 Second, when the Commission relies on evidence which is, in principle, sufficient to demonstrate the existence of the infringement, it is not sufficient for the undertaking concerned to raise the possibility that a circumstance arose which might affect the probative value of that evidence in order for the Commission to bear the burden of proving that that circumstance was not capable of affecting the probative value of the evidence. On the contrary, except in cases where such proof could not be provided by the undertaking concerned on account of the conduct of the Commission itself, it is for the undertaking concerned to prove to the requisite legal standard, on the one hand, the existence of the circumstance on which it relies and, on the other, that that circumstance calls into question the probative value of the evidence relied on by the Commission (see, to that effect, judgment of 15 December 2010, *E.ON Energie* v *Commission*, T-141/08, EU:T:2010:516, paragraph 56 and the case-law cited).

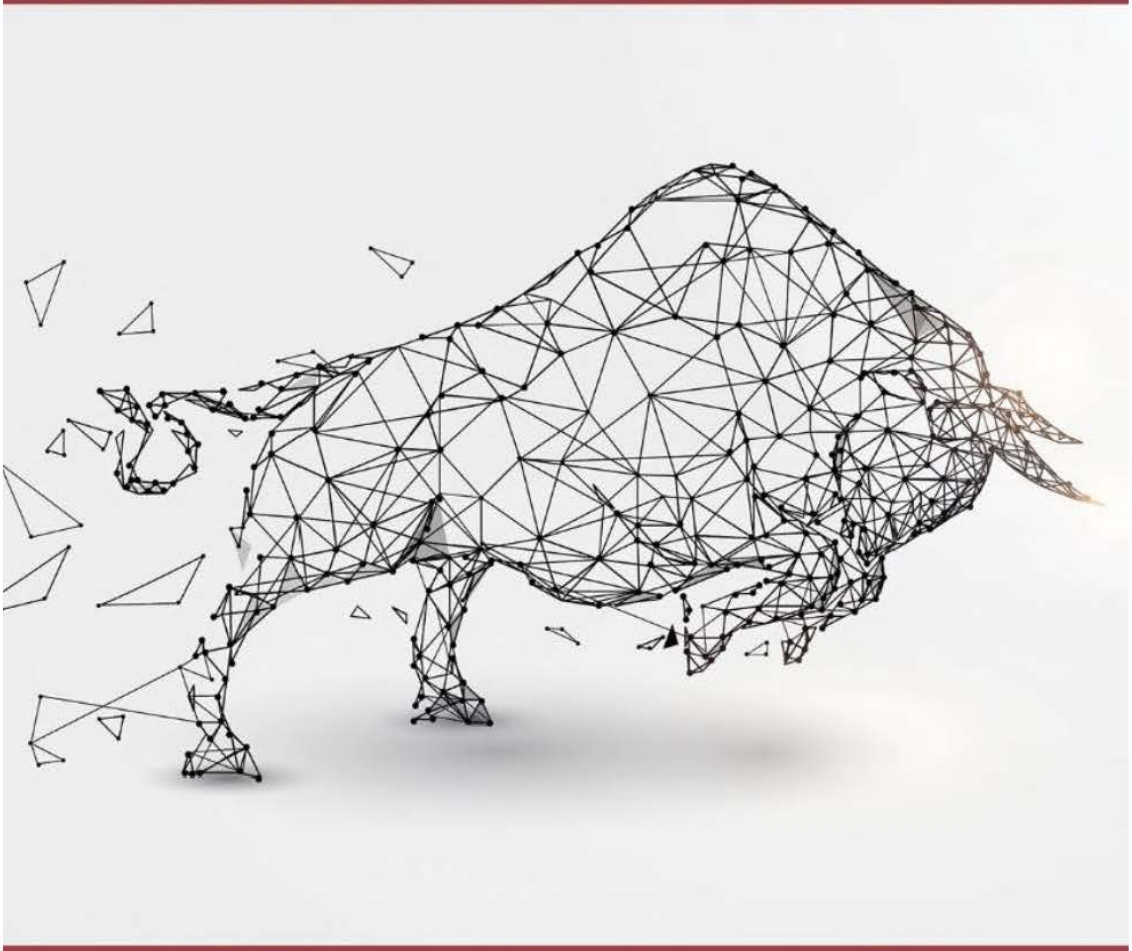
4. The substance of the arguments that the contested decision is vitiated by numerous errors in the AEC test

167 The applicant claims, in essence, that the AEC analysis carried out for all the OEMs and for MSH contains numerous errors, in particular as regards the contestable share, the conditional portion of the rebates and

Found at **Tab 4, Volume 1** of Google's Reply BOA.

RESEARCH HANDBOOK ON Abuse of Dominance and Monopolization

Edited by
Pınar Akman • Or Brook • Konstantinos Stylianou



RESEARCH HANDBOOKS IN COMPETITION LAW

Research Handbook on Abuse of Dominance and Monopolization

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Professor of Competition Law and Regulation, School of Law, University of Glasgow, UK

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16. Burden of proof and judicial review

Andriani Kalintiri

I. INTRODUCTION

The substantive liability rules naturally provide the starting point for law enforcement. The outcome of the latter, however, often hinges on evidential matters – including the rules on the burden of proof – and on the scope and intensity of judicial control. On the one hand, the burden of proof indicates who has to prove what needs to be proven. For all its apparent simplicity though, the burden of proof is a powerful rule which may sway litigation one way or the other and thus its allocation and discharge raise complex questions. On the other hand, the applicable standard of judicial control indicates what errors may lead to the annulment of the decision of an administrative agency or of a lower court, and, respectively, how strictly the reviewing court will carry out its control function. The aim of this chapter is to illuminate the burden of proof and judicial review in unilateral conduct cases with a focus on the European Union (EU) and the United States (US).

In the EU, the relevant provision is Article 102 of the Treaty on the Functioning of the European Union (TFEU), which prohibits the abuse of a dominant position within the internal market.[1] According to Article 2 of Regulation 1/2003, 'in any national or [Union] proceedings for the application of [Article 102 TFEU], the burden of proving an infringement of (…) [Article 102] of the Treaty shall rest on the party or the authority alleging the infringement'.[2] At the EU level, the enforcement of Article 102 TFEU is entrusted to the European Commission (Commission) which acts as the prosecutor, investigator and first-instance decision-maker. Commission decisions may then be challenged before the EU Courts under Article 263 TFEU which provides for a control of legality 'on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers'. At the national level, Article 102 TFEU can be enforced both by public authorities and by private parties before national courts, although public enforcement is rather the norm. Due to space constraints, this chapter only considers the burden of proof and judicial review in the enforcement of Article 102 TFEU by the Commission.

In the US, the relevant provision is Section 2 of the Sherman Act which prohibits monopolization and monopolization attempts. The enforcement landscape is both multi-tiered and multifaceted. The two federal agencies with competence in competition matters, namely the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ), as well as states or private plaintiffs may initiate civil litigation before a district court.[3]

[1] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47.

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[3] 15 USC §§4, 25; 15 USC §§1311–14 (DOJ); Section 13(b) of FTC Act, 15 USC §53b and Section 5(a) of the FTC Act, 15 USC §45(a) (FTC); 15 USC §15(c) (State Attorneys General); 15 USC §15 (private plaintiffs).

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depends on prevailing perceptions of normality.[24] For instance, the more plausible a theory of harm, the more effort it will take to cast doubt on it or overturn it.[25] Third, the features of the enforcement system within which the evidence rules operate inform their role. For example, in public enforcement, the burden of proof offers a safeguard against arbitrary interferences with one's freedom – especially where an administrative authority possesses multiple powers, such as the Commission. By contrast, in private enforcement, the burden of proof helps to weed out frivolous or vexatious claims and thus minimise costs and delays – a key concern in the US given the complexity and expense of unilateral conduct proceedings.

With these remarks in mind, the following subsections consider the burden of proof in unilateral conduct cases in the EU and in the US. As will be shown, there are remarkable similarities in the approach of the two jurisdictions towards the burden of proof, although important differences exist, too.

B. The Burden of Proof in EU Abuse of Dominance Cases

As noted, Article 2 of Regulation 1/2003 provides that 'the burden of proving an infringement of (…) [Article 102 TFEU] shall rest on the party or the authority alleging [it]'. According to settled case law, it is for the Commission to 'show precise and consistent evidence to support the firm conviction that the alleged infringement was committed'.[26] The requirement to establish a 'firm conviction' about the existence of a violation entails a high threshold of evidence sufficiency which is more demanding than the civil standard of proof, insofar as it requires a heightened degree of probability or belief for a factual allegation to be accepted as 'true'.[27] The reason for this lies in the application of the presumption of innocence to competition proceedings that may culminate in the imposition of fines.[28] Therefore, 'any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed' and '[t]he Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point'.[29]

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[24] The so-called duck test conveys this: 'if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck'. In the EU this idea was recently reaffirmed by AG Bobek in Case C-228/18 *Budapest Bank* ECLI:EU:C:2019:678, para 51: 'if it looks like a fish and it smells like a fish, one can assume that it is fish. Unless, at the first sight, there is something rather odd about this particular fish, such as that it has no fins, it floats in the air, or it smells like a lily, no detailed dissection of that fish is necessary in order to qualify it as such'.

[25] Anne-Lise Sibony, *Le Juge et le Raisonnement Economique en Droit de la Concurrence* (Librairie Générale de Droit et de Jurisprudence 2008) 746, coined the term 'economic normality' and referred to the 'probative effort' that the parties need to make.

[26] Case T-814/17 *Lietuvos geležinkeliai v Commission* ECLI:EU:T:2020:545, para 294.

[27] The standard of proof should not be conflated with the substantive legal tests for unilateral conduct, which are commonly articulated in probabilistic language (eg, 'actual' or 'likely' effects). See Andriani Kalintiri, 'Substantive Legal Tests and Standard of Proof: Rules Lost in Translation?' (*Chillin' Competition*, 8 June 2020), https://chillingcompetition.com/2020/06/08/substantive-legal-tests-and-standard-of-proof-rules-lost-in-translation-by-andriani-kalintiri/#comments, accessed 16 December 2022.

[28] Case C-199/92 P *Hüls v Commission* ECLI:EU:C:1999:358, paras 149–50; Case C-235/92 P *Montecatini v Commission* ECLI:EU:C:1999:362, paras 175–6.

[29] *Intel* (n 14) paras 62–4.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

27 September 2006 *

Found at **Tab 6, Volume 2** of Google's Reply BOA.

In Case T-59/02,

Archer Daniels Midland Co., established in Decatur, Illinois (United States), represented by C.O. Lenz, lawyer, L. Martin Alegi, M. Garcia, and E. Batchelor, Solicitors,

applicant,

v

Commission of the European Communities, represented by P. Oliver, acting as Agent,

defendant,

APPLICATION for annulment of Article 1 of Commission Decision 2002/742/EC of 5 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.604 — Citric acid) (OJ

* Language of the case: English.

2002 L 239, p. 18) in so far as it finds that the applicant infringed Article 81 EC and Article 53 of the EEA Agreement by agreeing to restrict capacity in the market in question and to designate a producer who was to lead price increases in each national segment of the said market, and for the annulment of Article 3 of the same decision in so far as it pertains to the applicant and, in the alternative, for the reduction of the fine imposed on it,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of J. Azizi, President, M. Jaeger and F. Dehousse, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 9 June 2004,

gives the following

Judgment

Facts

1 The applicant, Archer Daniels Midland Co. ('ADM'), is the parent company of a group of companies which operate in the cereal and oil seed processing industry. It entered the citric acid market in 1991.

B — *Findings of the Court*

41 The Court observes, first of all, that the principle of non-retroactivity of criminal laws, enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, as a fundamental right, constitutes a general principle of Community law which must be observed when fines are imposed for infringement of the competition rules and that that principle requires that the penalties imposed correspond with those fixed at the time when the infringement was committed (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri* v *Commission* [2005] ECR I-5425, paragraph 202; Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraphs 218 to 221; and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 39).

42 Next, the Court considers that the adoption of guidelines capable of modifying the general competition policy of the Commission as regards fines may, in principle, fall within the scope of the principle of non-retroactivity.

43 First, the Guidelines are capable of producing legal effects. Those effects stem not from any attribute of the Guidelines as rules of law in themselves, but from their adoption and publication by the Commission. By adopting and publishing the Guidelines, the Commission imposes a limit on its own discretion; it cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations and legal certainty (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 41 above, paragraphs 209 to 212).

44 Second, as an instrument of competition policy, the Guidelines fall within the scope of the principle of non-retroactivity, just like a new interpretation by the courts of a rule establishing an offence, in conformity with the case-law of the European Court of Human Rights on Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see, in particular, Eur. Court H.R., *S.W. v. United Kingdom* and *C.R. v. United Kingdom*, judgments of 22 November 1995, Series A Nos 335-B and 335-C, §§ 34 to 36 and §§ 32 to 34; *Cantoni v. France*, judgment of 15 November 1996, *Reports of Judgments and Decisions*, 1996-V, §§ 29 to 32, and *Coëme and Others v. Belgium*, judgment of 22 June 2000, Reports, 2000-VII, § 145) which holds that that provision precludes the retroactive application of a new interpretation of a rule establishing an offence. According to that case-law, that is the case in particular where there is an interpretation by the courts which produces a result which was not reasonably foreseeable at the time when the offence was committed, having regard notably to the interpretation of the rule applied in the case-law at the material time. It should however be stated that it follows from that same case-law that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it covers and the number and status of those to whom it is addressed. Thus, a law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. More specifically, in accordance with *Cantoni v. France* (§ 35), this is true particularly in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such an activity entails (*Dansk Rørindustri and Others* v *Commission*, paragraph 41 above, paragraphs 215 to 223).

45 In view of the foregoing, it is therefore necessary to ascertain whether the modification, which consisted in the adoption of the Guidelines, was reasonably foreseeable at the time when the infringements at issue were committed.

46 In that regard, it should be noted that the main innovation in the Guidelines consisted in taking as a starting point for the calculation a basic amount, determined on the basis of brackets laid down for that purpose by the Guidelines; those brackets

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Found at **Tab H(122), Volume 24** of Google's Motion Record.

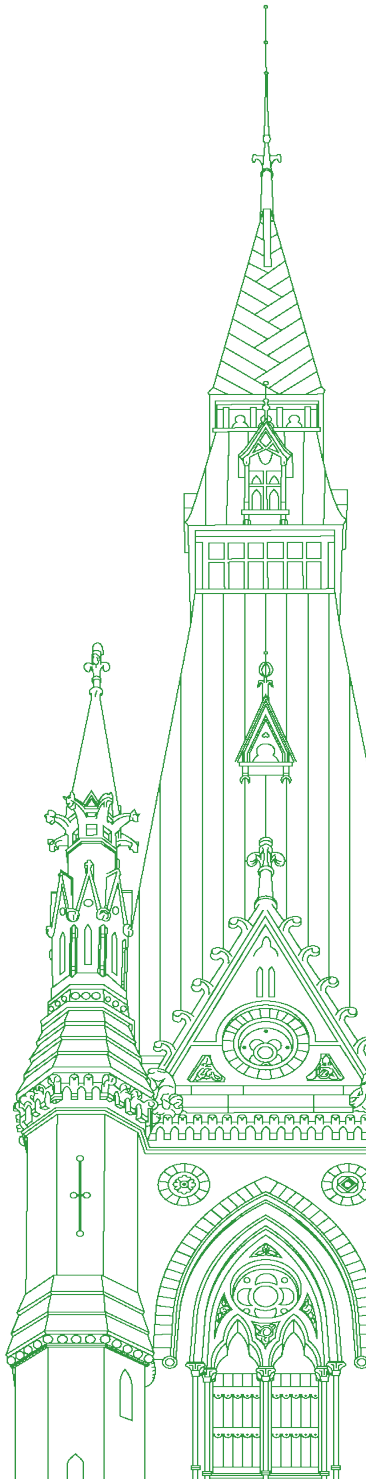
44th PARLIAMENT, 1st SESSION

Standing Committee on Finance

EVIDENCE

NUMBER 049

Thursday, May 19, 2022



Chair: Mr. Peter Fonseca

That said, details on many of these initiatives are lacking, making it difficult to comment on them, beyond stating that the ideas, at least, are welcome. We look forward to working with the government as it fleshes out these proposals.

My final theme is developing the workforce needed for the economy of tomorrow. Automation, technology development, the energy transition and the pandemic have converged to create stubbornly high long-term unemployment levels in Alberta. We were looking for the budget to provide a direct federal contribution to employment insurance to incentivize skills upgrades and an annual top-up to the Canada-Alberta Workforce Development Agreement.

We were happy to see the budget include plans to consult on modernizing EI to support workforce retraining programs, even if details were light. The emphasis on under-represented workers in the labour force and the focus on supporting innovative partnerships are critical to shaping a productive and relevant workforce.

We were also pleased to see labour supply and mobility measures proposed for trusted employers to access temporary foreign workers, a new tax deduction for relocation and travel expenses for tradespeople, and increased recognition of foreign health care worker credentials. However, the budget did not clarify the government's just transition policy priorities. Likewise, the proposed futures fund for regional economic diversification and the emissions reduction plan's promise of a clean jobs training centre were notably missing.

In summary, we believe this budget represents a step forward in several areas important to Alberta's long-term economic prosperity. There is still much work to be done, however, and we look forward to continuing that process.

Thank you for your time. I would be happy to answer any questions when the time comes.

● (1555)

The Chair: Thank you, Mr. Holden.

Now we'll go to the C.D. Howe Institute for five minutes.

Go ahead, please.

Mr. William Robson (Chief Executive Officer, C.D. Howe Institute): Thank you very much.

I'll start off, and then I'll turn it over to my colleague Ben Dachis. We appreciate your inviting Ben and me to join you here today, and we hope our contributions will help you and your work on the 2022 federal budget and Bill C-19.

By way of background, federal fiscal policy is a long-standing area of focus for the C.D. Howe Institute. Our work covers accountability and transparency, macro questions of debt and sustainability, detailed work on taxes and an annual shadow federal budget.

Our opening remarks will necessarily touch on only a few topics, mainly the elements of Bill C-19 dealing with competition issues. We would be glad to answer questions on a wider range of topics if that would be helpful to members of the committee.

Although it's applicable to much more than Bill C-19, I hope members will excuse my starting with a high-level comment about budgets and budget implementation bills, which is that there is too much in them.

A budget should be a fiscal document first and foremost. The key financial information—the pre-budget track for revenue, expense, the surplus or deficit, and the change in the accumulated surplus or deficit, plus what the budget projects are on those things—should be in the first 10 pages. Changes in taxes belong in budgets, as do changes in programs that affect expenses. Other program changes and commentary likely often belong in separate documents.

I have a comment about implementation bills. Even though Bill C-19 deals with only some elements of the 2022 budget, it is a daunting document. Omnibus bills have a bad reputation for good reason, and I mean no disrespect to MPs but rather the opposite. I mean great respect to Parliament when I say that it ought not to be challenging for elected representatives to get on top of the text of a bill, let alone to anticipate the regulations and the contingencies and all the consequences.

Among the specific items that are covered in Bill C-19 that Ben and I would answer questions on if there's interest would be the luxury tax. I did not know that Messieurs Mueller and Chartrand would be appearing on this issue. I think many economists would share the view that specific taxes of this kind are not good taxes. They distort purchases and production, as we've just heard from Mike and David. What they said about aircraft applies equally to motor vehicles and boats.

I'm not very enthusiastic about this but I'll say it anyway. If you think that it's really a good idea to single out specific products and services, use the GST. It's not as good as a low uniform rate on everything consumed, but it has some advantages compared to this.

Because Mr. Tobin...and we just heard also from Michael Holden on labour markets, I'll just quickly mention that a key test of any labour market policy—notably EI—is whether it impedes or promotes the matching of talent with opportunity. As everyone knows, the unemployment rate is at a record low. This is a good time to unwind provisions that encourage people in places or with employers that do not offer opportunities for stable jobs that pay well and offer advancement. We also would be happy, if people are interested, to answer questions with regard to vaping and the prohibition on foreign buyers of residential properties, among other things.

Let me just say that competition policy is a major focus of the provisions of Bill C-19. It's also a major focus for the C.D. Howe Institute, particularly of my colleague Ben Dachis, who has been introduced already. He's our internal lead on the institute's competition policy council, and I turn my remaining time over to Ben.

Mr. Benjamin Dachis (Associate Vice-President, Public Affairs, C.D. Howe Institute): Thank you very much, Bill.

The C.D. Howe Institute's competition policy council, which is comprised of top-ranked competition law academics and practitioners, noted support for the government's intention articulated in budget 2022 to consult broadly on the role and functioning of the Competition Act and its enforcement regime. However, the scope of changes to the Competition Act in the BIA does not fulfill that commitment. The BIA contains major changes that, even if in the right direction, consultation might have improved the outcome. Many more changes, especially on increasing administrative monetary penalties, will be harmful to the Canadian economy and may even be unconstitutional.

The government missed key opportunities to consult with the various constituencies affected by the legislation. The government and this committee should reconsider the BIA's approach on Competition Act amendments. Now, if carving division 15 isn't feasible, which is my recommendation, the committee should call for, at a minimum, setting the proclamation date for all provisions, not just some, for a year from passage.

We also need to hear more from government on their plans for further consultation, as they had promised, so that these proposed changes could then be seen in concert with other proposed changes that would come as part of a prompt second stage of the Competition Act amendments.

Given my limited time for opening remarks, I'll stop there and leave further discussion of specific problems for the questions.

● (1600)

The Chair: Thank you, Mr. Dachis.

Mr. Robson, I understand you're only here until 4:30. Is that correct?

Mr. William Robson: That's correct.

The Chair: Now we'll hear from the Canadian Labour Congress, please.

Ms. Siobhan Vipond (Executive Vice-President, Canadian Labour Congress): Good afternoon, Chair and honourable members.

My name is Siobhán Vipond. I am the executive vice-president of the Canadian Labour Congress. I am honoured to be joining you today from the traditional unceded territories of the Anishinabe and Algonquin peoples.

We at the CLC speak on behalf of working people in Canada in every industry, occupation and region of the country. The congress welcomes many aspects of the budget implementation bill. The introduction of a labour mobility tax deduction, improvements to Canada's trade remedy legislation and restoring the prohibition on wage-fixing in the Competition Act are all steps that Canada's unions have been urging the government to take.

However, there is a great deal that is missing from this bill. Budget 2022 provides an additional $2 billion one-time top-up to provinces and territories for health services, yet health workers are facing dire staffing shortages and growing burnout. The bill fails to take urgent action to improve the retention and recruitment needed to address this crisis.

Also missing is action to help Canada's care workers, including in early learning and child care and in long-term care. To appreciate the scale of this problem, in March, Statistics Canada estimated the value of unpaid care at between $515 billion and $680 billion.

The budget takes steps on housing affordability and transit shortfalls, but it falls short of addressing the affordability crisis facing working people. The cost of food, fuel and shelter has shot up while wages lag far behind. Workers' spending power is falling. Living standards are declining for workers whose real wages are dropping at the fastest rate in memory. Pensioners who lost inflation-protected pensions are seeing their fixed incomes quickly eroded by soaring inflation.

The government should be urgently responding to this crisis by taxing corporate superprofits, housing speculators and the concentrated wealth of the richest Canadians; allowing wages to rise by strengthening labour standards and removing barriers to unionization; and strengthening social programs by implementing national pharmacare and dental care, quickly getting child care fees down and expanding free high-quality public transit.

Instead, the government is ramping up employers' access to vulnerable migrant workers, while the Bank of Canada is preparing to hike interest rates in the hopes that it will cool inflation. These measures are going to hurt working-class households and worsen inequality while doing nothing to tackle the entrenched power and corporate greed responsible for price-gouging and pandemic profiteering.

Let me end with some specific recommendations for amending Bill C-19, starting with the EI board of appeal.

For many years, labour and community organizations have struggled to restore important elements of the EI boards of referees that were scrapped by Stephen Harper's government in 2012. EI appeals should be heard by worker and employer representatives: people who understand their communities and the realities of workplace life.

Just to add to the violent agreement about the shortcomings of omnibus bills, this is another example of where removing division 32 from Bill C-19 for separate study would be a service to parliamentarians and to all stakeholders of the EI system who want to see this fundamental institutional reform happen prudently and with the right amount of accountability, so that we don't repeat the experience of the Social Security Tribunal.

Mr. Daniel Blaikie: Thank you very much.

Mr. Chartrand, on the question of the luxury tax, part of what I'm hearing is that there is a design problem in terms of the way that manufacturers are targeted in the design of the tax. I'm wondering if you have some suggestions for how a luxury tax might be structured in the aerospace industry that would put less of a burden on manufacturers while still honouring the principle behind the luxury tax.

Mr. David Chartrand: There are already existing provisions in the legislation where we can tax people. We can tax on the usage of aircraft like that. One of the things that we also could do is take a look at used business aircraft. Right now, we're taxing the manufacturer in the way that we're doing things, and we're impeding the production of new aircraft and all that, where most of the jobs are.

When you're looking at the resale of used aircraft, usually that's where somebody who is rich, who has a lot of money and is using it for personal use will go and purchase an aircraft. There's nothing being done on that side. When you're looking, through the pandemic and prepandemic, at the used business aircraft segment, you see that the percentage of sales went up, contrary to the new manufacturing side, where sales went down by 20%.

What we would be doing, if we're not looking at the used market instead of the brand new market, is hurting the industry where all the workers are and where all the jobs are. That's one of the things that we can do. We also could lower the level. The level of taxation is very high. The obligation at 90% is extremely high, so that's another thing we can look at—lowering the percentage. Of course, we'd rather that business aircraft were removed. If that's impossible, there are other things that we can look at.

Always, of course, we're looking at it with the intent of saving as many jobs as possible. We're talking about a thousand jobs, and those are direct jobs. You also have all the indirect jobs that you're talking about, so it's a huge impact on the communities.

Mr. Daniel Blaikie: Thank you.

Mr. Mueller, is there anything that you would care to add on that topic?

Mr. Mike Mueller: Thank you for the question.

I would just say that part of it is the manufacturing, but one part that's also there is the maintenance, repair and overhaul on those used planes. There's a segment of the supply chain that would be impacted regardless. David is right. There is a personal use benefit taxation already in place, but when you place the tax on manufacturing and then indirectly on the maintenance, repair and overhaul, what we're hearing from companies is that it might be easier just to operate these planes out of the U.S. If you do that, the modifications happen there, the repair happens there, and it's just an absolute devastation to the industry and the workers.

Again, it doesn't make a lot of sense to me, considering the impacts that this will have on the industry, with a thousand jobs lost and a billion dollars in revenue lost. Also, then, once you start taking into account the modifications, the repairs that go along with it and the maintenance, it's quite significant. My concern is that the impacts of this piece of legislation aren't doing what the government would like them to do.

● (1635)

The Chair: Thank you, MP Blaikie.

Mr. Daniel Blaikie: Thank you.

The Chair: Members and witnesses, we're moving into our second round. In this round, the Conservatives are up first.

MP Stewart, you have five minutes.

Mr. Jake Stewart (Miramichi—Grand Lake, CPC): Thank you, Mr. Chair.

My first questions are to the C.D. Howe Institute with regard to your presentation earlier this afternoon. What did you mean by part of Bill C-19 being "unconstitutional"? I did hear that comment, and it really intrigued me. Could you explain what you meant by that comment?

By all means go into detail so that we can really understand what was being projected there.

Mr. Benjamin Dachis: Thank you very much for the question.

The changes proposed in the BIA result in corporations now facing administrative monetary penalties, or AMPs, of up to 3% of annual worldwide gross revenues. Let me talk a little bit about the legal process first. If an AMP is penal in nature rather than just a deterrent, then it's effectively a criminal penalty. The alleged offender must be tried in accordance with due process requirements of section 11 of the Canadian Charter of Rights and Freedoms. Neither the misleading advertising nor the abuse of dominance provisions that attract these new significant penalties are criminal offences. The burden of proof to be convicted in these areas is a lower balance of probability standard of proof. The increase to the fines to be set on global revenues of the firm, where the penalties could easily be in the billions of dollars and—this is the critical part—are not directly related to the harms of the practice, greatly raise the likelihood that the fines could be found as penal and, therefore, unconstitutional.

With these large potential penalties, not only is there a risk of unconstitutionality. There's also a risk of overdeterrence. Firms may shy away from some of the practices that are going to be beneficial for Canadians. These potential fines raise reputational risks for Canada as well of not being supportive of foreign direct investment.

Mr. Jake Stewart: Yes. Thank you for that. I appreciate your going into greater detail on that as well.

With Canada's deficit at a staggering $148 billion this year, would you agree that this government is not taking the urgent steps needed to protect Canadians from personal and corporate tax increases and service cuts in the near future?

Found at **Tab H(104), Volumes 22-23** of Google's Motion Record.

First Session, Forty-fourth Parliament,
70-71 Elizabeth II, 2021-2022

Première session, quarante-quatrième législature,
70-71 Elizabeth II, 2021-2022

STATUTES OF CANADA 2022

CHAPTER 10

An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures

ASSENTED TO

JUNE 23, 2022

BILL C-19

LOIS DU CANADA (2022)

CHAPITRE 10

Loi portant exécution de certaines dispositions du budget déposé au Parlement le 7 avril 2022 et mettant en œuvre d'autres mesures

SANCTIONNÉE

LE 23 JUIN 2022

PROJET DE LOI C-19

RECOMMENDATION

Her Excellency the Governor General recommends to the House of Commons the appropriation of public revenue under the circumstances, in the manner and for the purposes set out in a measure entitled "*An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*".

SUMMARY

Part 1 implements certain income tax measures by

(a) providing a Labour Mobility Deduction for the temporary relocation of tradespeople to a work location;

(b) allowing for the immediate expensing of eligible property by certain Canadian businesses;

(c) allowing the Children's Special Allowance to be paid in respect of a child who is maintained by an Indigenous governing body and providing consistent tax treatment of kinship care providers and foster parents receiving financial assistance from an Indigenous governing body and those receiving such assistance from a provincial government;

(d) doubling the allowable qualifying expense limit under the Home Accessibility Tax Credit;

(e) expanding the criteria for the mental functions impairment eligibility as well as the life-sustaining therapy category eligibility for the Disability Tax Credit;

(f) providing clarity in respect of the determination of the one-time additional payment under the GST/HST tax credit for the period 2019-2020;

(g) changing the delivery of Climate Action Incentive payments from a refundable credit claimed annually to a credit that is paid quarterly;

(h) temporarily extending the period for incurring eligible expenses and other deadlines under film or video production tax credits;

(i) providing a tax incentive for specified zero-emission technology manufacturing activities;

(j) providing the Canada Revenue Agency (CRA) the discretion to accept late applications for the Canada Emergency Wage Subsidy, the Canada Emergency Rent Subsidy and the Canada Recovery Hiring Program;

(k) including postdoctoral fellowship income in the definition of "earned income" for RRSP purposes;

(l) enabling registered charities to enter into charitable partnerships with organizations other than qualified donees under certain conditions;

RECOMMANDATION

Son Excellence la gouverneure générale recommande à la Chambre des communes l'affectation de deniers publics dans les circonstances, de la manière et aux fins prévues dans une mesure intitulée « *Loi portant exécution de certaines dispositions du budget déposé au Parlement le 7 avril 2022 et mettant en œuvre d'autres mesures* ».

SOMMAIRE

La partie 1 met en œuvre certaines mesures relatives à l'impôt sur le revenu afin de :

a) accorder une Déduction pour la mobilité de la main-d'œuvre pour la réinstallation temporaire de gens de métier à un lieu de travail;

b) permettre la passation en charges immédiate de biens admissibles par certaines entreprises canadiennes;

c) permettre le paiement de l'Allocation spéciale pour enfants relativement à un enfant dont un corps dirigeant autochtone a la charge et assurer un traitement uniforme entre les prestataires de soins des programmes de parenté et les familles d'accueil qui reçoivent de l'aide financière d'un corps dirigeant autochtone et ceux qui reçoivent cette assistance d'un gouvernement provincial;

d) multiplier par deux la limite de dépenses admissibles permise en vertu du Crédit d'impôt pour l'accessibilité domiciliaire;

e) élargir les critères d'admissibilité par rapport à la déficience des fonctions mentales ainsi qu'à la catégorie des règles relatives aux soins thérapeutiques essentiels du Crédit d'impôt pour personnes handicapées;

f) clarifier l'application de la détermination du versement unique supplémentaire du crédit d'impôt pour la TPS/TVH pour la période 2019-2020;

g) modifier les modalités de paiement de l'Incitatif à agir pour le climat d'un crédit d'impôt remboursable à chaque année à un crédit versé tous les trois mois;

h) accorder une période supplémentaire pour engager des dépenses admissibles et prolonger certaines dates d'échéance relatives aux crédits d'impôt pour production cinématographique ou magnétoscopique;

i) accorder un incitatif fiscal pour certaines activités déterminées de fabrication de technologies à zéro émission;

j) permettre à l'Agence du revenu du Canada (ARC) d'accepter les demandes tardives de Subvention salariale d'urgence du Canada, de Subvention d'urgence pour le loyer du Canada et du Programme d'embauche pour la relance économique du Canada sur une base discrétionnaire;

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www.noscommunes.ca

(m) allowing automatic and immediate revocation of the registration of an organization as a charity where that organization is listed as a terrorist entity under the *Criminal Code*;

(n) enabling the CRA to use taxpayer information to assist in the collection of Canada Emergency Business Account loans; and

(o) expanding capital cost allowance deductions to include new clean energy equipment.

It also makes related and consequential amendments to the *Excise Tax Act*, the *Children's Special Allowances Act*, the *Excise Act, 2001*, the *Income Tax Regulations* and the *Children's Special Allowance Regulations*.

Part 2 implements certain Goods and Services Tax/Harmonized Sales Tax (GST/HST) measures by

(a) ensuring that all assignment sales in respect of newly constructed or substantially renovated residential housing are taxable supplies for GST/HST purposes; and

(b) extending eligibility for the expanded hospital rebate to health care services supplied by charities or non-profit organizations with the active involvement of, or on the recommendation of, either a physician or a nurse practitioner, irrespective of their geographic location.

Part 3 amends the *Excise Act, 2001*, the *Excise Act* and other related texts in order to implement three measures.

Division 1 of Part 3 implements a new federal excise duty framework for vaping products by, among other things,

(a) requiring that manufacturers of vaping products obtain a vaping licence from the CRA;

(b) requiring that all vaping products that are removed from the premises of a vaping licensee to be entered into the Canadian market for retail sale be affixed with an excise stamp;

(c) imposing excise duties on vaping products to be paid by vaping product licensees;

(d) providing for administration and enforcement rules related to the excise duty framework on vaping products;

(e) providing the Governor in Council with authority to provide for an additional excise duty in respect of provinces and territories that enter into a coordinated vaping product taxation agreement with Canada; and

(f) making related amendments to other legislative texts, including to allow for a coordinated federal/provincial-territorial vaping product taxation system and to ensure that the excise duty framework applies properly to imported vaping products.

k) inclure le revenu d'une bourse de perfectionnement postdoctoral à la définition de "revenu gagné" pour les fins d'un RÉER;

l) permettre aux organismes de bienfaisance enregistrés de conclure sous certaines conditions des partenariats pour des fins charitables avec des organismes qui ne sont pas des donataires reconnus;

m) permettre la révocation automatique et immédiate de l'enregistrement d'un organisme de bienfaisance dans les situations où cet organisme est une entité terroriste énumérée sur la liste prévue par le *Code criminel*;

n) permettre à l'ARC d'utiliser des renseignements confidentiels de contribuables afin d'aider au recouvrement de prêts sous le Compte d'urgence pour les entreprises canadiennes;

o) élargir la déduction pour l'allocation du coût en capital pour y inclure le nouveau matériel de production d'énergie propre.

Elle apporte également des modifications connexes et corrélatives à la *Loi sur la taxe d'accise*, la *Loi sur les allocations spéciales pour enfants*, la *Loi de 2001 sur l'accise*, au *Règlement de l'impôt sur le revenu* et au *Règlement sur les allocations spéciales pour enfants*.

La partie 2 met en œuvre certaines mesures relatives à la taxe sur les produits et services/taxe de vente harmonisée (TPS/TVH) afin de :

a) s'assurer que toutes cessions de contrats de vente relatives aux habitations résidentielles nouvellement construites ou ayant fait l'objet de rénovations majeures soient des fournitures taxables aux fins de la TPS/TVH;

b) assouplir les règles d'admissibilité pour le remboursement élargi pour les hôpitaux afin d'inclure les services de soins de santé fournis par un organisme de bienfaisance ou un organisme à but non lucratif avec la participation active, ou sur la recommandation, d'un médecin ou d'une infirmière praticienne ou d'un infirmier praticien, peu importe leur emplacement géographique.

La partie 3 modifie la *Loi de 2001 sur l'accise*, la *Loi sur l'accise* et des textes connexes afin de mettre en œuvre trois mesures.

La section 1 de la partie 3 met en œuvre un nouveau cadre fédéral de droits d'accise pour les produits de vapotage pour, notamment :

a) obliger les fabricants de produits de vapotage à obtenir une licence de produits de vapotage auprès de l'ARC;

b) exiger qu'un timbre d'accise soit apposé sur tous les produits de vapotage qui sont sortis des locaux d'un titulaire de licence de produits de vapotage pour entrer dans le marché canadien pour la vente au détail;

c) imposer, sur les produits de vapotage, des droits d'accise qui seront à payer par les titulaires de licence de produits de vapotage;

d) prévoir des règles d'administration et d'exécution liées au cadre de droit d'accise sur les produits de vapotage;

e) conférer au gouverneur en conseil le pouvoir de mettre en place un droit d'accise additionnel relativement aux provinces et aux territoires qui concluent un accord de coordination de la taxation des produits de vapotage avec le Canada;

f) apporter des modifications connexes à d'autres textes, y compris pour permettre un régime fiscal sur les produits de vapotage coordonné entre le gouvernement fédéral et les gouvernements provinciaux et territoriaux et pour s'assurer que le cadre du droit d'accise s'applique de façon appropriée aux produits de vapotage importés.

Division 2 of Part 3 amends the excise duty exemption under the *Excise Act, 2001* for wine produced in Canada and composed wholly of agricultural or plant product grown in Canada.

Division 3 of Part 3 amends the *Excise Act* to eliminate excise duty for beer containing no more than 0.5% alcohol by volume.

Part 4 enacts the *Select Luxury Items Tax Act*. That Act creates a new taxation regime for domestic sales, and importations into Canada, of certain new motor vehicles and aircraft priced over $100,000 and certain new boats priced over $250,000. It provides that the tax applies if the total price or value of the subject select luxury item at the time of sale or importation exceeds the relevant price threshold. It provides that the tax is to be calculated at the lesser of 10% of the total price of the item and 20% of the total price of the item that exceeds the relevant price threshold. To promote compliance with the new taxation regime, that Act includes modern elements of administration and enforcement aligned with those found in other taxation statutes. Finally, this Part also makes related and consequential amendments to other texts to ensure proper implementation of the new tax and to ensure a cohesive and efficient administration by the CRA.

Division 1 of Part 5 retroactively renders a provision of the contract that is set out in the schedule to *An Act respecting the Canadian Pacific Railway*, chapter 1 of the Statutes of Canada, 1881, to be of no force or effect. It retroactively extinguishes any obligations and liabilities of Her Majesty in right of Canada and any rights and privileges of the Canadian Pacific Railway Company arising out of or acquired under that provision.

Division 2 of Part 5 amends the *Nisga'a Final Agreement Act* to give force of law to the entire Nisga'a Nation Taxation Agreement during the period that that Taxation Agreement is, by its terms, in force.

Division 3 of Part 5 repeals the *Safe Drinking Water for First Nations Act*.

It also amends the *Income Tax Act* to exempt from taxation under that Act any income earned by the Safe Drinking Water Trust in accordance with the Settlement Agreement entered into on September 15, 2021 relating to long-term drinking water quality for impacted First Nations.

Division 4 of Part 5 authorizes payments to be made out of the Consolidated Revenue Fund for the purpose of addressing transit shortfalls and needs and improving housing supply and affordability.

Division 5 of Part 5 amends the *Canada Deposit Insurance Corporation Act* by adding the President and Chief Executive Officer of the Canada Deposit Insurance Corporation and one other member to that Corporation's Board of Directors.

Division 6 of Part 5 amends the *Federal-Provincial Fiscal Arrangements Act* to authorize additional payments to the provinces and territories.

Division 7 of Part 5 amends the *Borrowing Authority Act* to, among other things, count previously excluded borrowings made in the spring of 2021 in the calculation of the maximum amount that may be borrowed. It also amends the *Financial Administration Act* to change certain reporting requirements in relation to amounts borrowed under orders made under paragraph 46.1(c) of that Act.

La section 2 de la partie 3 modifie l'exonération des droits d'accise en vertu de la *Loi de 2001 sur l'accise* sur le vin qui est produit au Canada et composé entièrement de produits agricoles ou végétaux cultivés au Canada.

La section 3 de la partie 3 modifie la *Loi sur l'accise* afin d'éliminer les droits d'accise sur la bière ne contenant pas plus de 0,5 % d'alcool par volume.

La partie 4 édicte la *Loi sur la taxe sur certains biens de luxe*. Cette loi instaure un nouveau régime fiscal pour les ventes au Canada et les importations au Canada de certains véhicules automobiles et aéronefs neufs dont le prix dépasse 100 000 $ et certaines embarcations neuves dont le prix dépasse 250 000 $. Cette loi prévoit que la taxe sur les biens de luxe s'applique lorsque le prix total ou la valeur de l'article en cause au moment de la vente ou de l'importation dépasse le seuil de prix pertinent. Elle calcule la taxe de luxe selon le moins élevé des deux montants suivants : 10 % du prix total de l'article en cause et 20 % du prix total de l'article en cause qui dépasse le seuil de prix pertinent. Pour favoriser la conformité au nouveau régime fiscal, cette loi comporte des éléments modernes d'application et d'exécution qui se trouvent également dans d'autres lois fiscales. Enfin, cette partie apporte des modifications corrélatives et connexes à d'autres textes afin d'assurer la mise en œuvre adéquate de la nouvelle taxe et afin de permettre à l'ARC de les appliquer de façon cohérente et efficace.

La section 1 de la partie 5 rend inopérante, rétroactivement, une disposition du contrat figurant à l'annexe de l'*Acte concernant le chemin de fer Canadien du Pacifique*, chapitre 1 des Statuts du Canada (1881). Elle éteint, rétroactivement, toutes les obligations et responsabilités de Sa Majesté du chef du Canada ainsi que tous les droits et privilèges conférés à la Compagnie de chemin de fer Canadien Pacifique qui découlent de cette disposition.

La section 2 de la partie 5 modifie la *Loi sur l'Accord définitif nisga'a* afin de donner force de loi à tout l'accord nisga'a sur la fiscalité, et ce pour la durée stipulée par celui-ci.

La section 3 de la partie 5 abroge la *Loi sur la salubrité de l'eau potable des Premières Nations*.

De plus, elle modifie la *Loi de l'impôt sur le revenu* pour exonérer de l'impôt prévu par cette loi tout revenu gagné par la Fiducie pour de l'eau potable salubre, conformément à l'entente de règlement conclue le 15 septembre 2021 concernant la qualité à long terme de l'eau potable des premières nations touchées.

La section 4 de la partie 5 autorise des paiements sur le Trésor pour faire face aux déficits et besoins en matière de transport en commun et améliorer l'offre de logements et l'accès à des logements abordables.

La section 5 de la partie 5 modifie la *Loi sur la Société d'assurance-dépôts du Canada* afin d'ajouter le président et premier dirigeant de la Société d'assurance-dépôts du Canada ainsi qu'un autre administrateur à la composition du conseil d'administration de cette Société.

La section 6 de la partie 5 modifie la *Loi sur les arrangements fiscaux entre le gouvernement fédéral et les provinces* afin d'autoriser des versements supplémentaires aux provinces et territoires.

La section 7 de la partie 5 modifie la *Loi autorisant certains emprunts* pour, entre autres, inclure dans le calcul du montant maximum de certains emprunts des emprunts qui en étaient auparavant exclus et qui ont été contractés pendant le printemps 2021. Elle modifie également la *Loi sur la gestion des finances publiques* afin de modifier certaines exigences en matière de reddition de compte relativement à des sommes empruntées au titre d'un décret pris en vertu de l'alinéa 46.1c) de cette loi.

Division 8 of Part 5 amends the *Pension Benefits Standards Act, 1985* to, among other things, permit the establishment of a solvency reserve account in the pension fund of certain defined benefit plans and require the establishment of governance policies for all pension plans.

Division 9 of Part 5 amends the *Special Import Measures Act* to, among other things,

(a) provide that assessments of injury are to take into account impacts on workers;

(b) require the Canadian International Trade Tribunal to make inquiries with respect to massive importations when it is acting under section 42 of that Act;

(c) require that Tribunal to initiate expiry reviews of certain orders and findings;

(d) modify the deadline for notifying the government of the country of export of properly documented complaints;

(e) modify the criteria for imposing duties in cases of massive importations;

(f) modify the criteria for initiating anti-circumvention investigations; and

(g) remove the requirement that, in order to find circumvention, the principal cause of the change in a pattern of trade must be the imposition of anti-dumping or countervailing duties.

It also amends the *Canadian International Trade Tribunal Act* to provide that trade unions may, with the support of domestic producers, file global safeguard complaints.

Division 10 of Part 5 amends the *Trust and Loan Companies Act* and the *Insurance Companies Act* to, among other things, modernize corporate governance communications of financial institutions.

Division 11 of Part 5 amends the *Insurance Companies Act* to permit property and casualty companies and marine companies to not include the value of certain debt obligations when calculating their borrowing limit.

Division 12 of Part 5 enacts the *Prohibition on the Purchase of Residential Property by Non-Canadians Act*. The Act prohibits the purchase of residential property in Canada by non-Canadians unless they are exempted by the Act or its regulations or the purchase is made in certain circumstances specified in the regulations.

Division 13 of Part 5 amends the *Parliament of Canada Act* and makes consequential and related amendments to other Acts to, among other things,

(a) change the additional annual allowances that are paid to senators who occupy certain positions so that the government's representatives and the Opposition in the Senate are eligible for the allowances for five positions each and the three other recognized parties or parliamentary groups in the Senate with the greatest number of members are eligible for the allowances for four positions each;

(b) provide that the Leader of the Government in the Senate or Government Representative in the Senate, the Leader of the Opposition in the Senate and the Leader or Facilitator of every other recognized party or parliamentary group in the Senate are to be consulted on the appointment of certain officers and agents of Parliament; and

(c) provide that the Leader of the Government in the Senate or Government Representative in the Senate, the Leader of

La section 8 de la partie 5 modifie la *Loi de 1985 sur les normes de prestation de pension* afin, notamment, de prévoir l'institution d'un compte de réserve de solvabilité du fonds de pension de certains régimes à prestations déterminées et d'exiger l'établissement de politiques sur la gouvernance pour tous les régimes de pension.

La section 9 de la partie 5 modifie la *Loi sur les mesures spéciales d'importation* afin, notamment :

a) de prévoir que l'évaluation du dommage tienne compte de l'incidence sur les travailleurs;

b) d'exiger du Tribunal canadien du commerce extérieur qu'il enquête sur les importations massives lorsqu'il agit au titre de l'article 42 de cette loi;

c) d'exiger de ce tribunal qu'il procède à un réexamen relatif à l'expiration de certaines ordonnances ou conclusions;

d) de modifier le délai à l'intérieur duquel le gouvernement du pays d'exportation est avisé de l'existence d'un dossier complet;

e) de modifier les critères permettant l'imposition de droits lors d'une importation massive;

f) de modifier les critères permettant d'ouvrir des enquêtes sur le contournement;

g) de retirer l'exigence selon laquelle la principale cause du changement à la configuration des échanges doit être l'imposition de droits antidumping ou compensateurs.

Elle modifie également la *Loi sur le Tribunal canadien du commerce extérieur* afin de permettre aux syndicats de déposer, avec l'appui des producteurs nationaux, des plaintes relatives aux mesures de sauvegarde globales.

La section 10 de la partie 5 modifie la *Loi sur les sociétés de fiducie et de prêt* et la *Loi sur les sociétés d'assurances* afin, notamment de moderniser les communications relatives à la gouvernance des institutions financières.

La section 11 de la partie 5 modifie la *Loi sur les sociétés d'assurances* afin de permettre aux sociétés d'assurances multirisques et aux sociétés d'assurance maritime de ne pas inclure la valeur de certains titres de créance dans le calcul de leur limite d'emprunt.

La section 12 de la partie 5 édicte la *Loi sur l'interdiction d'achat d'immeubles résidentiels par des non-Canadiens*. La loi interdit l'achat d'immeubles résidentiels au Canada par des non-Canadiens, à moins qu'ils ne soient exemptés par la loi ou ses règlements ou que l'achat soit effectué dans certaines situations précisées dans les règlements.

La section 13 de la partie 5 modifie la *Loi sur le Parlement du Canada* et apporte des modifications corrélative et connexes à d'autres lois afin, notamment :

a) de modifier les indemnités annuelles supplémentaires que reçoivent les sénateurs occupant certains postes de sorte qu'elles soient versées à l'égard de cinq postes occupés par les représentants du gouvernement au Sénat et de cinq postes occupés par l'opposition et, s'agissant des trois autres partis ou groupes parlementaires reconnus au Sénat qui comptent le plus grand nombre de sénateurs, à l'égard de quatre postes chacun;

b) de prévoir l'obligation de consulter le leader ou représentant du gouvernement au Sénat, le leader de l'opposition au Sénat et le leader ou facilitateur de chacun des autres partis ou groupes parlementaires reconnus au Sénat au sujet des nominations de certains hauts fonctionnaires et agents du Parlement;

the Opposition in the Senate and the Leader or Facilitator of every other recognized party or parliamentary group in the Senate may change the membership of the Standing Senate Committee on Internal Economy, Budgets and Administration.

Division 14 of Part 5 amends the *Financial Administration Act* in order to, among other things, allow the Treasury Board to provide certain services to certain entities.

Division 15 of Part 5 amends the *Competition Act* to enhance the Commissioner of Competition's investigative powers, criminalize wage fixing and related agreements, increase maximum fines and administrative monetary penalties, clarify that incomplete price disclosure is a false or misleading representation, expand the definition of anti-competitive conduct, allow private access to the Competition Tribunal to remedy an abuse of dominance and improve the effectiveness of the merger notification requirements and other provisions.

Division 16 of Part 5 amends the *Copyright Act* to extend certain terms of copyright protection, including the general term, from 50 to 70 years after the life of the author and, in doing so, implements one of Canada's obligations under the Canada–United States–Mexico Agreement.

Division 17 of Part 5 amends the *College of Patent Agents and Trademark Agents Act* to, among other things,

(a) ensure that the College has sufficient independence and flexibility to exercise its corporate functions;

(b) provide statutory immunity to certain persons involved in the regulatory activities of the College; and

(c) grant powers to the Registrar and Investigations Committee that will allow for improved efficiency in the complaints and discipline process.

Division 18 of Part 5 enacts the *Civil Lunar Gateway Agreement Implementation Act* to implement Canada's obligations under the Memorandum of Understanding between the Government of Canada and the Government of the United States of America concerning Cooperation on the Civil Lunar Gateway. It provides for powers to protect confidential information provided under the Memorandum. It also makes related amendments to the *Criminal Code* to extend its application to activities related to the Lunar Gateway and to the *Government Employees Compensation Act* to address the cross-waiver of liability set out in the Memorandum.

Division 19 of Part 5 amends the *Corrections and Conditional Release Act* to restrict the use of detention in dry cells to cases where the institutional head has reasonable grounds to believe that an inmate has ingested contraband or that contraband is being carried in the inmate's rectum.

Division 20 of Part 5 amends the *Customs Act* in order to authorize its administration and enforcement by electronic means and to provide that the importer of record of goods is jointly and severally, or solidarily, liable to pay duties on the goods under section 17 of that Act with the importer or person authorized to account for the goods, as the case may be, and the owner of the goods.

c) d'autoriser le leader ou représentant du gouvernement au Sénat, le leader de l'opposition au Sénat et le leader ou facilitateur de chacun des autres partis ou groupes parlementaires reconnus au Sénat à apporter des changements à la composition du Comité sénatorial permanent de la régie interne, des budgets et de l'administration.

La section 14 de la partie 5 modifie la *Loi sur la gestion des finances publiques* afin notamment de permettre au Conseil du Trésor de fournir certains services à certaines entités.

La section 15 de la partie 5 modifie la *Loi sur la concurrence* afin de renforcer les pouvoirs d'enquête du commissaire de la concurrence, d'ériger en infraction criminelle la fixation des salaires et les accords connexes, d'augmenter les amendes maximales et les sanctions administratives pécuniaires, de préciser que la divulgation incomplète des prix est une indication fausse ou trompeuse, d'élargir la définition d'agissement anti-concurrentiel, de permettre l'accès privé au Tribunal de la concurrence pour remédier à un abus de position dominante et d'améliorer l'efficacité des exigences en matière de transactions devant faire l'objet d'un préavis et d'autres dispositions.

La section 16 de la partie 5 modifie la *Loi sur le droit d'auteur* afin de prolonger la durée du droit d'auteur qui s'applique dans certains cas, notamment celle qui s'applique de manière générale, de la cinquantième à la soixante-dixième année suivant le décès de l'auteur et, ce faisant, met en œuvre une des obligations du Canada prévues par l'Accord Canada–États-Unis–Mexique.

La section 17 de la partie 5 modifie la *Loi sur le Collège des agents de brevets et des agents de marques de commerce* afin, notamment :

a) de faire en sorte que le Collège jouisse de l'indépendance et de la flexibilité nécessaires pour exercer ses fonctions corporatives;

b) d'accorder l'immunité par voie législative à certaines personnes impliquées dans les activités réglementaires du Collège;

c) de conférer au registraire et au comité d'enquête des pouvoirs qui permettront d'améliorer l'efficacité du processus de plaintes et de discipline.

La section 18 de la partie 5 édicte la *Loi de mise en œuvre de l'Accord sur la station lunaire civile Gateway* afin de mettre en œuvre les obligations du Canada découlant du Mémorandum d'accord entre le Gouvernement du Canada et le Gouvernement des États-Unis d'Amérique concernant la coopération relative à la station lunaire civile Gateway. Elle prévoit des pouvoirs permettant la protection des renseignements confidentiels communiqués aux termes du mémorandum. Elle apporte aussi des modifications connexes au *Code criminel* afin d'étendre la portée de son application aux activités relatives à la station lunaire Gateway et des modifications connexes à la *Loi sur l'indemnisation des agents de l'État* pour tenir compte de la renonciation mutuelle aux recours énoncée dans le mémorandum.

La section 19 de la partie 5 modifie la *Loi sur le système correctionnel et la mise en liberté sous condition* pour restreindre la détention en cellule nue aux cas où le directeur du pénitencier est convaincu qu'il existe des motifs raisonnables de croire qu'un détenu a dissimulé un objet interdit dans son rectum ou qu'il l'a ingéré.

La section 20 de la partie 5 modifie la *Loi sur les douanes* pour autoriser l'exécution et le contrôle d'application de cette loi par voie électronique et prévoir que l'importateur officiel de marchandises soit solidaire du paiement des droits, au même titre que l'importateur ou la personne autorisée à faire une déclaration en détail ou provisoire de marchandises, selon le cas, et le

Division 21 of Part 5 amends the *Criminal Code* to create an offence of wilfully promoting antisemitism by condoning, denying or downplaying the Holocaust through statements communicated other than in private conversation.

Division 22 of Part 5 amends the *Judges Act*, the *Federal Courts Act*, the *Tax Court of Canada Act* and certain other acts to, among other things,

(a) implement the Government of Canada's response to the report of the sixth Judicial Compensation and Benefits Commission regarding salaries and benefits and to create the office of supernumerary prothonotary of the Federal Court;

(b) increase the number of judges for certain superior courts and include the new offices of Associate Chief Justice of the Court of Queen's Bench of New Brunswick and Associate Chief Justice of the Court of Queen's Bench for Saskatchewan;

(c) create the offices of prothonotary and supernumerary prothonotary of the Tax Court of Canada; and

(d) replace the term "prothonotary" with "associate judge".

Division 23 of Part 5 amends the *Immigration and Refugee Protection Act* to, among other things,

(a) authorize the Minister of Citizenship and Immigration to give instructions establishing categories of foreign nationals for the purposes of determining to whom an invitation to make an application for permanent residence is to be issued, as well as instructions setting out the economic goal that that Minister seeks to support in establishing the category;

(b) prevent an officer from issuing a visa or other document to a foreign national invited in respect of an established category if the foreign national is not in fact eligible to be a member of that category;

(c) require that the annual report to Parliament on the operation of that Act include a description of any instructions that establish a category of foreign nationals, the economic goal sought to be supported in establishing the category and the number of foreign nationals invited to make an application for permanent residence in respect of the category; and

(d) authorize that Minister to give instructions respecting the class of permanent residents in respect of which a foreign national must apply after being issued an invitation, if the foreign national is eligible to be a member of more than one class.

Division 24 of Part 5 amends the *Old Age Security Act* to correct a cross-reference in that Act to the *Budget Implementation Act, 2021, No. 1*.

Division 25 of Part 5

(a) amends the *Canada Emergency Response Benefit Act* to set out the consequences that apply in respect of a worker who received, for a four-week period, an income support payment and who received, for any week during the four-week period, any benefit, allowance or money referred to in subparagraph 6(1)(b)(ii) or (iii) of that Act;

(b) amends the *Canada Emergency Student Benefit Act* to set out the consequences that apply in respect of a student who received, for a four-week period, a Canada emergency student benefit and who received, for any week during the

propriétaire des marchandises en vertu de l'article 17 de cette loi.

La section 21 de la partie 5 modifie le *Code criminel* afin de créer l'infraction de fomenter volontairement l'antisémitisme en cautionnant, en niant ou en minimisant l'Holocauste, par la communication de déclarations autrement que dans une conversation privée.

La section 22 de la partie 5 modifie la *Loi sur les juges*, la *Loi sur les Cours fédérales*, la *Loi sur la Cour canadienne de l'impôt* et certaines autres loi afin notamment :

a) de mettre en œuvre la réponse du gouvernement du Canada au rapport de la sixième Commission d'examen de la rémunération des juges concernant les salaires et les avantages sociaux et de créer le poste de protonotaire surnuméraire de la Cour fédérale;

b) d'augmenter le nombre de juges pour certaines cours supérieures et d'inclure les nouveaux postes de juge en chef adjoint de la Cour du Banc de la Reine du Nouveau-Brunswick et de juge en chef adjoint de la Cour du Banc de la Reine de la Saskatchewan;

c) de créer les postes de protonotaire et de protonotaire surnuméraire de la Cour canadienne de l'impôt;

d) de remplacer le terme « protonotaire » par celui de « juge adjoint ».

La section 23 de la partie 5 modifie la *Loi sur l'immigration et la protection des réfugiés* pour, notamment :

a) autoriser le ministre de la Citoyenneté et de l'Immigration à donner des instructions établissant des ensembles d'étrangers dans le but de déterminer les étrangers qui peuvent recevoir une invitation à présenter une demande de résidence permanente ainsi que les objectifs économiques dont le ministre cherche, en établissant les ensembles, à favoriser l'atteinte;

b) interdire aux agents de délivrer un visa ou autre document à un étranger à qui une invitation à présenter une demande a été formulée relativement à un ensemble établi s'il ne pouvait pas en fait être membre de l'ensemble en question;

c) exiger que le rapport annuel au Parlement sur l'application de cette loi contienne une description des instructions établissant des ensembles d'étrangers, des objectifs économiques dont le ministre cherche, en établissant les ensembles, à favoriser l'atteinte et du nombre d'étrangers qui ont été invités à présenter une demande de résidence permanente sur la base du fait qu'ils pouvaient être membres d'un ensemble établi;

d) autoriser le ministre à donner des instructions sur la catégorie de résidents permanents à l'égard de laquelle un étranger qui peut être invité à présenter une demande doit le faire, s'il peut être membre de plus d'une catégorie.

La section 24 de la partie 5 modifie la *Loi sur la sécurité de la vieillesse* afin d'y corriger un renvoi à la *Loi nº 1 d'exécution du budget de 2021*.

La section 25 de la partie 5, à la fois :

a) modifie la *Loi sur la prestation canadienne d'urgence* afin de prévoir les conséquences qui s'appliquent à l'égard d'un travailleur ayant reçu une allocation de soutien du revenu pour toute période de quatre semaines et une prestation, allocation ou autre somme visée aux sous-alinéas 6(1)b)(ii) ou (iii) de cette loi pour toute semaine comprise dans cette période;

b) modifie la *Loi sur la prestation canadienne d'urgence pour étudiants* afin de prévoir les conséquences qui s'appliquent à l'égard d'un étudiant ayant reçu une prestation canadienne

four-week period, any benefit, allowance or money referred to in subparagraph 6(1)(b)(ii) or (iii) of that Act; and

(c) amends the *Employment Insurance Act* to set out the consequences that apply in respect of a claimant who received, for any week, an employment insurance emergency response benefit and who received, for that week, any payment or benefit referred to in paragraph 153.9(2)(c) or (d) of that Act.

Division 26 of Part 5 amends the *Employment Insurance Act* to, among other things,

(a) replace employment benefits and support measures set out in Part II of that Act with employment support measures that are intended to help insured participants and other workers — including workers in groups underrepresented in the labour market — to obtain and keep employment; and

(b) allow the Canada Employment Insurance Commission to enter into agreements to provide for the payment of contributions to organizations for the costs of measures that they implement and that are consistent with the purpose and guidelines set out in Part II of that Act.

It also makes a consequential amendment to the *Income Tax Act*.

Division 27 of Part 5 amends the *Employment Insurance Act* to specify the maximum number of weeks for which benefits may be paid in a benefit period to certain seasonal workers and to extend, until October 28, 2023, the increase in the maximum number of weeks for which those benefits may be paid. It also amends the *Budget Implementation Act, 2021, No. 1* to add a transitional measure in relation to amendments to the *Employment Insurance Regulations* that are found in that Act.

Division 28 of Part 5 amends the *Canada Pension Plan* to make corrections respecting

(a) the calculation of the minimum qualifying period and the contributory period for the purposes of the post-retirement disability benefit;

(b) the determination of values for contributors who have periods excluded from their contributory periods by reason of disability; and

(c) the attribution of amounts for contributors who have periods excluded from their contributory periods because they were family allowance recipients.

Division 29 of Part 5 amends *An Act to amend the Criminal Code and the Canada Labour Code* to, among other things,

(a) shorten the period before which an employee begins to earn one day of medical leave of absence with pay per month;

(b) standardize the conditions related to the requirement to provide a medical certificate following a medical leave of absence, regardless of whether the leave is paid or unpaid;

(c) authorize the Governor in Council to make regulations in certain circumstances, including to modify certain provisions respecting medical leave of absence with pay;

(d) ensure that, for the purposes of medical leave of absence, an employee who changes employers due to the lease or transfer of a work, undertaking or business or due to a contract being awarded through a retendering process is deemed to be continuously employed with one employer; and

d'urgence pour étudiants pour toute période de quatre semaines et une prestation, allocation ou autre somme visée aux sous-alinéas 6(1)b)(ii) ou (iii) de cette loi pour toute semaine comprise dans cette période;

c) modifie la *Loi sur l'assurance-emploi* afin de prévoir les conséquences qui s'appliquent à l'égard d'un prestataire ayant reçu la prestation d'assurance-emploi d'urgence et l'allocation ou la prestation visée aux alinéas 153.9(2)c) ou d) de cette loi pour toute semaine.

La section 26 de la partie 5 modifie la *Loi sur l'assurance-emploi* afin, notamment :

a) de remplacer les prestations d'emploi et les mesures de soutien prévues par la partie II de cette loi par des mesures de soutien à l'emploi qui visent à aider les participants et autres travailleurs — notamment les membres des groupes sous-représentés sur le marché du travail — à obtenir ou à conserver un emploi;

b) de permettre à la Commission de l'assurance-emploi du Canada de conclure des accords prévoyant le versement à des organismes de contributions relatives aux frais liés à des mesures qui sont mises en œuvre par ces derniers et qui correspondent à l'objet et aux lignes directrices prévues par la partie II de cette loi.

Elle apporte également une modification corrélative à la *Loi de l'impôt sur le revenu*.

La section 27 de la partie 5 modifie la *Loi sur l'assurance-emploi* afin de préciser le nombre maximal de semaines pour lesquelles des prestations peuvent être versées à certains travailleurs saisonniers au cours d'une période de prestations et de prolonger, jusqu'au 28 octobre 2023, l'augmentation du nombre maximal de semaines pour lesquelles ces prestations peuvent être versées. Elle modifie également la *Loi nº 1 d'exécution du budget de 2021* pour ajouter une mesure transitoire relative aux modifications du *Règlement sur l'assurance-emploi* incluses dans cette loi.

La section 28 de la partie 5 modifie le *Régime de pensions du Canada* pour apporter des corrections concernant :

a) le calcul de la période minimale d'admissibilité et de la période cotisable qui s'appliquent à la prestation d'invalidité après-retraite;

b) la détermination de valeurs à l'égard du cotisant pour les périodes exclues de sa période cotisable en raison d'une invalidité;

c) l'attribution de sommes au cotisant pour les périodes exclues de sa période cotisable parce qu'il était bénéficiaire d'allocations familiales.

La section 29 de la partie 5 modifie la *Loi modifiant le Code criminel et le Code canadien du travail* afin, notamment :

a) de réduire pour l'employé le délai préalable à l'acquisition d'un jour de congé payé pour raisons médicales par mois;

b) d'uniformiser les conditions relatives à l'exigence de présentation d'un certificat médical à la suite d'un congé pour raisons médicales, que le congé soit payé ou non;

c) de conférer au gouverneur en conseil le pouvoir de prendre des règlements dans certaines circonstances, notamment pour adapter certaines dispositions concernant le congé payé pour raisons médicales;

d) de prévoir qu'aux fins du congé pour raisons médicales, l'employé dont l'employeur change à la suite de la location ou du transfert d'une installation, d'un ouvrage ou d'une entreprise ou à la suite d'un appel d'offres menant à l'octroi d'un contrat est réputé avoir travaillé sans interruption pour un seul employeur;

(e) provide that the provisions relating to medical leave of absence come into force no later than December 1, 2022.

Division 30 of Part 5 amends the *Canada Business Corporations Act* to, among other things,

(a) require certain corporations to send to the Director appointed under that Act information on individuals with significant control on an annual basis or when a change occurs;

(b) allow that Director to provide all or part of that information to an investigative body, the Financial Transactions and Reports Analysis Centre of Canada or any prescribed entity; and

(c) clarify that, for the purposes of subsection 21.1(7) of that Act, it is the securities of a corporation, not the corporation itself, that are listed and posted for trading on a designated stock exchange.

Division 31 of Part 5 amends the *Special Economic Measures Act* and the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* to, among other things,

(a) create regimes allowing for the forfeiture of property that has been seized or restrained under those Acts;

(b) specify that the proceeds resulting from the disposition of those properties are to be used for certain purposes; and

(c) allow for the sharing of information between certain persons in certain circumstances.

It also makes amendments to the *Seized Property Management Act* in relation to those forfeiture of property regimes.

e) de prévoir que les dispositions portant sur le congé pour raisons médicales entrent en vigueur au plus tard le 1er décembre 2022.

La section 30 de la partie 5 modifie la *Loi canadienne sur les sociétés par actions* afin, notamment :

a) d'obliger certaines sociétés à remettre au directeur nommé en vertu de cette loi les renseignements à l'égard des particuliers ayant un contrôle important de celles-ci, et ce annuellement ou à la suite d'un changement;

b) de permettre au directeur de fournir tout ou partie de ces renseignements à certains organismes d'enquête, au Centre d'analyse des opérations et déclarations financières du Canada ou à une entité réglementaire;

c) de préciser que, pour l'application du paragraphe 21.1(7) de cette loi, ce sont des valeurs mobilières de la société qui sont cotées et négociables à une bourse de valeurs désignée, et non la société elle-même qui est inscrite comme bourse de valeurs désignée.

La section 31 de la partie 5 modifie la *Loi sur les mesures économiques spéciales* et la *Loi sur la justice pour les victimes de dirigeants étrangers corrompus (loi de Sergueï Magnitski)* pour, notamment :

a) créer des régimes permettant la confiscation de biens saisis ou bloqués aux termes de ces lois;

b) préciser que le produit de la disposition de ces biens doit être utilisé à certaines fins;

c) permettre la communication de renseignements entre certaines personnes dans certaines circonstances.

Elle modifie aussi la *Loi sur l'administration des biens saisis* relativement à ces régimes de confiscation de biens.

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Table of Weeks of Benefits — Seasonal Workers

	Regional Unemployment Rate											
Number of hours of insurable employment in qualifying period	6% and under	More than 6% but not more than 7%	More than 7% but not more than 8%	More than 8% but not more than 9%	More than 9% but not more than 10%	More than 10% but not more than 11%	More than 11% but not more than 12%	More than 12% but not more than 13%	More than 13% but not more than 14%	More than 14% but not more than 15%	More than 15% but not more than 16%	More than 16%
420 - 454									31	33	35	37
455 - 489								29	31	33	35	37
490 - 524							28	30	32	34	36	38
525 - 559						26	28	30	32	34	36	38
560 - 594					25	27	29	31	33	35	37	39
595 - 629				23	25	27	29	31	33	35	37	39
630 - 664			22	24	26	28	30	32	34	36	38	40
665 - 699		20	22	24	26	28	30	32	34	36	38	40
700 - 734	19	21	23	25	27	29	31	33	35	37	39	41
735 - 769	19	21	23	25	27	29	31	33	35	37	39	41
770 - 804	20	22	24	26	28	30	32	34	36	38	40	42
805 - 839	20	22	24	26	28	30	32	34	36	38	40	42
840 - 874	21	23	25	27	29	31	33	35	37	39	41	43
875 - 909	21	23	25	27	29	31	33	35	37	39	41	43
910 - 944	22	24	26	28	30	32	34	36	38	40	42	44
945 - 979	22	24	26	28	30	32	34	36	38	40	42	44
980 - 1014	23	25	27	29	31	33	35	37	39	41	43	45
1015 - 1049	23	25	27	29	31	33	35	37	39	41	43	45
1050 - 1084	24	26	28	30	32	34	36	38	40	42	44	45
1085 - 1119	24	26	28	30	32	34	36	38	40	42	44	45
1120 - 1154	25	27	29	31	33	35	37	39	41	43	45	45
1155 - 1189	25	27	29	31	33	35	37	39	41	43	45	45
1190 - 1224	26	28	30	32	34	36	38	40	42	44	45	45
1225 - 1259	26	28	30	32	34	36	38	40	42	44	45	45
1260 - 1294	27	29	31	33	35	37	39	41	43	45	45	45
1295 - 1329	27	29	31	33	35	37	39	41	43	45	45	45
1330 - 1364	28	30	32	34	36	38	40	42	44	45	45	45
1365 - 1399	28	30	32	34	36	38	40	42	44	45	45	45
1400 - 1434	29	31	33	35	37	39	41	43	45	45	45	45
1435 - 1469	30	32	34	36	38	40	42	44	45	45	45	45
1470 - 1504	31	33	35	37	39	41	43	45	45	45	45	45
1505 - 1539	32	34	36	38	40	42	44	45	45	45	45	45
1540 - 1574	33	35	37	39	41	43	45	45	45	45	45	45
1575 - 1609	34	36	38	40	42	44	45	45	45	45	45	45
1610 - 1644	35	37	39	41	43	45	45	45	45	45	45	45
1645 - 1679	36	38	40	42	44	45	45	45	45	45	45	45

	Regional Unemployment Rate											
Number of hours of insurable employment in qualifying period	6% and under	More than 6% but not more than 7%	More than 7% but not more than 8%	More than 8% but not more than 9%	More than 9% but not more than 10%	More than 10% but not more than 11%	More than 11% but not more than 12%	More than 12% but not more than 13%	More than 13% but not more than 14%	More than 14% but not more than 15%	More than 15% but not more than 16%	More than 16%
1680 - 1714	37	39	41	43	45	45	45	45	45	45	45	45
1715 - 1749	38	40	42	44	45	45	45	45	45	45	45	45
1750 - 1784	39	41	43	45	45	45	45	45	45	45	45	45
1785 - 1819	40	42	44	45	45	45	45	45	45	45	45	45
1820 -	41	43	45	45	45	45	45	45	45	45	45	45

Legend:
Red: Text removed
Blue: Text added
Green: Text moved

Cumulative Blackline of Changes to the *Competition Act* from 1986 to Present

Abuse of Dominant Position

Definition of ~~"~~*anti-competitive act*~~"~~

~~50.~~78 (1) For the purposes of section ~~51, "~~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 ~~him~~the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing ~~his~~the competitor's entry into, or eliminating ~~him~~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~~.~~;

(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 ~~where~~if abuse of dominant position

~~51. (1)~~ ~~Where, on application by the Director, the Tribunal finds that~~

79 (~~a~~)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~~, throughout Canada or any area thereof,~~ 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

(~~b~~a) ~~that person or those persons have engaged in or are engaging in~~ a practice of anti-competitive acts~~, and~~ ; or

(b) conduct

(~~c~~i) ~~the practice has~~that 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~~ in which the person or persons ~~from engaging in that practice.~~have a plausible competitive interest, and

(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 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 ~~over-come~~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
~~**Superior competitive performance**~~
(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~~may consider ~~whether~~ the practice ~~is a result of superior competitive performance.~~

(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*, ~~*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 or conduct more than three years after the practice or conduct has ceased.

Where proceedings commenced under section ~~32~~45, 49, 76, 90.1 or ~~64~~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) ~~against whom~~ proceedings have been commenced against that person under section ~~32,~~45 or 49; or

~~(b) against whom an order is sought under section 64 on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 32 or 64, as the case may be.~~

(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 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.

G. True Penal Consequences

The True Penal Consequences Test

True Penal Consequence Case Law – Penalties At Issue

Decision	Financial Penalty at Issue
R. v. Wigglesworth, 1987 CarswellSask 385 (SCC)	$300
Martineau v. Minister of National Revenue, 2004 SCC 81	$315,458
Lavallee v. Alberta (Securities Commission), 2010 ABCA 48	$1,000,000 for each contravention
Rowan v. Ontario Securities Commission, 2012 ONCA 208	$1,220,000 (total of $520,000 against one defendant, $250,000 against another, and $450,000 against a third)
Goodwin v. B.C. (Superintendent of Motor Vehicles), 2015 SCC 46	$500
Guindon v. Canada, 2015 SCC 41	$546,747
R. v. Samji, 2017 BCCA 415	$33,000,000
Canada v. Chatr Wireless Inc., 2014 ONSC 1146	$500,000
United States Steel Corporation v. Canada (A.G.), 2011 FCA 176	$10,000 per day

Big M Drug Mart per Dickson J.
Found at **Tab 64, Volume 12** of Google's BOA.

VI

Purpose and Effect of Legislation

79 A finding that the Lord's Day Act has a secular purpose is, on the authorities, simply not possible. Its religious purpose, in compelling sabbatical observance, has been long established and consistently maintained by the courts of this country.

80 The Attorney General for Alberta concedes that the Act is characterized by this religious purpose. He contends, however, that it is not the purpose but the effects of the Act which are relevant. In his submission, *Robertson* , supra, is support for the proposition that it is effects alone which must be assessed in determining whether legislation violates a constitutional guarantee of freedom of religion.

81 I cannot agree. In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively in the sense of the legislation's object and its ultimate impact are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity.

82 Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the Charter. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of Charter rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact.

83 This approach to the relevance of purpose and effect is explicit in the American cases. In *McGowan v. Maryland* , supra, Warren C.J. stated at p. 453:

> We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose — evidence either on the face of the legislation, in conjunction with its legislative history, or in its operative effect — is to use the State's coercive power to aid religion.

Similarly, in *Braunfeld v. Brown* , supra, he wrote at p. 607:

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Found at **Tab 100, Volume 19** of Google's BOA.

1987 CarswellSask 385
Supreme Court of Canada

R. v. Wigglesworth

1987 CarswellSask 385, 1987 CarswellSask 519, [1987] 2 S.C.R. 541, [1987] S.C.J. No. 71, [1988] 1 W.W.R. 193, 24 O.A.C. 321, 28 Admin. L.R. 294, 32 C.R.R. 219, 37 C.C.C. (3d) 385, 3 W.C.B. (2d) 130, 45 D.L.R. (4th) 235, 60 C.R. (3d) 193, 61 Sask. R. 105, 81 N.R. 161, J.E. 87-1249, EYB 1987-67959

WIGGLESWORTH v. R. et al.

Dickson C.J.C., Beetz, Estey, McIntyre, Lamer, Wilson and La Forest JJ.

Heard: March 3 and 4, 1987
Judgment: November 19, 1987
Docket: No. 18613

Counsel: *G.N. Allbright, Q.C.*, for appellant.
C. Snell and *G.G. Mitchell*, for respondent.
J. Isaac, Q.C., and *Y. Vanasse*, for intervener the Attorney General of Canada.
D.W. Brown, Q.C., and *P.R. Jervis*, for intervener the Attorney General for Ontario.
Y. de Montigny and *F. Saint-Martin*, for intervener the Attorney General of Quebec.

Subject: Public

Headnote

Law enforcement agencies --- Police — Organization of police forces — Disciplinary proceedings — Relation to criminal charges

Accused Royal Canadian Mounted Police (R.C.M.P.) constable was found guilty by a R.C.M.P. service tribunal of unnecessary violence towards a prisoner, a major service offence under the Act. A $300 fine was imposed — Accused was also charged with common assault under the Code — The trial Judge held that the common assault charge was the same offence for which accused had already been found guilty under the Act and s. 11(h) of the Charter barred a second trial — Crown's appeal was allowed — Accused's appeal as to whether s. 11(h) of the Charter had been violated — The appeal should be dismissed — A prosecution for common assault in relation to an act for which accused had already been convicted under the Act did not violate s. 11(h) of the Charter — Accused was not being tried and punished for the same offence — Disciplinary offences were separate and distinct from criminal offences Constitution Act, 1982, s 11(h).

The accused was a Royal Canadian Mounted Police constable who, in the process of questioning a person from whom a breath sample had been demanded, grabbed the person by the throat and slapped him across the face. The constable was tried and found guilty by an R.C.M.P. service

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7 This case is completely different. Only one factual assault has occurred for which the appellant has been tried and punished. The potential imposition of a one-year imprisonment pursuant to a "trial" by the tribunal clearly points to this procedure as being in the nature of punishment to redress a social wrong and not only in the nature of disciplinary proceedings. The possibility of dismissal from the force pursuant to s. 38 of the statute reinforces this view. With respect, I cannot agree with the view of Wilson J. that the two offences are in any way totally separate from or different from each other.

8 The test must be the practical one of determining whether the first court upon registering a conviction was performing a task assigned by Parliament which by the scale of punishment available to the tribunal is readily recognizable as a process in which the general public's interest in the administration of criminal law is recognized over and above the limited interest of internal discipline.

9 For the reasons given above it is my view that this test is met in this case. The subsequent proceeding under s. 245(1) of the Criminal Code falls squarely within the prohibition in s. 11(*h*) of the Charter that any person "finally found guilty and punished for the offence" has the right "not to be tried or punished for it again". Furthermore, a breach of s. 11(*h*) rights cannot be justified by any conceivable s. 1 reasonable limits analysis. In any case, the Crown here has made no attempt to do so. The right to be tried and punished only once for an offence cannot, in my view, be fettered or circumscribed by Parliament. I would allow the appeal and answer the first constitutional question "yes", and the second constitutional question "no".

***Wilson J.* (*Dickson C.J.C., Beetz, McIntyre, Lamer* and *La Forest JJ.* concurring):**

10 The central issue on this appeal is whether the appellant's conviction of a "major service offence" under the Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9, precludes subsequent proceedings under the Criminal Code for the same mis conduct. The resolution of this issue requires a decision as to whether such a major service offence constitutes an "offence" within the meaning of s. 11 of the Canadian Charter of Rights and Freedoms and, if so, whether proceedings under the Criminal Code would violate the appellant's right under s. 11(*h*) of the Charter not to be tried and punished again for the same offence. Before turning to a consideration of these issues it is necessary to examine briefly the facts of the case.

I The Facts

11 The appellant was at all material times a constable of the Royal Canadian Mounted Police ["R.C.M.P."]. On 21st August 1981 one Donald Kerr was brought to the R.C.M.P. detachment in Yorkton, Saskatchewan, for a breathalyzer test. Kerr was taken into a room where he met the appellant.

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12 The appellant started to question Kerr concerning the incident giving rise to his arrest. He asked Kerr who was driving the car at the time. Kerr indicated that his sister was driving. The appellant suspected he was lying. He repeated the question a couple of times, receiving the same response each time. The appellant then grabbed Kerr, who was seated in a chair at the time, by the throat and pushed him against a wall. The grab around the throat was sufficient to cause a choking sensation to Kerr.

13 After a few seconds the appellant questioned Kerr again as to who was driving the car. Kerr continued to maintain that his sister was driving. The appellant slapped Kerr across the face with his open hand and repeated the question. Kerr gave the same answer. However, after three or four slaps Kerr admitted that he had been driving the car. At no time did Kerr respond physically to the appellant's slaps. The defence has admitted, on these facts, that the appellant committed a common assault as defined in the Criminal Code. As a result of the assault Kerr suffered a sore throat, a ringing in his ears and several minor marks on his face.

14 Two charges were laid following this incident. On 21st August 1981 the appellant was charged with common assault contrary to s. 245(1) of the Criminal Code, R.S.C. 1970, c. C-34. The appellant was also charged under the Royal Canadian Mounted Police Act as follows:

> That at or near Yorkton, in the Province of Saskatchewan, on the 21st day of August, 1981, that you were unnecessarily violent towards a prisoner, to wit: Donald Kerr, by forcibly grabbing him and slapping him in the face, contrary to Section [*sic*] (L), Section 25 of the *Royal Canadian Mounted Police Act*.

II The Courts Below

15 On 2nd June 1982 the appellant appeared before Inspector S.G. Wilcox of the Royal Canadian Mounted Police Service Court for trial of the charge laid under the Royal Canadian Mounted Police Act. The appellant was found guilty of a "major service offence" under s. 25(1) of that Act. The section reads as follows:

> 25. Every member who
>
> > (*l*) is cruel, harsh or unnecessarily violent to any prisoner or other person;
>
> is guilty of an offence, to be known as a major service offence, and is liable to trial and punishment as prescribed in this Part.

The maximum penalty imposed by s. 36(1) of the Act for such an offence is imprisonment for one year. The appellant was assessed a fine of $300.

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16 On 2nd February 1983 the appellant appeared before His Honour Judge Meagher of the Saskatchewan Provincial Court for trial of the charge of common assault under s. 245(1) of the Criminal Code [reported at 33 C.R. (3d) 44]. His counsel submitted that it would be improper to proceed with this charge following the conviction under the Royal Canadian Mounted Police Act since this would violate the accused's right under s. 11(*h*) of the Charter not to be tried and punished twice for the same offence. The trial judge accepted this submission and quashed the information pursuant to s. 24(1) of the Charter. He held that both the proceeding before the service tribunal and the proceeding before the criminal court were penal in nature — both involved a trial for an alleged "offence" and a possible term of imprisonment following a determination of guilt. In his view, if punishment were meted out in each case, the appellant would be punished twice for the same offence.

17 The Crown appealed to the Court of Queen's Bench for Saskatchewan [reported at 35 C.R. (3d) 322 7 C.C.C. (3d) 170 150 D.L.R. (3d) 748 25 Sask. R. 149]. On 5th July 1983 that court allowed the appeal. Kindred J. held that the trial judge had erred in law in holding that the conviction under the Royal Canadian Mounted Police Act precluded him from trying the appellant under the Criminal Code. The two constituted different offences. The former was a trial before a service tribunal for a breach of discipline amounting to a major service offence applicable only to members of the force, while the latter was a trial in a court of record for a criminal offence applicable to all. The court found the appellant guilty as charged and assessed a fine of $250 to be paid within one month or imprisonment for 15 days.

18 The appellant appealed to the Court of Appeal for Saskatchewan. On 16th February 1984 the appeal was dismissed [reported at [1984] 3 W.W.R. 289, 38 C.R. (3d) 388, 11 C.C.C. (3d) 27, 7 D.L.R. (4th) 361, 31 Sask. R. 153]. The Court of Appeal held that the proceeding before the R.C.M.P. service tribunal was purely "disciplinary". In its view that proceeding was concerned only with the professional aspect of the appellant's conduct. It was still necessary for the appellant to answer to society for the criminal aspect of his conduct. It held that s. 11(*h*) of the Charter did not prevent the appellant from being tried and charged for the criminal offence of assault because he was not found guilty and punished for that "offence" within the meaning of s. 11 of the Charter. Cameron J.A. stated [at pp. 294-95]:

> A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public. At the same time, the act may, if it involves injury and a breach of one's duty to another, constitute a private cause of action for damages, for which the actor must answer to the person he injured. And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers. For example a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal

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(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

21 As mentioned above, the first question to be considered is whether the appellant has been "charged with an offence" within the meaning of the opening words of s. 11. The proper approach to Charter interpretation was set out by this court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 85 C.L.L.C. 14,023, 60 A.R. 161, 58 N.R. 81. At p. 344 Dickson J. [now C.J.C.] stated:

> The meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> ... this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*,

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[1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

22 There have been a large number of cases decided on the issue whether the accused has been "charged with an offence" within the meaning of the section. A number of these cases have recognized a so-called "disciplinary exception" to the application of s. 11. Thus, in *R. v. Mingo* (1982), 2 C.C.C. (3d) 23, 4 C.R.R. 18(B.C.S.C.), s. 11(*h*) was held to be inapplicable to a criminal prosecution for the same conduct which had been the subject of disciplinary proceedings against an inmate. A similar result has been reached in cases dealing with proceedings following a conviction for a disciplinary offence under the Penitentiary Service Regulations: for example, *Yeomans, Commr. of Corrections v. Gaw*, [1985] 1 F.C. 561, [1986] 6 W.W.R. 72, 22 C.C.C. (3d) 311(C.A.), and *Howard v. Stony Mountain Inst., Presiding Officer of Inmate Disciplinary Ct.* (1983), 8 C.C.C. (3d) 557, 4 D.L.R. (4th) 147, 8 C.R.R. 301(Fed. T.D.), subsequently reversed but in reliance on s. 7 of the Charter at [1984] 2 F.C. 642, 11 Admin. L.R. 63, 45 C.R. (3d) 242, 19 C.C.C. (3d) 195, 19 D.L.R. (4th) 502, 17 C.R.R. 5, 57 N.R. 280(C.A.); contra *Russell v. Radley*, [1984] 1 F.C. 543, 5 Admin. L.R. 39, 11 C.C.C. (3d) 289(T.D.); *Peltari v. Dir. of Lower Mainland Regional Correctional Centre* 1984 42 C.R. (3d) 103 15 C.C.C. (3d) 223(B.C.S.C.); and *Knockaert v. Can. (Commr. of Corrections)*, [1986] 2 F.C. 361, 51 C.R. (3d) 183, 18 Admin. L.R. 273, 25 C.C.C. (3d) 373, 2 F.T.R. 179(T.D.), subsequently upheld by the Federal Court of Appeal in a judgment rendered on 21st November 1986 [now reported at [1987] 2 F.C. 202*Knockaert v. Commr. of Corrections*55 C.R. (3d) 171 22 Admin. L.R. 1 32 C.C.C. (3d) 288 8 F.T.R. 321n 72 N.R. 161]. The same conclusion that s. 11 does not apply to disciplinary proceedings has been reached in cases involving proceedings brought pursuant to professional disciplinary statutes: see, for example, *Re James* [1982] 2 W.W.R. 316 42 B.C.L.R. 10, *(*sub nom. *Re James and Law Soc. of B.C.)* 143 D.L.R. (3d) 379, 4 C.R.R. 293(S.C.) ; *Rosenbaum v. Law Soc. of Man.*, [1983] 5 W.W.R. 752, 2 Admin. L.R. 210, 6 C.C.C. (3d) 472, 150 D.L.R. (3d) 352, 22 Man. R. (2d) 260(Q.B.); *Belhumeur v. Discipline Ctee. of Que. Bar Assn.*198334 C.R. (3d) 279(C.S. Que.); *Law Soc. of Man. v. Savino*, [1983] 6 W.W.R. 538, 1 D.L.R. (4th) 285, 23 Man. R. (2d) 293(C.A.); and *Fang v. College of Physicians & Surgeons of Alta.*, [1986] 2 W.W.R. 380, 42 Alta. L.R. (2d) 89, 25 D.L.R. (4th) 632, 66 A.R. 352(C.A.).

23 The breadth of the opening words of s. 11, "Any person charged with an offence", suggests that the section may well apply to non-criminal proceedings. A few cases support this interpretation, holding that the rights guaranteed by s. 11 of the Charter are available to those "charged" with disciplinary offences. In *Re Nash and R.* (1982), 70 C.C.C. (2d) 490(Nfld. Prov. Ct.), it was submitted before Kennedy Prov. J. that an internal disciplinary panel of the Royal Newfoundland Constabulary contravened s. 11(*d*) of the Charter because it was not an independent and impartial tribunal. In considering the meaning of the word "offence" in s. 11(*d*), Kennedy Prov. J. stated at p. 494:

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> The word "offence" is broad enough to apply to any breach or charge whereby an accused can be punished. "Offence" is broad enough to apply to any of the actions taken against members of self-governing professional groups and associations and is also applicable to offences involving breaches of codes of conduct for such groups as police forces and members of the armed services.

24 An equally broad interpretation of the word "offence" appears in *Re Lazarenko (Lazarendo)*[1984] 2 W.W.R. 2429 Alta. L.R. (2d) 28*Re Lazarenko and Law Soc. of Alta.*4 D.L.R. (4th) 389 at 3989 C.R.R. 11450 A.R. 337(Q.B.), subsequently disapproved by the Alberta Court of Appeal in *Fang v. College of Physicians & Surgeons of Alta.*, supra. In *R. v. B & W Agricultural Services Ltd.* (1982), 3 C.R.R. 354(B.C. Prov. Ct.), the accused was charged with a violation of the Aeronautics Act even although his licence had already been suspended for 30 days by an Air Transport Committee. Shupe Prov. J., noting that the term "offence" in s. 11 of the Charter was much broader than the term "criminal offence" in s. 2(*f*) of the Canadian Bill of Rights, R.S.C. 1970, App. III, granted the accused's request for a stay of proceedings based on s. 11(*h*) of the Charter. There is also some academic support for the broader interpretation of the word "offence" in s. 11. Morris Manning in Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982 (1983) states at p. 362 that the breach of a law which carries a penalty is a "penal matter" and is thus an "offence". He adds that the absence of the word "criminal" is indicative of the intent of the framers of the Charter to have s. 11 apply to more than purely criminal offences. At p. 83 in his text on Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources (1982), D.C. McDonald J. states:

> ... "offence" may include ... offences which may be committed only by persons who are members of certain organizations such as the Armed Forces and the Royal Canadian Mounted Police ... The word "offence", which signifies "a breach of law" or "an infraction of law", may be so broad as to include conduct which constitutes a ground upon which, by statute, a professional body may impose discipline upon its members, by disqualification, suspension or a fine.

25 It is my view that the narrower interpretation of s. 11 favoured by the majority of the authorities referred to above is in fact the proper interpretation of the section. The rights guaranteed by s. 11 of the Charter are available to persons prosecuted by the state for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted. A number of factors impel me to this conclusion.

26 I turn first to the text of s. 11. The Ontario Court of Appeal in *Trumbley v. Fleming*198655 O.R. (2d) 57021 Admin. L.R. 23229 D.L.R. (4th) 55724 C.R.R. 333*Trumbley v. Toronto Police Force*15 O.A.C. 279, in concluding that s. 11 is concerned with only criminal or penal matters, properly observed [at p. 583] that "the clear impression created by s. 11, read as a whole, is

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that it is intended to provide procedural safeguards relating to the criminal law process." Section 11 contains terms which are classically associated with criminal proceedings: "tried", "presumed innocent until proven guilty", "reasonable bail", "punishment for the offence", "acquitted of the offence" and "found guilty of the offence". Indeed, some of the rights guaranteed in s. 11 would seem to have no meaning outside the criminal or quasi-criminal context. As Hugessen A.C.J.S.C. stated in *Belhumeur v. Discipline Ctee. of Que. Bar Assn.*, supra, at p. 281, s. 11 [translation] "is directed exclusively at procedure in criminal and penal matters". This same observation was made by Stevenson J.A. in *Re Barry and Alta. Securities Comm.* (1986), 25 D.L.R. (4th) 730 at 734, 24 C.R.R. 9, 67 A.R. 222(C.A.), and by Monnin C.J.M. in *Law Soc. of Man. v. Savino*, supra, at p. 292.

27 The Ontario Court of Appeal in *Trumbley* noted that the legislative history of the section indicates that it was not intended to be restricted solely to criminal law but was meant to extend to "penal proceedings" as well. Section 2(*f*) of the Canadian Bill of Rights reads as follows:

> 2. ... no law of Canada shall be construed or applied so as to
>
> (*f*) deprive *a person charged with a criminal offence* of the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause. [emphasis added.]

Section 2(*f*) differs from s. 11 of the Charter in that it refers to a "criminal offence" whereas the Charter refers only to an "offence". As already mentioned, some authorities see this difference as intended to give s. 11 a broader application than mere "criminal offences": see *R. v. B & W Agricultural Services Ltd.*, supra; Morris Manning, Rights, Freedoms and the Courts. But this leaves open the issue of how much broader the application of s. 11 should be. One possible inference is that the word "criminal" was deleted in order to ensure that s. 11 would also be applicable to summary conviction and provincial offence prosecutions under quasi-criminal public welfare statutes. The Canadian Bill of Rights was a federal statute which had no application to prosecutions of provincial offences created pursuant to s. 92(15) of the Constitution Act, 1867. I would agree with the conclusion of Toy J. in *R. v. Mingo*, supra, at p. 36:

> In my respectful view, the authors of the new Charter, when they employed the unqualified word "offence" as opposed to "criminal offence", were doing nothing more than providing for the equal protection of Canadian citizens from breaches of their rights under provincial as well as federal laws in so far as public as opposed to private or domestic prohibitions were concerned.

The same view was expressed by Monnin C.J.M. in *Law Soc. of Man. v. Savino*, supra, at p. 292:

> Section 11 speaks of a person charged with an offence; its nine subsections deal with criminal matters ...

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> Its main purpose is matters dealing with criminal offences ...
>
> Section 11 certainly was primarily meant to cover crimes or *quasi*-crimes whether under federal or provincial legislation.

28 The marginal note to s. 11 seems to support this interpretation of the section. It reads "Proceedings in criminal and penal matters". The Attorney General of Ontario and the respondent submitted, however, that the court ought not to place any emphasis on the marginal note to s. 11 in interpreting the section. There is no doubt that the traditional view was that marginal notes could not be used as aids to interpretation as they formed no part of the Act which was passed by Parliament: see E.A. Driedger, The Construction of Statutes, 2nd ed. (1983), at p. 133; P.B. Maxwell, Maxwell on the Interpretation of Statutes, 12th ed. (1969), at p. 10; W.F. Craies, Craies on Statute Law, 7th ed. (1971), at p. 195. But reference to marginal notes has been made in some English authorities: see, for example, *Eastern Counties & London & Blackwall Ry. Cos. v. Marriage*18609 H.L. Cas. 32 at 41, 11 E.R. 639; *Sheffield Waterworks Co. v. Bennett*1872L.R. 7 Ex. 409 at 421; and *Stephens v. Cuckfield Rural Dist. Council*, [1960] 2 Q.B. 373, [1960] 3 W.L.R. 248, [1960] 2 All E.R. 716 at 720(C.A.). And this court has used statutory headings to assist in interpreting sections of the Charter: see *L.S.U.C. v. Skapinker*, [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, 8 C.R.R. 193, 3 O.A.C. 321, 53 N.R. 169. In that case, Estey J., writing for a unanimous court, held that the headings were deliberately included as part of the Charter and formed part of the resolution which Parliament debated. At pp. 376-77 he stated:

> It is clear that these headings were systematically and deliberately included as an integral part of the *Charter* for whatever purpose. At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the *Charter*. The extent of the influence of a heading in this process will depend upon many factors including (but the list is not intended to be all-embracing) the degree of difficulty by reason of ambiguity or obscurity in construing the section; the length and complexity of the provision; the apparent homogeneity of the provision appearing under the heading; the use of generic terminology in the heading; the presence or absence of a system of headings which appear to segregate the component elements of the *Charter*; and the relationship of the terminology employed in the heading to the substance of the headlined provision.
>
> ... I conclude that an attempt must be made to bring about a reconciliation of the heading with the section introduced by it. If, however, it becomes apparent that the section when read as a whole is clear and without ambiguity, the heading will not operate to change that clear and unambiguous meaning. Even in that midway position, a court should not, by the adoption of a technical rule of construction, shut itself off from whatever small assistance might be gathered from an examination of the heading as part of the entire constitutional document.

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It must be acknowledged, however, that marginal notes, unlike statutory headings, are not an integral part of the Charter: see *C.P. Ltd. v. A.G. Can.*, [1986] 1 S.C.R. 678 at 682, 11 C.C.E.L. 1, 27 D.L.R. (4th) 1, 86 C.L.L.C. 14,032, 66 N.R. 321 [Fed.]. The case for their utilization as aids to statutory interpretation is accordingly weaker. I believe, however, that the distinction can be adequately recognized by the degree of weight attached to them. I find some support in the marginal note therefore for the proposition that the opening words of s. 11, "charged with an offence", restrict the application of the section to criminal or quasi-criminal proceedings and proceedings giving rise to penal consequences.

29 Another factor which leads me to adopt a somewhat narrow definition of the opening words of s. 11 is a concern for the future coherent development of the section if it is made applicable to a wide variety of proceedings. Unless the section is restricted to criminal or penal matters there may be serious difficulty in giving the section a reasonably consistent application. The particular content of the various rights set out in s. 11 may well vary according to the type of proceeding if a broader definition is given to the opening words of the section. It is beyond question that those rights are accorded to those charged with criminal offences, to those who face the prosecutorial power of the state and who may well suffer a deprivation of liberty as a result of the exercise of that power. The content of those rights ought not to suffer from a lack of predictability or a lack of clarity because of a universal application of the section. As is obvious from a study of the various rights enumerated in the section, they are crucial fundamental rights whose meaning ought to be made crystal clear to the authorities who prosecute the offences falling within the section. For this reason it is, in my view, preferable to restrict s. 11 to the most serious offences known to our law, i.e., criminal and penal matters, and to leave other "offences" subject to the more flexible criteria of "fundamental justice" in s. 7.

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

31 There are many examples of offences which are criminal in nature but which carry relatively minor consequences following conviction. Proceedings in respect of these offences would nevertheless be subject to the protections of s. 11 of the Charter. It cannot be seriously contended that just because a minor traffic offence leads to a very slight consequence, perhaps only a small fine, that offence does not fall within s. 11. It is a criminal or quasi-criminal proceeding. It is the sort of offence which by its very nature must fall within s. 11. I would agree, therefore, with the comments made by Linden J. in *McCutcheon v. Toronto* (1983), 41 O.R. (2d) 652, 20 M.V.R.

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267, 22 M.P.L.R. 139, 147 D.L.R. (3d) 193(H.C.). In that case, the accused claimed the benefit of s. 11 following the alleged commission of a parking offence. At p. 205 Linden J. said:

> This provision of the Charter is available only to persons charged with an offence. On my reading of the by-laws and the legislation, the applicant is such a person, having been charged with offences when the summonses were issued against her ...
>
> There can be no question that parking infractions are "offences" as that word is used in s. 11 of the Charter. The respondents contend that these are not the types of transgressions against society s. 11 of the Charter is directed at, since there is virtually no stigma attached to a parking ticket. In my view, however, the degree of stigma is of no significance.

32 In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity: see, for example, *Law Soc. of Man. v. Savino*, at p. 292; *Malartic Hygrade Gold Mines (Can.) Ltd. v. Ont. Securities Comm.* (1986), 54 O.R. (2d) 544 at 549, 9 O.S.C.B. 2286, 19 Admin. L.R. 21, 27 D.L.R. (4th) 112, 24 C.R.R. 1, 15 O.A.C. 124(Div. Ct.); and *Re Barry and Alta. Securities Comm.*, supra, at p. 736, per Stevenson J.A. There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.

A) "By its nature" test

33 This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matter intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the

B) "True Penal Consequence" test

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limited sphere of activity. In "Annotation to *R. v. Wigglesworth*" 198438 C.R. (3d) 388, at p. 389, Professor Stuart states:

> ... other *punitive* forms of disciplinary measures, such as fines or imprisonment, are indistinguishable from criminal punishment and should surely fall within the protection of s. 11(*h*).

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

34 Before turning to the application of the law to the facts of this case, I want to emphasize that nothing in the above discussion takes away from the possibility that constitutionally guaranteed procedural protections may be available in a particular case under s. 7 of the Charter even although s. 11 is not available. The appellant in this case has chosen to base his case solely on s. 11 of the Charter. In view of this I make no comment on the applicability of s. 7.

35 It is clear that the R.C.M.P. Code of Discipline is concerned with the maintenance of discipline and integrity within the force. It is designed to regulate conduct within a limited private sphere of activity, i.e., conduct relevant to one's position as a member of the R.C.M.P. In considering the

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offences set out in the Royal Canadian Mounted Police Act in *R. v. White*, [1956] S.C.R. 154 at 158, 114 C.C.C. 77, 1 D.L.R. (2d) 305 [B.C.], Rand J. stated:

> ... the delinquencies in s. 30 [of the *Royal Canadian Mounted Police Act*] are strictly of domestic discipline, that is, the member, by joining the Force, has agreed to enter into a body of special relations, to accept certain duties and responsibilities, to submit to certain restrictions upon his freedom of action and conduct and to certain coercive and punitive measures prescribed for enforcing fulfilment of what he has undertaken. These terms are essential elements of a status voluntarily entered into which affect what, by the general law, are civil rights, that is, action and behaviour which is not forbidden him as a citizen.

At p. 168 Abbott J. stated:

> The *Royal Canadian Mounted Police Act* and the regulations made thereunder constitute a code of law regulating the recruitment, administration and discipline of the Force.

36 In *Inkster v. Radey*[1979] 2 F.C. 457*Re Radey and Supt. of R.C.M.P.*47 C.C.C. (2d) 148 at 150(C.A.), Le Dain J. stated:

> The major service offences specified in s. 25 of the Act obviously relate to matters of discipline. They are not, generally speaking, offences of the public character punishable under the *Criminal Code* or other statutes of a criminal law nature, although they might in some cases give rise to prosecution under the criminal law.

It would therefore seem that the proceedings before the Royal Canadian Mounted Police Service Court fail what I have called the "by nature" test. They are neither criminal proceedings nor quasi-criminal proceedings. They do not appear to be the kind of proceedings which fall within the ambit of s. 11. But it is apparent that an officer charged under the Code of Discipline faces a true penal consequence. He or she may be imprisoned for one year pursuant to s. 36(1) of the Royal Canadian Mounted Police Act if he or she is found guilty of a major service offence. As was stated by Joyal J. in *Van Rassel v. Can. (Commr. of R.C.M.P.)*[1987] 1 F.C. 473 at 48431 C.C.C. (3d) 10*Van Rassel v. R.C.M.P.*7 F.T.R. 187(T.D.), a case which also dealt with a s. 11(*h*) claim with respect to proceedings for a major service offence under the Royal Canadian Mounted Police Act, "The statute as a consequence [of the provision for imprisonment] is as much a penal statute as is the *Criminal Code*". This would seem, therefore, to be that unusual case where proceedings have failed the "by nature" test but have passed the "true penal consequence" test. As I have indicated above, in a case of conflict the "by nature" test must give way to the "true penal consequence" test. I find, therefore, that s. 11 applies to proceedings in respect of a major service offence before the Royal Canadian Mounted Police Service Court. Is the appellant entitled then to have the prosecution for the alleged criminal assault stayed on the ground that punishment for that offence would result in double punishment of the appellant for the same offence contrary to s. 11(*h*) of the Charter?

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37 This court in *R. v. Prince*, [1986] 2 S.C.R. 480, [1987] 1 W.W.R. 1, 54 C.R. (3d) 97, 30 C.C.C. (3d) 35, 33 D.L.R. (4th) 724, 45 Man. R. (2d) 93, 70 N.R. 119, recently examined the scope of the rule against multiple convictions enunciated in *Kienapple v. R.*, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 [Ont.]. In *Prince* the accused's single act caused injury to one person and allegedly caused the death of another person. The accused was convicted of causing bodily harm in respect of the injured victim. The court considered whether she could also be tried for manslaughter in respect of the deceased victim. The court held that she could be so tried. In its view, although a single act of the accused grounded both charges, there was not sufficient correspondence between the elements of the two offences to sustain the operation of the rule against multiple convictions. The two offences, the court found, involved distinct elements. In the course of his reasons Dickson C.J.C. discussed the requirement that there be a sufficient nexus between the offences charged before the rule against multiple convictions is triggered. He said at pp. 494-95:

> In my opinion, the weight of authority since *Kienapple* also supports the proposition that there must be sufficient nexus between the offences charged to sustain the rule against multiple convictions. In a unanimous judgment in *McKinney v. The Queen*, [1980] 1 S.C.R. 401, delivered orally by Laskin C.J., the Court saw no reason for interfering with a decision of the Manitoba Court of Appeal ... McKinney and others were charged and convicted of hunting out of season and hunting at night with lights contrary to ss. 16(1) and 19(1), respectively, of the *Wildlife Act*, R.S.M. 1970, c. W140. Both charges arose out of the same hunting incident. O'Sullivan J.A. for the majority held that the case involved two "delicts". Monnin J.A., dissenting on another issue, said that hunting out of season and hunting with lights were two different "matters", totally separate one from the other and not alternative one to the other. The judges of the Court of Appeal all agreed that *Kienapple* was inapplicable. Thus, notwithstanding there was but a single act of hunting, there were distinct delicts, causes or matters which would sustain separate convictions ... If an accused is guilty of several wrongs, there is no injustice in his or her record conforming to that reality.

In the context of proceedings before disciplinary tribunals there is ample authority for the view that disciplinary offences are separate and distinct from criminal offences for the purpose of the rule against multiple convictions: see *Re Pelissero and Loree*1982140 D.L.R. (3d) 676(Ont. Div. Ct.); *MacDonald v. Marriott* 1984 52 B.C.L.R. 346 7 D.L.R. (4th) 697(S.C.); *Van Rassel v. Can.*, supra; *Re Bridges and Bridges*, Ont. Prov. Ct., per Colter Prov. J. (unreported); *R. v. DeBaie* (1983), 60 N.S.R. (2d) 78, 128 A.P.R. 78(C.A.); and *R. v. Belliveau; Belliveau v. Warden of Dorchester Penitentiary* (1984), 55 N.B.R. (2d) 82 at 86, 144 A.P.R. 82(C.A.). In their text on The Doctrine of Res Judicata, 2nd ed. (1969), Spencer Bower and Turner state at pp. 279-80:

> An example is readily found in an inquiry instituted by the disciplinary authority of a professional body, with a view to the expulsion of one against whom conduct infamous in a

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professional respect is alleged. In such a case it may be that the conduct alleged is no more and no less than conduct in respect of which the accused person has already been acquitted by a criminal court on a criminal charge. Neither a conviction nor an acquittal before a criminal court on a criminal charge will bar the use of the same conduct before such a tribunal on an application to suspend or expel; for the purpose of the proceeding is not to punish the practitioner for the commission of an offence as such, but to exercise disciplinary power over the members of a profession so as to ensure that their conduct conforms to the standards of the profession.

38 I would hold that the appellant in this case is not being tried and punished for the same offence. The "offences" are quite different. One is an internal disciplinary matter. The accused has been found guilty of a major offence and has, therefore, accounted to his profession. The other offence is the criminal offence of assault. The accused must now account to society at large for his conduct. He cannot complain, as a member of a special group of individuals subject to private internal discipline, that he ought not to account to society for his wrongdoing. His conduct has a double aspect as a member of the R.C.M.P. and as a member of the public at large. To borrow from the words of the Chief Justice quoted above, I am of the view that the two offences were "two different 'matters', totally separate one from the other and not alternative one to the other". While there was only one act of assault there were two distinct delicts, causes or matters which would sustain separate convictions. I would respectfully adopt the following passage from the reasons of Cameron J.A. in the court below [at pp. 294-95]:

> A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public ... And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers. For example a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal conviction at the behest of the state; to a judgment for damages, at the same instance of the patient; and to an order of discipline on the motion of the governing council of his profession. Similarly, a policeman who assaults a prisoner is answerable to the state for his crime; to the victim for damage he caused; and to the police force for discipline.

39 For these reasons I would dismiss the appeal. I would answer the constitutional questions as follows:

> 1. Is a prosecution by the Crown for the offence of common assault pursuant to s. 245(1) of the *Criminal Code* of Canada, in relation to an act for which the accused has been previously convicted and fined for an offence of unnecessary violence towards a prisoner contrary to s. 25(1) and Part II of the *Royal Canadian Mounted Police Act*, in violation of s. 11(*h*) of the *Canadian Charter of Rights and Freedoms*?

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Found at Tab 51, Volume 9 of Google's BOA.

Normand Martineau *Appellant*

v.

Minister of National Revenue *Respondent*

and

Attorney General of Ontario and Attorney General of Quebec *Interveners*

Normand Martineau *Appelant*

c.

Ministre du Revenu national *Intimé*

et

Procureur général de l'Ontario et procureur général du Québec *Intervenants*

2004 SCC 81 (CanLII)

Indexed as: Martineau *v.* M.N.R.

Neutral citation: 2004 SCC 81.

File No.: 29794.

Hearing and judgment: October 14, 2004.

Reasons delivered: December 16, 2004.

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

Répertorié : Martineau *c.* M.R.N.

Référence neutre : 2004 CSC 81.

N° du greffe : 29794.

Audition et jugement : 14 octobre 2004.

Motifs déposés : 16 décembre 2004.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Self-incrimination — Customs — Notice of ascertained forfeiture — Examination for discovery — Minister of National Revenue upholding decision of customs officer to serve notice of ascertained forfeiture on alleged offender — Offender contesting Minister's decision by way of action pursuant to s. 135 of Customs Act — Motion by Minister to examine offender for discovery allowed — Whether offender may rely on protection against self-incrimination guaranteed by s. 11(c) of Canadian Charter of Rights and Freedoms — Whether offender "person charged with an offence" within meaning of that section — Whether ascertained forfeiture penal in nature — Canadian Charter of Rights and Freedoms, s. 11(c) — Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), ss. 124(1), 135 — Federal Court Rules, 1998, SOR/98-106, r. 236(2).

A customs officer demanded, pursuant to s. 124 of the *Customs Act*, that the appellant pay more than $315,000, that is, the deemed value of goods he allegedly attempted to export by making false statements. The respondent upheld the notice of ascertained forfeiture and the appellant appealed this decision by way of an action

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Auto-incrimination — Douanes — Avis de confiscation compensatoire — Interrogatoire préalable — Ministre du Revenu national confirmant la décision d'un agent de douane de signifier à un présumé contrevenant un avis de confiscation compensatoire — Contrevenant contestant la décision du ministre par voie d'action conformément à l'art. 135 de la Loi sur les douanes — Requête du ministre en vue d'interroger le contrevenant au préalable accordée — Le contrevenant peut-il invoquer la protection contre l'auto-incrimination garantie par l'art. 11c) de la Charte canadienne des droits et libertés? — Le contrevenant est-il un « inculpé » au sens de cet article? — La confiscation compensatoire est-elle une mesure de nature pénale? — Charte canadienne des droits et libertés, art. 11c) — Loi sur les douanes, L.R.C. 1985, ch. 1 (2e suppl.), art. 124(1), 135 — Règles de la Cour fédérale (1998), DORS/98-106, règle 236(2).

Un agent des douanes réclame à l'appelant, en vertu de l'art. 124 de la *Loi sur les douanes*, plus de 315 000 $, soit la valeur présumée des marchandises qu'il aurait tenté d'exporter au moyen de fausses déclarations. L'intimé confirme l'avis de confiscation compensatoire et l'appelant fait appel de cette décision par voie d'action

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 11(*c*), 13, 14, 24(2).
Criminal Code, R.S.C. 1985, c. C-46.
Customs Act, R.S.C. 1970, c. C-40, s. 180(2).
Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), ss. 95, 109.1-109.5, 110, 124-126, 124(1), 129, 130, 131, 135 [am. 1990, c. 8, s. 49], 153(*a*), (*c*), 160 [am. 1993, c. 25, s. 88; c. 44, s. 107], 161.
Federal Court Rules, 1998, SOR/98-106, rr. 236(2), 288.

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Oxford English Dictionary, 2nd ed., vol. XII. Oxford: Clarendon Press, 1989, "proceeding".
Petit Robert 1: Dictionnaire alphabétique et analogique de la langue française. Paris: Le Robert, 1990, "*poursuite*".

APPEAL from a judgment of the Federal Court of Appeal (2003), 310 N.R. 235, [2003] F.C.J. No. 557 (QL), 2003 FCA 176, affirming a decision of the Trial Division (2002), 216 F.T.R. 218, [2002] F.C.J. No. 111 (QL), 2002 FCT 85, affirming a decision of a prothonotary, [2001] F.C.J. No. 1865 (QL), 2001 FCT 1361. Appeal dismissed.

Frédéric Hivon and *Jacques Waite*, for the appellant.

Pierre Cossette and *Yvan Poulin*, for the respondent.

Michel Y. Hélie, for the intervener the Attorney General of Ontario.

Richard Dubois and *Gilles Laporte*, for the intervener the Attorney General of Quebec.

English version of the judgment of the Court delivered by

FISH J. —

I

Introduction

1 The issue in this case is whether the appellant may, in the course of an action under s. 135 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) ("*CA*"), avail himself of the right against self-incrimination

Lois et règlements cités

Charte canadienne des droits et libertés, art. 11*c*), 13, 14, 24(2).
Code criminel, L.R.C. 1985, ch. C-46.
Loi sur les douanes, L.R.C. 1985, ch. 1 (2e suppl.), art. 95, 109.1-109.5, 110, 124-126, 124(1), 129, 130, 131, 135 [mod. 1990, ch. 8, art. 49], 153*a*), *c*), 160 [mod. 1993, ch. 25, art. 88; ch. 44, art. 107], 161.
Loi sur les douanes, S.R.C. 1970, ch. C-40, art. 180(2).
Règles de la Cour fédérale (1998), DORS/98-106, règles 236(2), 288.

Doctrine citée

Oxford English Dictionary, 2nd ed., vol. XII. Oxford : Clarendon Press, 1989, « *proceeding* ».
Petit Robert 1 : Dictionnaire alphabétique et analogique de la langue française. Paris : Le Robert, 1990, « poursuite ».

POURVOI contre un arrêt de la Cour d'appel fédérale (2003), 310 N.R. 235, [2003] A.C.F. no 557 (QL), 2003 CAF 176, qui a confirmé une décision de la Section de première instance (2002), 216 F.T.R. 218, [2002] A.C.F. no 111 (QL), 2002 CFPI 85, confirmant une décision d'un protonotaire, [2001] A.C.F. no 1865 (QL), 2001 CFPI 1361. Pourvoi rejeté.

Frédéric Hivon et *Jacques Waite*, pour l'appelant.

Pierre Cossette et *Yvan Poulin*, pour l'intimé.

Michel Y. Hélie, pour l'intervenant le procureur général de l'Ontario.

Richard Dubois et *Gilles Laporte*, pour l'intervenant le procureur général du Québec.

Le jugement de la Cour a été rendu par

LE JUGE FISH —

I

Introduction

Il s'agit de savoir en l'espèce si l'appelant peut invoquer, dans le cadre d'une action fondée sur l'art. 135 de la *Loi sur les douanes*, L.R.C. 1985, ch. 1 (2e suppl.) (« *LD* »), la protection contre l'auto-

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guaranteed by s. 11(*c*) of the *Canadian Charter of Rights and Freedoms*.

Section 11(*c*) provides that a "person charged with an offence" cannot be compelled to be a witness "in proceedings against that person in respect of the offence". At the conclusion of the hearing, we were all of the opinion that the appellant in this case is not a "person charged with an offence" within the meaning of s. 11 of the *Charter*. The Court therefore dismissed his appeal, stating that the reasons would follow at a later date. Here are those reasons.

II

Facts and Judicial History

On June 25, 1996, a customs officer demanded, by way of a written notice served pursuant to s. 124 of the *CA*, that the appellant pay $315,458, that is, the deemed value of the goods he allegedly attempted to export by making false statements. This set in motion the process commonly referred to as "ascertained forfeiture".

The appellant subsequently exercised the recourse provided for in s. 129 of the *CA*, requesting that the respondent review the customs officer's decision. He submitted his representations to the respondent. The respondent upheld the demand for payment on the ground that the goods had not been reported in accordance with ss. 95 and 153(*a*) and (*c*) of the *CA*. According to the respondent, the goods in question were stolen automobiles.

On September 25, 2001, the appellant appealed the respondent's decision by way of an action, pursuant to s. 135 of the *CA*. He asked that the respondent's decision be varied and replaced by a judgment cancelling the notice demanding payment. He also contested the constitutional validity of a number of provisions of the *CA*.

Before filing a defence, the respondent filed a notice of motion for the purpose of examining the appellant for discovery pursuant to Rule 236(2) of the *Federal Court Rules, 1998*, SOR/98-106 ("*FCR*"). The appellant contested the motion on the ground that it would violate his right against self-incrimination under s. 11(*c*) of the *Charter*.

incrimination que lui garantit l'al. 11*c*) de la *Charte canadienne des droits et libertés*.

2 L'alinéa 11*c*) prévoit qu'un « inculpé » ne peut pas être contraint de témoigner contre lui-même « dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche ». Au terme de l'audience, nous étions tous d'avis que l'appelant n'est pas, dans l'action ici en cause, un « inculpé » au sens de l'art. 11 de la *Charte*. La Cour a donc rejeté son pourvoi en précisant que les motifs seraient déposés ultérieurement. Voici ces motifs.

II

Faits et historique judiciaire

3 Le 25 juin 1996, un agent des douanes réclame à l'appelant, par avis écrit conformément à l'art. 124 de la *LD*, la somme de 315 458 $, soit la valeur présumée des marchandises qu'il aurait tenté d'exporter au moyen de fausses déclarations. S'enclenche par le fait même le processus communément qualifié de « confiscation compensatoire ».

4 L'appelant exerce ensuite le recours prévu par l'art. 129 de la *LD* et demande à l'intimé de réviser la décision de l'agent des douanes. Il fait parvenir ses prétentions à l'intimé. Ce dernier confirme alors la réclamation pour le motif que les marchandises n'ont pas été déclarées conformément à l'art. 95 et aux al. 153*a*) et *c*) de la *LD*. Il s'agissait, selon l'intimé, d'automobiles volées.

5 Le 25 septembre 2001, l'appelant fait appel de la décision de l'intimé par voie d'action intentée en vertu de l'art. 135 de la *LD*. Il demande ainsi que la décision de l'intimé soit modifiée et remplacée par un jugement annulant l'avis de réclamation. De même, il conteste la constitutionnalité de plusieurs dispositions de la *LD*.

6 Avant de déposer sa défense, l'intimé présente un avis de requête pour interroger l'appelant au préalable en vertu du par. 236(2) des *Règles de la Cour fédérale (1998)*, DORS/98-106 (« *RCF* »). L'appelant s'oppose à la requête pour le motif qu'elle irait à l'encontre de la protection contre l'auto-incrimination garantie par l'al. 11*c*) de la *Charte*.

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IV

Issue

The issue in this case is whether Rule 236(2) of the *FCR* violates s. 11(*c*) of the *Charter* by requiring a plaintiff in an action under s. 135 of the *CA* to submit to an examination for discovery.

V

Analysis

A. *Is the Appellant a "Person Charged With an Offence" Within the Meaning of Section 11 of the Charter?*

Section 11(*c*) of the *Charter* reads as follows:

11. Any person charged with an offence has the right

. . .

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

11. Tout inculpé a le droit :

. . .

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

In *Wigglesworth*, *supra*, at p. 554, Wilson J., writing for the majority, interpreted the expression "person charged with an offence" to limit its application to "public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences". She stated that a matter falls within s. 11 of the *Charter* where, first, by its very nature it is a criminal proceeding or, second, a conviction in respect of the offence may lead to a true penal consequence (*Wigglesworth*, at p. 559).

Section 124 of the *CA* must therefore be considered in light of these two tests.

IV

Question en litige

17 Il s'agit de déterminer en l'espèce si la règle 236(2) des *RCF* viole l'al. 11*c*) de la *Charte* dans la mesure où elle oblige un demandeur dans une action fondée sur l'art. 135 de la *LD* à subir un interrogatoire préalable.

V

Analyse

A. *L'appelant est-il un « inculpé » au sens de l'art. 11 de la Charte?*

18 L'alinéa 11*c*) de la *Charte* dispose :

11. Tout inculpé a le droit :

. . .

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

11. Any person charged with an offence has the right

. . .

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

19 Dans l'arrêt *Wigglesworth*, précité, p. 554, la juge Wilson, écrivant au nom des juges majoritaires, a interprété la notion d'« inculpé » de façon à en limiter l'application aux « infractions publiques comportant des sanctions punitives, c.-à-d. des infractions criminelles, quasi criminelles et de nature réglementaire ». Elle a précisé qu'une affaire relève de l'art. 11 de la *Charte* lorsque, premièrement, de par sa nature même, il s'agit d'une procédure criminelle ou, deuxièmement, une déclaration de culpabilité relativement à l'infraction est susceptible d'entraîner une véritable conséquence pénale (*Wigglesworth*, p. 559).

20 Il y a donc lieu d'examiner, en fonction de ces deux critères, l'art. 124 de la *LD*.

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(1) Does Section 124 of the *CA* Provide for a Penal Proceeding?

21 When a matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, it falls, by its very nature, within s. 11 of the *Charter*. This is clearly true of federal prosecutions under the *Criminal Code*, R.S.C. 1985, c. C-46, and of prosecutions of quasi-criminal offences under provincial legislation.

22 By contrast, proceedings of an administrative — private, internal or disciplinary — nature instituted for the protection of the public in accordance with the policy of a statute are not penal in nature (*Wigglesworth*, *supra*, at p. 560).

23 A distinction must therefore be drawn between penal proceedings on the one hand and administrative proceedings on the other. Only penal proceedings attract the application of s. 11 of the *Charter*.

24 To determine the nature of the proceeding, the case law must be reviewed in light of the following criteria: (1) the objectives of the *CA* and of s. 124 thereof; (2) the purpose of the sanction; and (3) the process leading to imposition of the sanction.

(i) *Objectives of the CA and of Section 124*

25 The objectives of the *CA* are to regulate, oversee and control cross-border movements of people and goods. As Dickson C.J. stated in *R. v. Simmons*, [1988] 2 S.C.R. 495, at p. 528: "It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role." To this end, the *CA* provides for the collection of duties and taxes on imported goods.

26 The attainment of these objectives depends on the effectiveness of the voluntary or self-reporting system provided for in the *CA*. To enforce the *CA*,

(1) L'article 124 de la *LD* prescrit-il une procédure de nature pénale?

Lorsqu'une affaire est de nature publique et vise à promouvoir l'ordre et le bien-être publics dans une sphère d'activité publique, alors, de par sa nature même, elle relève de l'art. 11 de la *Charte*. Manifestement, il en est ainsi des poursuites fédérales régies par le *Code criminel*, L.R.C. 1985, ch. C-46, et de celles pour les infractions quasi criminelles créées par les lois provinciales.

Par contre, les procédures de nature administrative — privées, internes ou disciplinaires — engagées pour protéger le public conformément à la politique générale d'une loi ne sont pas de nature pénale (*Wigglesworth*, précité, p. 560).

Il convient donc de distinguer, d'une part, les procédures pénales et, d'autre part, les procédures administratives. Seules les procédures pénales entraînent l'application de l'art. 11 de la *Charte*.

Pour déterminer la nature de la procédure, un examen de la jurisprudence sous l'éclairage des critères suivants s'impose : (1) les objectifs de la *LD* et de son art. 124; (2) le but visé par la sanction; (3) le processus menant à la sanction.

(i) *Les objectifs de la LD et de son art. 124*

La *LD* a pour objectifs de régir, d'encadrer et de contrôler la circulation transfrontalière des personnes et des marchandises. En effet, comme l'a indiqué le juge en chef Dickson dans l'arrêt *R. c. Simmons*, [1988] 2 R.C.S. 495, p. 528 : « Il est communément reconnu que les États souverains ont le droit de contrôler à la fois les personnes et les effets qui entrent dans leur territoire. On s'attend à ce que l'État joue ce rôle pour le bien-être général de la nation. » La *LD* prévoit à cette fin la perception de droits et de taxes sur les marchandises importées.

La réalisation de ces objectifs dépend de l'efficacité du système d'autodéclaration ou de déclaration volontaire prévu par la *LD*. Pour assurer le respect

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Parliament has implemented civil and penal mechanisms.

The civil mechanisms include the seizure as forfeit of goods and conveyances (s. 110 of the *CA*), the demand by written notice or "ascertained forfeiture" (ss. 124 to 126 of the *CA*), and the imposition of administrative penalties (ss. 109.1 to 109.5 of the *CA*). The penal mechanisms, properly so called, are provided for in ss. 160 and 161 of the *CA*.

The offence imputed to the appellant, that he made false statements (ss. 95 and 153(*a*) and (*c*) of the *CA*), may give rise to a notice demanding payment (s. 124 of the *CA*), to criminal prosecution by way of summary conviction or indictment (s. 160 of the *CA*), or to both a demand for payment and criminal prosecution. On this basis, the appellant argues that a distinction as regards the nature of the imputed offence cannot be drawn based solely on the respondent's choice of proceeding (civil or penal). Thus, since the offence may have penal consequences, it must be considered penal in nature.

This argument must be rejected.

As stated by McLachlin J. (as she then was) in *R. v. Shubley*, [1990] 1 S.C.R. 3, at pp. 18-19: "The question of whether proceedings are criminal in nature is concerned not with the nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves" (emphasis added).

In the case at bar, the fact that the false statements could result in criminal prosecution does not in itself mean that a notice of ascertained forfeiture can properly be characterized as a penal proceeding. The fact that a single violation can give rise to both a notice of ascertained forfeiture and a criminal prosecution is irrelevant. The appropriate test is the nature of the proceedings, not the nature of the act.

Cameron J.A. of the Saskatchewan Court of Appeal stated the following (quoted with approval in *Wigglesworth*, *supra*, at p. 566):

de la *LD*, le législateur a mis en place des mécanismes civils et pénaux.

27 Les mécanismes civils comprennent la saisie à titre de confiscation de marchandises et de moyens de transport (art. 110 de la *LD*), la réclamation par avis écrit ou « confiscation compensatoire » (art. 124 à 126 de la *LD*) et l'infliction de pénalités administratives (art. 109.1 à 109.5 de la *LD*). Pour leur part, les mécanismes pénaux, proprement dits, sont prévus aux art. 160 et 161 de la *LD*.

28 L'infraction reprochée à l'appelant, celle d'avoir fait de fausses déclarations (art. 95 et al. 153*a*) et *c*) de la *LD*), peut donner lieu à un avis de réclamation (art. 124 de la *LD*) ou à une poursuite criminelle par voie sommaire ou par voie de mise en accusation (art. 160 de la *LD*), ou encore, à une réclamation et à une poursuite criminelle. Fort de ce fait, l'appelant soutient qu'on ne peut distinguer la nature de l'infraction reprochée uniquement en raison du choix du mode de poursuite (civil ou pénal) de l'intimé. Ainsi, du fait qu'elle peut entraîner des conséquences pénales, l'infraction doit être considérée comme étant de nature pénale.

29 Cet argument doit être rejeté.

30 Comme l'indique la juge McLachlin (maintenant Juge en chef) dans l'arrêt *R. c. Shubley*, [1990] 1 R.C.S. 3, p. 18-19 : « La détermination du caractère criminel des procédures dépend non pas de la nature de l'acte qui est à l'origine de ces procédures, mais de la nature des procédures elles-mêmes » (je souligne).

31 Dans la présente affaire, le risque que les fausses déclarations entraînent des poursuites criminelles ne permet pas, en soi, de qualifier de recours pénal le mécanisme d'avis de confiscation compensatoire. La possibilité que la même infraction donne lieu à la fois à un avis de confiscation compensatoire et à une poursuite criminelle n'est pas pertinente. Le critère approprié est celui de la nature des procédures et non celui de la nature de l'acte.

32 En effet, comme l'a indiqué le juge Cameron de la Cour d'appel de la Saskatchewan (cité avec approbation dans l'arrêt *Wigglesworth*, précité, p. 566) :

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A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public. At the same time, the act may, if it involves injury and a breach of one's duty to another, constitute a private cause of action for damages for which the actor must answer to the person he injured. And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers.

(*R. v. Wigglesworth* (1984), 31 Sask. R. 153, at para. 11)

(ii) *Purpose of the Notice of Ascertained Forfeiture*

33 In principle, ascertained forfeiture is a civil collection mechanism. It is used where it would be difficult or even impossible to seize goods in respect of which a customs officer believes on reasonable grounds that an offence has been committed. In such cases, rather than seizing the goods as forfeit (an *in rem* proceeding), the officer may demand payment of an amount of money that is determined according to the value of the goods in question.

34 In the instant case, the appellant submits that the purpose of ascertained forfeiture, like that of a criminal prosecution, is to punish the offender in order to produce a deterrent effect and redress a wrong done to society.

35 This argument must fail for three reasons.

36 First, the purpose of a forfeiture mechanism is to ensure compliance with the *CA* by giving customs officers a timely and effective means of enforcing it. This mechanism is not designed to punish the offender. If the offender were not the actual owner of the seized property, he or she would not, in principle, be punished by the forfeiture thereof.

37 A notice of ascertained forfeiture is served only where the property cannot be seized because, for example, it has already been exported. Only then

[TRADUCTION] Il est possible qu'un acte unique comporte plus d'un aspect et entraîne plus d'une conséquence juridique. S'il constitue un manquement à une obligation envers la société, il peut équivaloir à un crime dont l'auteur est responsable envers le public. S'il y a eu blessure et manquement à une obligation envers autrui, le même acte peut donner lieu à une action en dommages-intérêts intentée par la personne à qui l'auteur de l'acte a causé un préjudice. Le même acte peut comporter un autre aspect, c'est-à-dire le manquement aux obligations découlant de l'exercice d'une fonction ou d'une profession, auquel cas l'auteur doit s'expliquer devant ses pairs.

(*R. c. Wigglesworth* (1984), 31 Sask. R. 153, par. 11)

(ii) *Le but visé par l'avis de confiscation compensatoire*

En principe, la confiscation compensatoire est un mécanisme de recouvrement civil. Elle a lieu lorsqu'il est difficile ou impossible de saisir les marchandises à l'égard desquelles un agent des douanes a des motifs raisonnables de croire qu'une infraction a été commise. Le cas échéant, l'agent peut réclamer, en lieu et place de la saisie à titre de confiscation (une procédure *in rem*), le paiement d'une somme d'argent dont le montant est établi en fonction de la valeur des marchandises en question.

En l'espèce, l'appelant soutient que le but de la confiscation compensatoire, tout comme celui de la poursuite criminelle, est de punir le contrevenant afin de produire un effet dissuasif et de réparer un tort causé à la société.

Cet argument échoue, et ce, pour trois raisons.

Premièrement, le but des mécanismes de confiscation est d'assurer le respect de la *LD* en dotant les agents des douanes de moyens rapides et efficaces d'en assurer l'application. Ce mécanisme n'a pas pour objet de punir le contrevenant. En effet, si le contrevenant n'était pas lui-même propriétaire des biens saisis, il ne serait pas, en principe, puni par leur confiscation.

L'avis de confiscation compensatoire n'est signifié que dans les cas où les biens ne peuvent pas être saisis, par exemple, lorsqu'ils ont déjà été exportés.

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is the offender, who is not necessarily the owner of the property, directly exposed to civil consequences. Thus, although ascertained forfeiture may in some cases have the effect of "punishing" the offender, that is not its purpose.

Second, it is true that ascertained forfeiture is intended to produce a deterrent effect. This is completely understandable in a self-reporting system. Fraud must be discouraged, and offences punished severely, for the system to be viable. However, actions in civil liability and disciplinary proceedings, which are also aimed at deterring potential offenders, nevertheless do not constitute criminal proceedings.

Third, there is nothing that would indicate that the objective of ascertained forfeiture is to redress a wrong done to society. For example, s. 124 of the *CA* does not in any way take into account the principles of criminal liability or sentencing. I will address this point in greater detail in the next section.

(iii) *The Ascertained Forfeiture Process*

Ascertained forfeiture involves a four-step administrative process.

First, under s. 124 of the *CA*, a customs officer must have reasonable grounds to believe that a provision of the *CA* has been contravened. Once this precondition has been met, and once it has been established that it would be difficult to seize the goods and conveyances related to the customs offence, the officer may demand that the offender pay an amount of money equal to the value of the goods.

Second, the person to whom a notice of ascertained forfeiture applies has 90 days to ask the Minister to review the customs officer's decision (s. 129(1)(*d*) of the *CA*). The Minister then serves notice of the reasons in support of the imposed sanction (s. 130(1) of the *CA*). Within 30 days after notice of the reasons is served, the alleged offender may make submissions and give evidence,

Ce n'est qu'à ce moment que le contrevenant, qui n'est pas nécessairement le propriétaire des biens, s'expose directement à des conséquences civiles. Ainsi, bien que la confiscation compensatoire puisse parfois avoir pour effet de punir en quelque sorte le contrevenant, tel n'est pas son objet.

38 Deuxièmement, il est exact d'affirmer que la confiscation compensatoire vise à produire un effet dissuasif. Cela est tout à fait compréhensible dans un système d'autodéclaration. La fraude doit être découragée et les infractions sévèrement punies pour assurer la viabilité du régime. Toutefois, les poursuites en responsabilité civile et les instances disciplinaires visent aussi à dissuader d'éventuels contrevenants. Elles ne constituent pas pour autant des procédures criminelles.

39 Troisièmement, rien n'indique que la confiscation compensatoire a pour objet de réparer un tort causé à la société. En effet, à titre d'exemple, l'art. 124 de la *LD* ne tient aucunement compte des principes de responsabilité pénale et des principes de détermination de la peine. Je traiterai davantage de ce dernier point dans la prochaine section.

(iii) *Le processus de confiscation compensatoire*

40 Le processus administratif de confiscation compensatoire comporte quatre étapes.

41 En premier lieu, en vertu de l'art. 124 de la *LD*, l'agent des douanes doit avoir des motifs raisonnables de croire qu'une infraction à la *LD* a été commise. Cette condition préliminaire remplie, et après avoir constaté la difficulté de saisir les marchandises et les moyens de transport liés à l'infraction douanière, l'agent peut exiger du contrevenant un montant égal à la valeur de ces biens.

42 En deuxième lieu, la personne visée par un avis de confiscation compensatoire peut, dans un délai de 90 jours, demander au ministre de réviser la décision de l'agent des douanes (al. 129(1)*d*) de la *LD*). Le ministre communique alors les motifs qui appuient la sanction appliquée (par. 130(1) de la *LD*). Dans les 30 jours suivant la communication des motifs, le présumé contrevenant peut faire valoir ses

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the nature of the sanction imposed on Amway are necessarily restricted in scope.

54 A number of judgments in tax matters support the conclusion that an administrative sanction is not penal in nature: see, *inter alia*, *R. v. Yes Holdings Ltd.* (1987), 48 D.L.R. (4th) 642 (Alta. C.A.); *R. v. Luchuk* (1987), 18 B.C.L.R. (2d) 301 (C.A.); *Lavers v. British Columbia (Minister of Finance)* (1989), 41 B.C.L.R. (2d) 307 (C.A.). In *Time Data Recorder International Ltd. v. Canada (Minister of National Revenue)*, [1997] F.C.J. No. 475 (QL) (C.A.), at para. 12, Pratte J.A. correctly summarized the Canadian case law on the subject as follows: "It is common ground that seizures and forfeitures under the Customs Act are not criminal but civil proceedings and penalties."

55 The case law of the United States Supreme Court has for quite some time been to the same effect. According to Brandeis J. in *Helvering v. Mitchell*, 303 U.S. 391 (1938), at p. 400, the forfeiture of goods or their value and any other monetary sanctions provided for under tax legislation are civil in nature, regardless of their severity:

> Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789. . . . In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.

56 For these reasons, I find that the notice of ascertained forfeiture is not penal in nature, but is rather an administrative measure intended to provide a timely and effective means of enforcing the *CA*.

(2) Does the Written Notice Demanding Payment Under Section 124 of the *CA* Constitute a True Penal Consequence?

57 In *Wigglesworth*, *supra*, at p. 561, Wilson J. wrote that "a true penal consequence which would attract the application of s. 11 [of the *Charter*] is

être un témoin, ses commentaires sur la nature de la sanction infligée à Amway ont forcément une portée restreinte.

Nombre de jugements rendus en matière fiscale étayent la conclusion qu'une sanction administrative n'est pas de nature pénale : voir, par exemple, *R. c. Yes Holdings Ltd.* (1987), 48 D.L.R. (4th) 642 (C.A. Alb.); *R. c. Luchuk* (1987), 18 B.C.L.R. (2d) 301 (C.A.); *Lavers c. British Columbia (Minister of Finance)* (1989), 41 B.C.L.R. (2d) 307 (C.A.). Dans l'arrêt *Time Data Recorder International Ltd. c. Canada (Ministre du Revenu national)*, [1997] A.C.F. nº 475 (QL) (C.A.), par. 12, le juge Pratte résume bien la jurisprudence canadienne à ce sujet : « Il est constant que les saisies et confiscations opérées sous le régime de la Loi sur les douanes ne sont pas de nature pénale, mais civile. »

La jurisprudence de la Cour suprême des États-Unis va dans le même sens, et ce, depuis fort longtemps. Il ressort de l'opinion du juge Brandeis, dans l'arrêt *Helvering c. Mitchell*, 303 U.S. 391 (1938), p. 400, que la confiscation de biens ou de leur valeur ainsi que les autres sanctions financières prévues par les lois fiscales sont de nature civile, et ce, malgré leur sévérité :

> [TRADUCTION] La confiscation de biens ou de leur valeur et le paiement de sommes fixes ou variables sont d'autres sanctions reconnues, depuis la première loi fiscale de 1789, comme des sanctions dont l'exécution relève de la procédure civile. [. . .] Malgré leur sévérité relative, ces sanctions ont résisté à l'argument voulant qu'elles soient essentiellement de nature criminelle et assujetties aux règles de procédure applicables aux poursuites criminelles.

Pour tous ces motifs, j'estime que l'avis de confiscation compensatoire est non pas un mécanisme de nature pénale, mais plutôt une mesure administrative visant à assurer le respect de la *LD* de façon rapide et efficace.

(2) La réclamation par avis écrit prévue à l'art. 124 de la *LD* constitue-t-elle une véritable conséquence pénale?

Dans l'arrêt *Wigglesworth*, précité, p. 561, la juge Wilson a écrit : « une véritable conséquence pénale qui entraînerait l'application de l'art. 11 [de

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imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity". In her view, in the rare cases where the two tests conflict, the "by nature" test must give way to the "true penal consequence" test (*Wigglesworth*, *supra*, at p. 561).

Wigglesworth is one example of this sort of unusual situation. In that case, the Court held that proceedings before the Royal Canadian Mounted Police Service Court failed the "by nature" test. However, since the accused was liable to imprisonment for a term of one year, he faced a true penal consequence.

In the case at bar, the appellant, unlike Mr. Wigglesworth, does not face imprisonment should he be found to have contravened the *CA*.

It remains to be determined whether the payment of $315,458 demanded pursuant to s. 124 of the *CA* constitutes a fine that, by its magnitude, is imposed for the purpose of redressing a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness of customs requirements.

(i) *Magnitude of the Fine*

The appellant's main argument in this regard is based on the magnitude of the amount claimed. He contends that $315,458 is six times greater than the maximum fine that could be imposed on him upon summary conviction under s. 160(*a*) of the *CA* and that it accordingly constitutes a true penal consequence.

This argument is based on a false premise. There can be no doubt that the amount of $315,458 demanded from the appellant is greater than the sanction he would face in a summary conviction prosecution. However, if the appellant had been proceeded against by way of indictment, the maximum fine would have been $500,000 (s. 160(*b*) of the *CA*). In either case, moreover, the fine does not

la *Charte*] est l'emprisonnement ou une amende qui par son importance semblerait imposée dans le but de réparer le tort causé à la société en général plutôt que pour maintenir la discipline à l'intérieur d'une sphère d'activité limitée ». Selon la juge Wilson, dans les rares cas où il y a conflit entre les deux critères, le critère de la « nature même » doit céder le pas à celui de la « véritable conséquence pénale » (*Wigglesworth*, précité, p. 561-562).

58 L'arrêt *Wigglesworth* nous fournit un exemple de ce type de situation inusitée. En effet, dans cette affaire, la Cour a jugé que les procédures engagées devant le tribunal du service de la Gendarmerie royale du Canada ne satisfaisaient pas au critère de la « nature même ». Néanmoins, vu qu'il était passible d'un an d'emprisonnement, l'accusé était tout de même exposé à une véritable conséquence pénale.

59 Dans le cas présent, contrairement à celui de M. Wigglesworth, l'appelant ne risque pas d'être emprisonné s'il s'avère qu'il a effectivement contrevenu à la *LD*.

60 Reste donc la question de savoir si le paiement de 315 458 $ exigé en vertu de l'art. 124 de la *LD* constitue une amende qui, par son importance, est infligée dans le but de réparer le tort causé à la société en général plutôt que dans celui de maintenir l'efficacité des exigences douanières.

(i) *L'importance de l'amende*

61 L'argument principal de l'appelant à cet égard est fondé sur l'importance du montant réclamé. En effet, il soutient que la somme de 315 458 $ est six fois plus élevée que l'amende maximale qui pourrait lui être infligée à l'issue d'une poursuite sommaire fondée sur l'al. 160*a*) de la *LD*. Il s'agirait donc d'une véritable conséquence pénale.

62 Cet argument repose sur une fausse prémisse. Il est certes vrai que la somme de 315 458 $ réclamée à l'appelant est supérieure à la sanction à laquelle l'exposerait une poursuite par voie sommaire. Toutefois, si l'appelant était poursuivi par voie de mise en accusation, l'amende maximale serait de 500 000 $ (al. 160*b*) de la *LD*). Qui plus est, dans un cas comme dans l'autre, l'amende ne remplace pas la

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replace the ascertained forfeiture. These are two distinct consequences that are completely independent of each other. One of them, the fine, is clearly penal in nature and thus takes into account the relevant factors and principles governing sentencing; the other, being civil in nature and purely economic, is instead arrived at by a simple mathematical calculation.

63 In addition, forfeiture is an *in rem* proceeding in which the subject is the thing itself. In such a proceeding, the guilt or innocence of the owner of the forfeited property is irrelevant. The notice of ascertained forfeiture, the amount of which is established based on the estimated value of the property, is the necessary counterpart of this *in rem* proceeding. If the property is subsequently seized, the notice will be immediately cancelled (s. 125 of the *CA*).

(ii) *Redressing a Wrong Done to Society*

64 Unlike a criminal conviction, the demand by written notice stigmatizes no one.

65 As has just been seen, the principles of criminal liability and sentencing are totally irrelevant when fixing the amount to be demanded. Such a notice does not result in a criminal record for either the offender or the owner of the property. Its purpose is neither to punish the offender nor to elicit societal condemnation. In short, the notice of ascertained forfeiture has neither the appearance nor the distinctive characteristics of a sanction intended to "redress a wrong done to society".

66 To sum up, the notice of ascertained forfeiture does not lead to true penal consequences for the appellant. He cannot be characterized as a "person charged with an offence" within the meaning of s. 11(*c*) of the *Charter* and therefore cannot benefit from its protection in this case.

B. *Is the Appellant Compelled to Be a Witness in Proceedings Against Him in Respect of an Offence With Which He Is Charged, Contrary to Section 11(c) of the Charter?*

67 As the appellant is not a "person charged with an offence" within the meaning of s. 11 of the *Charter*, there is in principle no need to consider the scope of

confiscation compensatoire : il s'agit de deux conséquences distinctes dont l'une ne dépend aucunement de l'autre. L'une, l'amende, est manifestement pénale et tient donc compte des facteurs et des principes pertinents en matière de détermination de la peine; l'autre, de nature civile et purement économique, est plutôt déterminée par un simple calcul mathématique.

En outre, la confiscation est une procédure *in rem* qui vise la « chose elle-même ». Une telle procédure n'a rien à voir avec la culpabilité ou l'innocence du propriétaire des biens confisqués. L'avis de confiscation compensatoire, dont le montant est établi en fonction de la valeur estimée de ces biens, est le pendant nécessaire de cette procédure *in rem*. De plus, si les biens sont par la suite saisis, l'avis sera dès lors annulé (art. 125 de la *LD*).

(ii) *La réparation d'un tort causé à la société*

Contrairement à une condamnation criminelle, la réclamation par avis écrit ne stigmatise personne.

Comme nous venons de le voir, les principes de responsabilité pénale et de détermination de la peine n'entrent nullement en jeu pour fixer le montant réclamé. Un tel avis ne crée aucun casier judiciaire ni pour le contrevenant, ni pour le propriétaire des biens. Il n'a pas pour but de punir le contrevenant ou de susciter la réprobation sociale. Bref, l'avis de confiscation compensatoire n'a ni l'apparence ni les caractéristiques distinctives de la « réparation d'un tort causé à la société ».

Somme toute, l'avis de confiscation compensatoire n'entraîne pas de véritables conséquences pénales pour l'appelant. Ce dernier ne peut pas être qualifié d'« inculpé » au sens de l'al. 11*c*) de la *Charte* et ne peut donc pas bénéficier de la protection en l'espèce.

B. *L'appelant est-il contraint de témoigner contre lui-même dans une poursuite intentée contre lui pour une infraction qu'on lui reproche, en contravention de l'al. 11c) de la Charte?*

L'appelant n'étant pas un « inculpé » au sens de l'art. 11 de la *Charte*, il ne serait pas nécessaire, en principe, de se pencher sur la portée de l'al. 11*c*). Il

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Found at **Tab 72, Volume 14** of Google's BOA.

NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Cross***, 2006 NSCA 30

Leave to Appeal Refused: 2006 CanLII 29077 (SCC)

Date: 20060309
Docket: CAC 251898
Registry: Halifax

2006 NSCA 30 (CanLII)

Between:

Her Majesty the Queen

Appellant

v.

James Everett Cross

Respondent

Judges: MacDonald, C.J.N.S.; Roscoe and Bateman, JJ.A.

Appeal Heard: February 13, 2006, in Halifax, Nova Scotia

Held: Appeal allowed per reasons for judgment of Bateman, J.A.; MacDonald, C.J.N.S. and Roscoe, J.A. concurring.

Counsel: Daniel A. MacRury, Q.C., for the appellant
Roger Burrill, for the respondent

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Reasons for judgment:

[1] This is an appeal from the Order of Judge James H. Burrill of the Provincial Court refusing an application by the Crown for an order requiring Mr. Cross to comply with the requirements of the **Sex Offender Registration Information Act** which are contained in S.C. 2004, c. 10. The decision is reported as **R. v. Cross** (2005), 235 N.S.R. (2d) 93; N.S.J. No. 263 (Q.L.).

BACKGROUND:

[2] The facts and issues before the Court were summarized by the trial judge as follows:

> **[2]** James Everett Cross, was found guilty of assault (S. 266(a) **C.C.**), sexual assault (S. 271 **C.C.**) and unlawful confinement (279(2) **C.C.**). The offences occurred on May 7, 2002, he was convicted on June 23, 2004 and after several adjournments the matter was before me for sentencing on January 6, 2005. Mr. Cross was sentenced to 42 months imprisonment. The Crown sought an order under the **S.O.I.R.A.**, but the defence objected on the basis that it would violate s. 11(i) of the **Canadian Charter of Rights and Freedoms**.
>
> . . .
>
> **[4]** Section 11(i) of the **Charter** provides that:
>
> > Any person charged with an offence has the right
> >
> > (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.
>
> **[5]** Obviously the offences committed by Mr. Cross occurred prior to the proclamation of the **S.O.I.R.A.** The issue is whether the requirements of the legislation constitute a "punishment" within the meaning of s. 11(i).
>
> **[6]** The defence argues that they do and that s. 11(i) exempts Mr. Cross from a registration order. The Crown argues that the requirements of a registration order made pursuant to the **S.O.I.R.A.** do not constitute a "punishment" and, therefore, do not violate section

> 11(i). The Crown asks the court to impose a registration order in Form 52.
>
> (Emphasis added)

[3] "**S.O.I.R.A.**" in the extract above refers to the **Sex Offender Information Registration Act**. That **Act** creates a sex offender registry, specifies the information to be collected in the registry and addresses the control of that information. Related sections of the **Criminal Code** authorize an application for a sex offender registration order and provide an exemption provision. In this judgment I will use **SOIRA** to refer, collectively, to the **Act** and the companion provisions of the **Criminal Code**. The judge concluded that a **SOIRA** order is a "punishment" and could not be made in relation to Mr. Cross as it would violate s.11(i) of the **Charte**r:

> 11. Any person charged with an offence has the right
>
> . . .
>
> (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[4] There is a single issue on this appeal. The Crown says the judge erred at law in ruling the order under s.490.012 of the **Criminal Code** is "punishment" within the meaning of s.11(i) of the **Canadian Charter of Rights**. The standard of review is correctness.

[5] For the reasons set out below, it is my view that the appeal must be allowed.

ANALYSIS:

[6] The **SOIRA** sections of the **Code** which are relevant here provide:

> **490.012 (1)** A court shall, on application of the prosecutor, make an order in Form 52 requiring a person to comply with the *Sex Offender Information Registration Act* for the applicable period specified in subsection 490.013(2), (3) or (4) as soon as possible after it imposes a sentence on the person for an offence referred to in paragraph (a), (c), (d) or (e) of the definition "designated offence" in subsection

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[30] Helpful here is her consideration of whether the R.C.M.P. proceeding was "in respect of a criminal or penal matter". She rejected an analysis which was based solely upon the harshness of the sanction (p. 559 "There are many examples of offences which are criminal in nature but which carry relatively minor consequences following conviction. ...") and, instead, asked whether consequences were "truly penal in nature" (*per* Wilson, J. for the majority, at p. 560 S.C.R.:

> This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity. ...

[31] This lends support to the objective analysis adopted by McDonald, J. in **R. v. T.R., supra**. The nature of the consequence is initially assessed in the context of the purpose of the measure in question, which in **Wigglesworth** was the regulation of conduct within the R.C.M.P. Notwithstanding its stated purpose, if the sanction is of such magnitude that it appears to be directed at redressing a wrong done to society it will be considered "a true penal consequence".

[32] In **R. v. Shubley**, [1990] 1 S.C.R. 3; S.C.J. No. 1 (Q.L.), in determining whether internal prison disciplinary proceedings engaged the double jeopardy section of the **Charter**, McLachlin, J. (as she then was), for the majority, considered the nature of the proceeding and concluded that the purpose of the disciplinary proceedings was not "to mete out criminal punishment, but to maintain order in the prison." (p. 20). She endorsed Wilson, J.'s caution in **Wigglesworth**, **supra**, against too broad an application of s. 11 (at p. 23).

[33] While in **Wigglesworth** and **Shubley** the Court was concerned with an over-expansive interpretation of "offence" as used in the opening words of s. 11, I

Found at **Tab 14, Volume 1** of Google's BOA.

PUBLIC 114

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Facing the Consequences: Should the *Charter* Apply to Administrative Proceedings Involving Monetary Penalties?

Doug McLeod[*]

Canadian regulators have increasingly adopted the practice of imposing administrative monetary penalties, or "AMPs", as a sanction for regulatory contraventions. In substance, these AMPs are essentially regulatory fines. Unlike the fines imposed via conventional regulatory offence provisions, however, regulators do not need to comply with the due process obligations in section 11 of the Charter when imposing AMPs. This paper examines whether AMPs should be made subject to section 11 of the Charter on the basis that they constitute "true penal consequences". The paper begins by providing an overview of both AMPs and the law on the application of section 11. The paper then offers a critique that the contemporary law is overly permissive in allowing AMPs to avoid Charter scrutiny. The paper also considers the policy concerns raised by the prospect of making AMPs subject to section 11, before concluding with a principled argument as to why the current status quo is unacceptable and should be revised.

Les organismes de régulation canadiens adoptent de plus en plus la pratique d'imposer des sanctions administratives pécuniaires ou « SAP » afin de sanctionner les infractions aux règlements. Dans leur essence, ces SAP consistent en des amendes de nature réglementaire. Toutefois, contrairement aux amendes imposées en vertu des dispositions habituelles en matière d'infraction aux règlements, les organismes de régulation n'ont pas à respecter les obligations d'application régulière de la loi prévues à l'article 11 de la Charte lorsqu'ils imposent des SAP. Le présent article traite de la question à savoir si l'article 11 de la Charte devrait s'appliquer aux SAP au motif que celles-ci constituent de « véritables conséquences pénales ». L'auteur dresse d'abord le portrait des SAP et de l'état du droit quant à l'application de l'article 11. Il présente ensuite une critique selon laquelle le droit contemporain est trop permissif lorsqu'il permet à ce que les SAP ne fassent pas l'objet d'un examen en vertu de la Charte. Il se penche également sur les enjeux politiques d'une possible application de l'article 11 aux SAP pour enfin conclure à l'aide d'un argument de principe qui explique la raison pour laquelle l'actuel statu quo est inacceptable et devrait être revu.

1. INTRODUCTION

Over the past two decades, several Canadian administrative bodies and other regulators[1] have been granted new powers to impose monetary penalties as sanc-

* Blake, Cassels & Graydon LLP, Toronto. The views expressed herein are those of the author and do not necessarily reflect the opinion of Blakes or any of its clients.

1 The terms "administrative" and "regulatory" have been used interchangeably in this paper.

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tor will almost always be able to shield itself at the "by nature" stage of the *Wigglesworth* test, a conclusion that has been borne out by the subsequent jurisprudence on the issue.[29]

Given the likelihood that an administrative or regulatory proceeding will not be found to be subject to section 11 by its "nature", in the context of such proceedings the "true penal consequences" branch of the *Wigglesworth* test is likely to be the only truly operative branch of the test. Accordingly, the second branch assumes a relatively heightened importance as a safeguard against punitive state action in the administrative context. As a corollary, it also becomes particularly important that the "true penal consequences" branch of the test is applied correctly in such cases.

In recent years, in response to the challenges to AMP powers referred to earlier, the meaning of the *Wigglesworth* "true penal consequences" test in the context of administrative proceedings has been considered in a series of decisions. These are surveyed in Part 4, below.

4. THE CONTEMPORARY JURISPRUDENCE ON AMPS AND SECTION 11

In the wake of the trend towards more widespread use of AMPs, there have been a series of cases involving challenges to those AMPs. Three recent cases in particular have considered this issue, as outlined below.[30]

(a) *Lavallee v. Alberta (Securities Commission)*

In *Lavallee v. Alberta (Securities Commission)*,[31] Staff of the Alberta Securities Commission had commenced regulatory proceedings against the applicants for alleged breaches of the Alberta *Securities Act*,[32] which, if proven, would have authorized the Commission to impose sanctions including an AMP of $1 million per contravention.[33] The applicants applied to the Alberta Court of Queen's Bench for, *inter alia*, a declaration that the AMP power in question was subject to section 11 on the grounds that the AMP they faced constituted a "true penal consequence".[34]

Staff and the intervener Attorney General of Alberta argued that the AMP in question was not subject to section 11 because its purposes fell within the class of

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29 See Part 4. But see *Doyon c. Canada (Procureur général)*, 2009 FCA 152, 2009 CarswellNat 1353, 2009 CarswellNat 3597 at paras. 27-27 (F.C.A.).

30 The Competition Tribunal has also considered this issue. See *Canada (Commissioner of Competition) v. Gestion Lebski Inc.*, 2006 Comp. Trib. 32, 2006 CarswellNat 6420 (Competition Trib.).

31 2009 ABQB 17, 2009 CarswellAlta 27 (Alta. Q.B.); affirmed 2010 ABCA 48, 2010 CarswellAlta 235 (Alta. C.A.); leave to appeal refused 2010 CarswellAlta 1382, 2010 CarswellAlta 1383 (S.C.C.), [*Lavallee*].

32 R.S.A. 2000, c. S-4.

33 *Ibid.*, s. 199. The AMP power in the Alberta *Securities Act* is substantially similar to the AMP in the Ontario *Securities Act*, noted in Part 2 above.

34 The reasons do not state whether Staff was seeking the maximum AMP possible or a lesser amount.

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"exempt" administrative purposes set out in *Wigglesworth*.[35] Both Staff and the Attorney General further argued that it would be inappropriate to regard the AMP in question as a "true penal consequence" by reference to the maximum possible sanction faced by the accused, since the Commission could be trusted to use its discretion to refrain from imposing an inappropriately large AMP.[36]

In the decision of the Court of Queen's Bench, Wittman J. favoured the arguments of Staff and the Attorney General. With respect to his finding that the AMP did not constitute a "true penal consequence", Wittman J. set out his interpretation of the second branch of the *Wigglesworth* test as follows:

> My reading of *Wigglesworth* is that, on one hand, the fact that the *Securities Act* is regulatory legislation is obviously not sufficient to determine whether the consequences of the application of s. 29 leads to true penal consequences. On the other hand, the dollar amount of the administrative penalty or its magnitude is not determinant, in itself, to qualify as a true penal consequence. In fact, it is the magnitude of the administrative penalty combined with the purpose for which it can be imposed that will determine whether it entails true penal consequences.[37]

Wittmann J. went on to state, based on his review of the jurisprudence, that the question of whether the proceedings under review constituted a "true penal consequence" would be determined in large part not by the impact of the potential consequences on the accused, but rather by the intended purpose of the sanction:

> . . . [T]hey show the importance of identifying the purpose of the sanction in the determination as to whether there is an offence and whether there is a true penal aspect to the sanction. In this case, I must determine the purpose of the administrative penalty under the *Securities Act* in order to see whether a contravention to the legislation is an offence under s. 11 of the *Charter*.[38]

In ultimately concluding that no "true penal consequence" was present, Wittmann J. explained that:

> The existence of administrative penalties under the *Securities Act* can be justified in light of the general purposes of the legislation . . .
>
> . . .
>
> I agree . . . that the potential imposition of administrative penalties of a certain magnitude reflects the legislative intent to ensure that penalties are not simply considered as another cost of doing business.[39]

Upon appeal by the applicants, the Alberta Court of Appeal affirmed Wittmann J.'s decision, which it characterized as:

> [E]mphasizing the need to consider the purpose of the sanction, and not just its magnitude, in assessing whether it amounts to a true penal

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35 2009 ABQB 17, 2009 CarswellAlta 27 at paras. 25–26, 127–134 (Alta. Q.B.); affirmed 2010 CarswellAlta 235 (Alta. C.A.); leave to appeal refused 2010 CarswellAlta 1382, 2010 CarswellAlta 1383 (S.C.C.).

36 *Ibid.* at paras. 26, 132.

37 *Ibid.* at para. 142.

38 *Ibid.* at para. 150.

39 *Ibid.* at para. 163.

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consequence.[40]

Leave to make a further appeal to the Supreme Court of Canada was denied.[41]

(b) *Canada (Attorney General) v. United States Steel Corp.*

Canada (Attorney General) v. United States Steel Corp.[42] concerned a dispute between U.S. Steel and the Government of Canada pertaining to the alleged breach by U.S. Steel of undertakings given pursuant to the *Investment Canada Act*. The Attorney General of Canada commenced proceedings under the *Investment Canada Act* that, if successful, carried sanctions including the AMP noted in Part 2 above, with its $10,000 per-day penalty for non-compliance.[43] On the facts of the case, U.S. Steel accordingly faced a potential AMP of $10,000 multiplied by every day following November 1, 2008 in which it failed to comply with the Attorney General's demands. The first of the decisions considered herein, that of the Federal Court, was dated June 14, 2010, making the jeopardy faced at the time of that judgement in excess of $6 million, with the penalty continuing to grow daily over the course of the subsequent appeals discussed below. It appears that the Attorney General was seeking to impose the maximum AMP.[44] U.S. Steel brought a motion challenging the constitutionality of the AMP power in question.

In its motion before the Federal Court, U.S. Steel argued for a magnitude-based interpretation of "true penal consequences":

> U.S. Steel contends that the magnitude of the monetary penalty alone is sufficient to engage section 11(d) of the *Charter*. U.S. Steel characterizes the potential monetary penalty under section 40 as being a "King Kong fine" and submits that the magnitude is of such significance that it can only be regarded as a true penal consequence. This assertion raises a number of questions. The first is whether U.S. Steel's interpretation of the second branch of the test is correct . . . U.S. Steel's interpretation is that it is the fine by its magnitude that leads to the conclusion it is being imposed for the purpose of redressing the harm done to society.[45]

However, based on her review of the law, including the decision in *Lavallee*, Hansen J. found against U.S. Steel on this point:

> [I]t is clear that the magnitude of a monetary penalty alone is not a sufficient basis upon which to conclude that the penalty is a true penal consequence.
>
> . . .
>
> The difficulty with [the magnitude-oriented] argument is that the enormity of a monetary penalty cannot be assessed in isolation. . . . Without context,

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40 2010 ABCA 48, 2010 CarswellAlta 235 at para. 23 (Alta. C.A.); leave to appeal refused 2010 CarswellAlta 1382, 2010 CarswellAlta 1383, 410 N.R. 382 (note) (S.C.C.).

41 33638 (July 15, 2010).

42 2010 FC 642, 2010 CarswellNat 1654, 2010 CarswellNat 1617 (F.C.); affirmed 2011 CarswellNat 1858, 2011 CarswellNat 3264 (F.C.A.); leave to appeal refused 2011 CarswellNat 4793, 2011 CarswellNat 4794 (S.C.C.) [*U.S. Steel*].

43 *Supra* note 13.

44 *Supra* note 41 at para. 3.

45 *Ibid.* at para. 52.

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> it cannot be said that a dollar value alone, can lead to no other inference but that the penalty is being imposed to punish. To be effective, the legislated monetary penalty has to be of a sufficient scope to address the financial range of the reviewable investments. It also has to be of a sufficient magnitude to deter non-compliance and to not be seen as simply a cost of doing business.[46]

Because the Attorney General appears to have been seeking the maximum AMP, the question of whether "true penal consequences" should be assessed by the maximum AMP possible or by some lesser amount identified as being the "actual" or "likely" AMP imposed does not appear to have been directly engaged on the facts. Nonetheless, in an echo of the arguments advanced in *Lavallee*, Hansen J.'s reasons reject the idea of a maximum-based assessment on the basis that the sanctioning body will always have the discretion to impose an AMP of a less than maximum magnitude:

> [T]he argument is premised on the assertion that the magnitude of the maximum monetary penalty available under the legislation alone is sufficient to render the provision unconstitutional. Section 40 does not require the imposition of the maximum monetary penalty or any monetary penalty. The court may make any order or orders the court considers the circumstances require.[47]

Having found that a magnitude-based assessment was inappropriate, Hansen J. proceeded to assess whether the AMP was a "true penal consequence" on the basis of a range of criteria, including the following:

> In the context of ICA, the court should have regard to the objectives of the legislation, the legislative scheme including the nature of the monitoring process and the availability of the opportunity to voluntary [sic] comply or remedy a default, the critical role the investor's undertakings play in the attainment of the legislative objectives, the nature of the transaction subject to review, the relationship between the investor and the government, the conduct being sanctioned is not morally blameworthy conduct and the structuring of the monetary penalty.[48]

Upon considering the above factors, Hansen J. concluded that on the basis of its purpose, the AMP in question could not be a "true penal consequence":

> I conclude that the monetary penalty is not a true penal consequence. Instead, the purpose of the monetary penalty is to promote and ensure the attainment of the legislative objectives.[49]

Hansen J.'s decision was subsequently appealed. In its judgement, the Federal Court of Appeal affirmed Hansen J.'s decision and reasoning.[50] Writing for the Federal Court of Appeal, Nadon J.A. agreed that in assessing "true penal conse-

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46 *Ibid.* at paras. 57-58.

47 *Ibid.* at para. 59.

48 *Ibid.* at para. 67.

49 *Ibid.*

50 2011 FCA 176, 2011 CarswellNat 1858, 2011 CarswellNat 3264 at paras. 74–81 (F.C.A.); leave to appeal refused 2011 CarswellNat 4793, 2011 CarswellNat 4794 (S.C.C.).

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quences", the magnitude of the AMP sought was not determinative, and that instead, "[t]he important thing is purpose".[51]

Nadon J.A. went on to find that the broad discretion granted under the AMP provision — and the large potential maximum sanction created as a result — was not objectionable, on the basis that the court retained the discretion to impose a lesser sanction. In making this finding, Nadon J.A. referenced two Supreme Court precedents suggesting that, in at least some contexts, statutory provisions granting a broad degree of discretion are not inherently objectionable vis-à-vis the *Charter*. In particular, Nadon J.A. cited the concurring opinion of Lebel J. in *R. v. Shoker*,[52] in which Lebel J. held that a *Criminal Code* provision granting a residual discretion to a sentencing judge did not breach section 8 of the *Charter* because:

> We should not assume that such a discretion would be abused by sentencing judges or exercised in an unconstitutional manner in the absence of a detailed statutory framework.[53]

Lebel J.'s opinion in *Shoker* in turn cited the majority decision of the Supreme Court in *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*,[54] a case concerning challenges of customs legislation brought pursuant to sections 2(b) and 15 of the *Charter*. Writing for the majority in *Little Sisters*, Binnie J. stated that:

> I do not think there is any constitutional rule that requires Parliament to deal with Customs' treatment of constitutionally protected expressive material by legislation (as the appellants contend) rather than by way of regulation (as Parliament contemplated in s. 164(1)(j)) or even by ministerial directive or departmental practice. Parliament is entitled to proceed on the basis that its enactments "will be applied constitutionally" by the public service.
>
> . . .
>
> [I]t is in the nature of government work that the power of the state is exercised and the Charter rights of the citizen may therefore be engaged. While there is evidence of actual abuse here, there is the *potential* for abuse in many areas, and a rule requiring Parliament to enact in each case special procedures for the protection of *Charter* rights would be unnecessarily rigid.[55]

On the basis of these precedents, Nadon J.A. concluded that the *Investment Canada Act* AMP was not objectionable pursuant to section 11 because:

> A statutory power to impose fines that comes along with little statutory guidance will not be subject to section 11 as long as it is exercised in a way so as to achieve proper administrative aims . . . This, in my view, accords with the principle that we should not assume before the fact that judges will exer-

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51 *Ibid.* at paras. 74–76.

52 2006 SCC 44, 2006 CarswellBC 2458, 2006 CarswellBC 2459, [2006] 2 S.C.R. 399 (S.C.C.) [*Shoker*].

53 *Ibid.*, at para. 39.

54 2000 SCC 69, 2000 CarswellBC 2442, 2000 CarswellBC 2452, [2000] 2 S.C.R. 1120 (S.C.C.) [*Little Sisters*].

55 *Ibid.* at paras. 71 and 137 [Emphasis in original].

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cise their discretion in an unconstitutional way.[56]

Leave to make a further appeal to the Supreme Court of Canada was denied.[57]

(c) *Rowan, Re*

In *Rowan, Re*,[58] a decision of a Panel of the Ontario Securities Commission (the "Panel") subsequently upheld by the Divisional Court of Ontario, Staff of the Ontario Securities Commission sought to impose sanctions including an AMP on the respondents for breaches of the Ontario *Securities Act*. Staff was seeking to impose actual AMPs of between $300,000 to $1 million on each of the individual respondents.[59] The respondents challenged the AMP power in question on the grounds that, *inter alia*, it constituted a "true penal consequence".

The respondents argued that *Wigglesworth* required that the AMP be assessed by reference to its magnitude, and that magnitude in turn had to be measured by the maximum amount potentially imposable, on the basis that this was the measure of jeopardy faced by the accused:

> Professor Peter W. Hogg who made submissions regarding the constitutional validity of section 127(1)9 of the Act for the Respondents, puts it this way: that a $1 million administrative penalty for any regulatory violation, no matter what it may be called, is plainly and simply a "fine", and a very large fine at that. It is, he submits, "word play" to call it anything other than a fine. This is especially so with the legislation which not only has a $1 million maximum administrative penalty but provides for a $1 million administrative penalty for "each failure to comply". He says that this means the legislation permits Staff in this factual allegation to seek an administrative penalty of $1 million on each of the 7,410 trades found to be "offside" the regulations. Professor Hogg submits that just because Staff is treating all trades as a continuing breach would not prevent them in another such case as this from seeking an administrative penalty of over $7 billion. How could anyone conclude that a $1 million administrative penalty, let alone a $7 billion administrative penalty, be anything other than a "punitive fine"?[60]

In response, Staff argued that the purposes of the AMP provision were valid regulatory purposes, and that therefore the AMP could not be used to impose "true penal consequences". The high maximum amounts imposable under the AMP power were similarly argued to not be objectionable because of the need for regulators to have broad flexibility in carrying out their regulatory purposes.[61] The intervener Attorney General took a similar view, and argued that it would be inappropriate to find the AMP unconstitutional on the basis of the high maximum amount imposable because the Panel retained the discretion to choose to impose lower

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56 *Supra* note 50 at para. 80.

57 34389 (November 24, 2011).

58 2009 CarswellOnt 8219, 33 O.S.C.B. 91 (Ont. Securities Comm.); affirmed 2010 ONSC 7029, 2010 CarswellOnt 9956 (Ont. Div. Ct.).

59 *Ibid.*, at paras. 14–20.

60 *Ibid.* at para. 26. Staff of the OSC had requested an AMP of between $750,000 and $1,000,000 (see para. 15).

61 *Ibid.* at paras. 34-35.

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amounts.[62]

In its decision, the Panel rejected the respondents' arguments for an assessment based on the maximum magnitude of the AMP faced by the respondents. The Panel instead adopted a broadly-based approach similar to that seen in *Lavallee* and *U.S. Steel*, stating with respect to the "true penal consequences" assessment that:

> [T]he administrative penalty in question, *notwithstanding its quantum*, has for its primary purpose, the protection of investors as well as specific deterrence . . .[63]

From its conclusion as to the "primary purpose" of the AMP power in question, the Panel proceeded to state that:

> In order to determine whether section 127(1)9 imposes true penal consequences on the Respondents, we must take a contextual approach. The importance of a contextual analysis was referred to as early as 1991 when the Supreme Court in *R. v. Wholesale Travel Group Inc.* stated:
>
> > A contextual approach is particularly appropriate in the present case to take account of the regulatory nature of the offence and its place within a larger scheme of public welfare legislation. This approach requires that the rights asserted by the appellant be considered in light of the regulatory context in which the claim is situated, acknowledging that a *Charter* right may have different scope and implications in a regulatory context than in a truly criminal one.[64]

As part of its assessment, the Panel considered factors such as the lack of criminal characteristics, and the fact that no criminal record could follow from conviction.[65]

The Panel further found that to the extent the magnitude of an AMP *was* to be considered in assessing whether it constituted a "true penal consequence", the assessment would be on the basis of the actual AMP imposed or sought, rather than by the maximum amount imposable. The Panel favourably cited the argument that it was necessary for the AMP power in question to involve a broad degree of discretion and high maximums, because this would allow Staff and the Panel to "tailor sanctions to suit the particular circumstances of a case".[66] On the basis of this reasoning, the Panel concluded that the AMP in question was therefore not objectionable:

> In pursuit of the legitimate regulatory goal of deterring others from engaging in illegal conduct, the Commission must, therefore, have proportionate sanctions at its disposal. The administrative penalty represents an appropriate legislative recognition of the need to impose sanctions that are more than "the cost of doing business". In the current securities regulation and today's capital markets context, a $1,000,000 administrative penalty is not *prima*

62 *Ibid.* at para. 32.

63 *Ibid.* at para. 43 [emphasis added].

64 *Ibid.* at para. 48 [internal citations omitted].

65 *Ibid.* at paras. 57–61.

66 *Ibid.* at para. 51.

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facie penal.[67]

The Ontario Divisional Court subsequently upheld the Panel's decision on the AMP issue without giving further reasons.[68] The Divisional Court's decision is currently being appealed to the Ontario Court of Appeal.[69]

(d) The Contemporary Standard Constitutes a "Purpose-Oriented" Approach to "True Penal Consequences"

Taken together, the three cases outlined above constitute the core of the contemporary law on the application of section 11 to AMPs. As can be seen from this overview, the overarching precedent established by these cases involves two related propositions: first, that "true penal consequences" are *not* to be assessed solely or primarily on the basis of the maximum magnitude, or severity, faced; and second, that assessment is instead to be by recourse to a broader analysis of the context and purposes of the legislation in question. This broader analysis is referred to herein as a "purpose-oriented" analysis.

At first blush, the consistency between the three cases would suggest that the contemporary "purpose-oriented" approach adopted in the cases is now the settled law on "true penal consequences" and section 11. As is discussed next in Part 5, however, there are fundamental problems with the current standard that remain to be addressed.

5. A CRITIQUE OF THE CONTEMPORARY LAW ON SECTION 11 AND AMPS

Critical analysis of the contemporary standard on section 11 and AMPs reveals that there are at least three significant problems with the law as currently formulated. The first problem with the contemporary standard is that with respect to the narrow but important question of how to measure the magnitude of an AMP, the contemporary law is simply not consistent with the binding precedent set by the practice of the Supreme Court in *Wigglesworth*. Second, with respect to the *Wigglesworth* test more generally, the contemporary treatment has rendered the test incoherent, internally redundant, and in need of clarification. Third, and most importantly, setting aside the *Wigglesworth* precedent and analyzing the current standard on its merits shows the contemporary standard to be flawed on its merits.

(a) The Contemporary Standard is Contrary to Binding Supreme Court Precedent

First, the contemporary standard is not consistent with the Supreme Court's practice in *Wigglesworth*. As noted in Part 4 above, the contemporary standard is characterized in part by the rejection of an assessment of "true penal consequences" based on the maximum jeopardy faced by an accused. As characterized by the Federal Court of Appeal in *U.S. Steel*, the contemporary standard operates on the prin-

67 *Ibid.* at para. 56.

68 2010 ONSC 7029, 2010 CarswellOnt 9956 at para. 15 (Ont. Div. Ct.).

69 File No. C53960 (C.A.).

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ciple that "we should not assume before the fact that judges will exercise their discretion in an unconstitutional way". In other words, pursuant to the contemporary standard, a severe maximum possible sanction is not inherently objectionable. Insofar as the magnitude of penalty is considered at all under the contemporary standard, it is considered on the basis of the actual penalty that has been or is perceived as likely to be imposed.

As has been noted, however, *Wigglesworth* involved a finding of a "true penal consequence" not on the basis of the $300 fine actually imposed on the accused, but rather on the maximum jeopardy faced.[70] The provision in question in that case was not saved by the fact that discretion had been exercised to impose a lesser-than-maximum sanction. Accordingly, while Wilson J.'s reasoning in *Wigglesworth* is admittedly at points somewhat cryptic,[71] the practice of the Supreme Court on the question of whether maximum jeopardy is the appropriate benchmark for "true penal consequences" is unambiguous: true penal consequences are to be assessed by the maximum sanction possible. None of the lower courts and tribunals rejecting the Supreme Court's approach have explained their basis for departing from this binding precedent, and the contemporary jurisprudence has as a result created an unresolved inconsistency in the law.

(b) The Contemporary Standard is Incoherent and Internally Redundant

Second, as is self-evident, the two-branch test devised in *Wigglesworth* was to entail two phases of analysis. By adopting a "purpose-oriented" approach to the second "true penal consequences" branch, however, the contemporary treatment has conflated the two branches and rendered them largely indistinguishable.

Wilson J. explained that the first "by nature" branch was to be assessed by examining the intention or purpose underlying a given matter:

> In my view, if a particular matter is of a public nature, *intended* to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or correc-

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70 In addition to being consistent with the practice in *Wigglesworth*, assessing "true penal consequences" on the basis of the maximum sanction possible also makes sense on the merits. See Part 5(c) below.

71 In particular, in paragraph 33 of *Wigglesworth*, Wilson J. puts forward a hypothetical situation involving a regulator with an "unlimited power to fine". This reference to an "unlimited power to fine" has since been argued to be an indication that Wilson J. cannot have intended that monetary fines would be assessed solely by their maximum magnitude (since there cannot be a maximum higher than "unlimited"). It is not clear what Wilson J. meant by her reference to "unlimited power to fine", given the apparent contrast with both her earlier remarks concerning assessment of fines "by [their] magnitude" and the actual practice of the Supreme Court in *Wigglesworth*. It is possible that Wilson J.'s reference to "unlimited power" was not a reference to a power to impose fines of unlimited *quantum*, but rather to a power to impose fines for unlimited *scope of subject-matters*. See the Queen's Bench decision in *Lavallee*, *supra* note 31 at para. 140; see also *U.S. Steel*, *supra* note 42 at paras. 53, 64.

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> tive and which are primarily *intended* to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity.[72]

As would be expected given its reliance on questions of intent or purpose, the assessment of the first "by nature" branch in practice has tended to involve statutory interpretation, review of legislative history, and similar considerations.[73] As far as the first branch is concerned, there is nothing problematic in undertaking such an analysis.

However, in order for the second branch of the *Wigglesworth* test to not be rendered a nullity, there must be a distinct analysis involved once the assessment moves to the second branch. Simply adopting the same "purpose-oriented" approach for both branches of the test would have the result of blurring and conflating the two branches of the test, and would render the second branch largely redundant. Unfortunately, as noted in Part 4 above, the contemporary treatment of *Wigglesworth* has endorsed just such a blurring of the test.

Moreover, while the contemporary cases make passing reference to an intention to consider the severity of the consequences faced as at least part of their analysis of "true penal consequences", in practice, the consideration of "purpose" dominates their analysis.

For example, in *U.S. Steel*, after rejecting a magnitude-based assessment of the "true penal consequences" branch, Hansen J. found that U.S. Steel was not faced with a "true penal consequence" based on factors including the objectives of the legislation, the legislative scheme, and the structuring of the monetary penalty.[74] All of these factors had previously been cited in the course of the "by nature" assessment in the same decision.[75] In upholding Hansen J.'s decision, the Federal Court of Appeal cited purpose as the "important thing" to be considered in assessing "true penal consequences".[76]

In an even starker example, in the analysis undertaken by the Alberta Court of Queen's Bench in *Lavallee*, the assessment of the two branches appears to have been conducted simultaneously and on essentially the same set of considerations. Upon the conclusion of that single analysis, the assessment of both branches is concluded at once, without any material distinction made between the two branches.[77]

Similarly, in affirming the decision (and the analytical approach) of the Court of Queen's Bench, the Alberta Court of Appeal described its view of the "true penal consequences" assessment as follows:

> The appellants rely on this last statement to argue that the potential penalties they face, for fines of up to $1 million per contravention of securities law, amount to true penal consequences and that the protections guaranteed by s.

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72 *Supra* note 17 at para. 23 [emphasis added].

73 See, e.g., *U.S. Steel*, *supra* note 42 at paras. 36–50, *Re Rowan*, *supra* note 58 at paras. 36–40.

74 *Supra* note 42 at para. 67.

75 *Ibid.* at paras. 36–50.

76 *Supra* note 50 at para. 74.

77 *Supra* note 31 at paras. 150–165.

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> 11 are therefore engaged. The chambers judge rejected that argument, emphasizing the need to consider the purpose of the sanction, and not just its magnitude, in assessing whether it amounts to a true penal consequence. *Moreover, when considering the purpose of the sanction it is necessary to consider the overarching purposes of the Securities Act, which include the protection of investors and the public, the efficiency of the capital markets, and ensuring public confidence in the system.* In the end, the chambers judge agreed with this Court's conclusion . . . that the increase in the magnitude of administrative penalties reflects a *legislative intent* to ensure that the penalties are not simply considered another cost of doing business. He therefore concluded that no true penal consequences arise under ss. 198 and 199 of the *Securities Act* and that s. 11 of the *Charter* is, accordingly, not engaged here. I agree.[78]

It is difficult to meaningfully differentiate this analysis — with its focus on considerations of intent and purpose — from that undertaken at the "by nature" stage.

As a result, the test as currently interpreted has been rendered incoherent and internally redundant. It is, at present, a "one branch" test being conducted two times. Irrespective of the ultimate determination of the substantive law on this issue, the test is in need of clarification.

(c) The Contemporary Standard is Problematic on the Merits

The two critiques set out above concern inconsistencies between the contemporary standard and the binding precedent in *Wigglesworth*. Below, the analysis moves beyond the *Wigglesworth* precedent to consider why the contemporary standard is problematic on its merits.

(i) True Penal Consequences Should Properly Be Assessed on the Basis of the Maximum Jeopardy Faced by an Accused

First, the contemporary standard's preference for an assessment based on the actual or "likely" AMP to be imposed rather than the maximum AMP imposable is problematic on the merits.

The protections in section 11 are procedural in nature, and as such, they have their most important application prior to and throughout the course of the proceeding in question. At those stages, the jeopardy faced by an accused is the jeopardy presented by the maximum sanction faced. This jeopardy is not lessened by the possibility that, in the event the accused is found guilty, the sanctioning body may exercise its discretion to impose a lesser than maximum sanction. As a matter of principle, it is no answer to the denial of an accused's *Charter* rights today to state that the sanctioning body in question will probably act responsibly tomorrow.

Assessment on a basis other than the maximum jeopardy raises serious practical problems. As a practical matter, by withholding the assessment of whether an accused is entitled to section 11 until after the conclusion of the

78 *Supra* note 40 at para. 23 [emphasis added].

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proceeding in question, an accused wishing to assert his or her right to section 11 protections is reduced to doing so by way of an appeal. However, the very accused persons for whom a large monetary AMP will most likely constitute a true penal consequence will be those least unable to afford the cost of an appeal,[79] meaning that by deferring the assessment of accused persons' section 11 rights, the adjudicators in question will be, as a practical reality, effectively denying those rights for the very persons most entitled to them.[80]

As noted, in response to arguments that it should assess the AMP in the *Investment Canada Act* on the basis of the maximum sanction imposable, the Federal Court of Appeal cited the Supreme Court precedents in *Shoker* and *Little Sisters* for the proposition that, in the context of a section 11 challenge, "a statutory power to impose fines that comes along with little statutory guidance will not be subject to section 11 as long as it is exercised in a way so as to achieve proper administrative aims." It is respectfully submitted that the Federal Court of Appeal erred in drawing this conclusion.

Neither *Shoker* nor *Little Sisters* concerned challenges to procedural rights such as those found in section 11. For the reasons detailed above, the two precedents should be distinguished on that basis. In addition, while an in-depth analysis of the constitutionality of broad statutory grants of discretion is beyond the scope of this paper, it is submitted that both the scope and the practical effect of the precedents in question are open to debate.

With respect to scope, the Supreme Court does not appear to have reached a settled consensus in favour of the principle that broadly discretionary provisions statutory are constitutional, and as such, the scope of application of the *Little Sisters* and *Shoker* precedents is debatable. The cited opinion in *Shoker* was not that of the majority but rather the concurring opinion of two justices, Lebel J. and Bastarache J.[81] In *Little Sisters*, the

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79 This practical reality is further exacerbated by the fact that in at least some cases, even a successful accused will be unable to recover their costs; see *Tindall, Re*, 2000 CarswellOnt 3740, 23 O.S.C.B. 6889 at para. 76 (Ont. Securities Comm.). Furthermore, even a successful appeal will in many cases likely only result in the accused "winning" the right to recommence the proceeding *ab initio* with the benefit of section 11 protections, while incurring all the costs entailed by doing so in addition to the costs of the initial proceeding and appeal.

80 Furthermore, many if not most of the regulatory proceedings carrying the possibility of the imposition of an AMP are resolved by way of negotiated settlement rather than a contested trial or hearing. As such, the relevance of an accused's section 11 rights will in many cases truly be felt only in the influence those rights have on the negotiating positions of the parties at the time of settlement (e.g., by making it clear to both parties how much of a burden the state actor will face in proving its case should the proceeding not be settled). As such, deferring the assessment of an accused's *Charter* rights until the conclusion of a contested proceeding will in many cases be tantamount to denying the accused the effective benefit of those rights.

81 *Supra* note 52 at para. 39.

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Court split six to three, with the three dissenters directly breaking with the majority on the question of whether the statutory provision in question was constitutional.[82] Moreover, *Little Sisters* involved highly specific circumstances, giving rise to further questions about how broadly the majority's findings in that case should be applied in different contexts.[83]

Moreover, even were the *Shoker* or *Little Sisters* precedents to apply in cases of section 11 challenges of AMP provisions, it is debatable whether, properly applied, those precedents would serve to support either the provisions or the contemporary approach in general. This is because the *Shoker* and *Little Sisters* precedents arguably do not stand for the proposition that "bare" statutory provisions granting broad discretion are constitutional, but rather, stand for the narrower proposition that broadly discretionary statutory provisions can be made *Charter* compliant by virtue of subordinate legislation. As noted, the principle relied upon by the Federal Court of Appeal in *U.S. Steel* was formulated by the Supreme Court in part as follows:

> I do not think there is any constitutional rule that requires Parliament to deal with Customs' treatment of constitutionally protected expressive material by legislation (as the appellants contend) *rather than by way of regulation* . . . *or even by ministerial directive or departmental practice*.[84]

As illustrated in the above excerpt, even if applicable, the presumption of constitutionality as set out by the majority in *Little Sisters* would arguably not justify any lessening of the overall stringency of the assessment of an AMP power, but rather would simply require that the assessment be directed to consider constraints and guidance set out on the broader regulatory regime as a whole, rather than just the underlying statutory provision. In particular, the assessing court or adjudicator would need to consider any supplementary guidance set out by way of regulation, ministerial directive or other subordinate legislation. In the cases of the AMP provisions discussed in this paper, adopting a broader assessment of this nature would make no practical difference to the fundamental question of whether the broadest AMP powers must be constrained, but would simply rather compel that their shortcomings be addressed by way of subordinate legislation rather than statutory amendment. In either case, the approach taken in the recent jurisprudence, and the approvals of "bare" AMP provisions that have been rendered as a result of that approach, would be deemed inadequate.

For these reasons, it is submitted that even setting aside the precedential force of *Wigglesworth*, the contemporary approach's deference to broadly discretionary

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82 *Supra* note 54 at para. 204.

83 The statutory provision under consideration in *Little Sisters* expressly contemplated being, and was in fact, supported by subordinate legislation and policy guidance, which were considered by the Supreme Court and the lower courts in some detail in the course of their assessments of constitutionality; see, e.g., *supra* note 55 at paras. 70–94. The regulatory regime in *Little Sisters* also incorporated guidance set out in previous Supreme Court jurisprudence: see paras. 45–69. These circumstances are not present in the cases of the AMP provisions considered in this paper.

84 *Supra* note 54 at para. 71 [Emphasis Added].

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AMP provisions is poorly founded. The *Wigglesworth* approach of assessing "true penal consequences" on the basis of the maximum sanction imposable is justified on the merits, and should be applied with respect to AMP provisions.

(ii) The Contemporary Standard Fails to Adequately Assess Whether Section 11 Should Apply to a Given Matter

More broadly, the contemporary standard fails in its overarching objective of accurately and adequately detecting when section 11 should apply to a given matter. To understand this broader failing of the contemporary standard, it is helpful to revisit one of the basic premises of the "true penal consequences" branch as set out in *Wigglesworth*:

> *. . . This is not to say that if a person is charged with a private, domestic or disciplinary matter* which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, *he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matter intended to fall within the section, but because they involve the imposition of true penal consequences.*[85]

In other words, one of the basic premises of the "true penal consequences" concept is a recognition of the fact that such consequences *can still occur* even in cases where the state actor in question is acting with an "acceptable" purpose.

It is precisely this situation — where an assessment of "purpose" or "intent" will produce a "false negative" on the question of whether section 11 should apply — that provides the entire rationale for the existence of an independent and distinct "true penal consequences" assessment. The proper application of the protections in section 11 is dependent on the law being sensitive to the imposition of such "true penal consequences".

The contemporary standard's importation of a "purpose-oriented" analysis into the "true penal consequences" assessment means that the circumstances that could produce a false negative on the first branch will also prevail in producing a false negative on the second branch. In this way, the contemporary approach overlooks an important part of the assessment of whether section 11 should apply to a given matter, and potentially negates the ability of the test to serve as an effective monitor of the wide range of administrative conduct that will generally be shielded at the "by nature" stage of the test. The contemporary test thus leaves state actors with an easy route to avoiding compliance with the protections of the *Charter*.

6. WOULD APPLYING SECTION 11 TO AMPS PRECLUDE EFFECTIVE REGULATION?

The widespread use of AMPs indicates that they are regarded as effective tools of regulation, and the prospect of a change in the law of AMPs accordingly raises policy considerations about the impact that a less-permissive standard would have on the ability of regulators to do their jobs effectively.

This Part considers both the influence that such policy concerns have had on

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85 *Supra* note 17 at para. 33 [emphasis added].

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shaping the contemporary law, and the extent to which such concerns may be overstated. As well, although it is beyond the scope of this paper to give detailed recommendations on the design of specific AMPs, in the course of the following discussion on policy considerations, general suggestions are offered on some prescriptive measures that could be taken to refine AMPs and make them more palatable with respect to the *Charter*.[86]

(a) The Influence of Policy Concerns on the Contemporary Standard

It is apparent that the policy concern of not impeding effective regulation has significantly influenced the formation of the contemporary law on AMPs. Indeed, the concern that regulators not be reduced to merely an irritant or "cost of doing business" is referenced in each of *Lavallee*,[87] *U.S. Steel*,[88] and *Re Rowan*.[89]

Each of the decisions tends to imply a stark dichotomy between untrammeled AMPs on the one hand, and marginalized regulators on the other. In *Lavallee*, for example, Wittman J. states:

> Although I do agree that, considered in isolation, and without considering the overarching purposes of the *Securities Act*, the alleged harm suffered by investors as a result of the Applicants' activities, the alleged benefits received by the Applicants as a result of the improper activity and the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, may tend towards a conclusion of an intent to punish.
>
> However, when considering all the factors as a whole, it is clear that not taking those factors into consideration would likely jeopardize the attainment of the objectives of the *Securities Act*. For instance, without a certain level of deterrence, it is likely that the investors would not receive efficient protection. Also, if the harm suffered and the benefits received are not taken into account, the public's confidence in the system may be seriously shaken.[90]

If true, such a dichotomy would serve as a compelling practical argument in favour of insulating AMP powers from compliance with section 11; after all, as the Supreme Court has stated, the *Charter* should not operate to "tie the hands of the regulatory state".[91]

However, it is submitted below that the severity of this policy dilemma has been overstated. In particular, there are three reasons why applying section 11 to AMPs will not preclude effective regulation. First, there is no reason to assume, as a general rule, that requiring compliance with the protections in section 11 would completely negate the ability of regulators to impose AMPs. Second, even in cases

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86 For a more comprehensive discussion of AMP design, see Archibald, "Regulatory and Corporate Liability", *supra* note 4.

87 *Supra* note 31 at para. 165.

88 *Supra* note 42 at para. 58.

89 *Supra* note 58 at paras. 47–56, 67–76.

90 *Supra* note 31 at paras. 156-157.

91 *R. v. Fitzpatrick*, 1995 CarswellBC 904, 1995 CarswellBC 2496, [1995] 4 S.C.R. 154 at para. 29 (S.C.C.).

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where the ability to impose a given AMP would be lost, the regulators in question would retain a range of other sanctioning tools at their disposal. And finally, to the extent that some AMPs as presently constituted may be found to be irredeemably inconsistent with section 11, such a finding need only result in the evolution and refinement of the design of AMP powers, not their outright extinction. The remainder of this Part considers each of these three points.

(b) Conducting Proceedings in Accordance with Section 11

The most straightforward solution to a finding that a given AMP was subject to section 11 would be for the prosecuting body to simply take measures to conduct any proceedings involving that AMP power in accordance with the requirements of section 11. In practice, this could potentially include requiring regulators to take measures relating to: the constitution of the tribunal hearing the matter;[92] the burden of proof applicable in the proceeding;[93] "*Stinchcombe*" level disclosure obligations;[94] the scope of the defences and procedural fairness rights available to the accused;[95] and allowing other protections such as affording a right for the accused to resist examination for discovery.[96]

The extent of the measures required to make a given AMP compliant with section 11, and the difficulty in achieving those measures, would of course depend on the specific circumstances of a given AMP, and some AMPs as presently designed likely cannot be made compatible with section 11.[97] There is, however, no reason to conclude *prima facie* that the application of section 11 would automatically preclude the use of AMPs as a sanction.

(c) Other Sanctioning Tools

Second, under most regulatory regimes regulators have recourse to a range of sanctioning tools other than AMPs, and even in the absence of a given AMP power they would accordingly retain a range of other sanctioning tools to utilize in carrying out their responsibilities.

For example, under the two provincial securities acts that form the basis of the respective decisions in *Re Rowan* and *Lavallee*, the AMPs in question are but one of many possible sanctions available to the regulators, ranging from numerous administrative sanctions to quasi-criminal offences. Taking the Ontario *Securities Act*

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92 *Supra* note 3, s. 11(d) (with respect to "an independent and impartial tribunal").

93 *Ibid.* (with respect to "presumed innocent"). See also *R. v. Oakes*, 1986 CarswellOnt 95, 1986 CarswellOnt 1001, [1986] 1 S.C.R. 103 at para. 57 (S.C.C.).

94 See *R. v. Stinchcombe*, 1991 CarswellAlta 559, 1991 CarswellAlta 192, [1991] 3 S.C.R. 326 (S.C.C.).

95 *Supra* note 4, s. 11(d) (with respect to "fair and public hearing").

96 *Ibid.*, s. 11(c).

97 Notably, the obligation would be more difficult to meet for those AMPs utilizing administrative forums, such as the Ontario and Alberta *Securities Act* AMPs discussed in this paper. On the other hand, AMPs which already operate through the court system, such as the *Investment Canada Act* AMP also discussed herein, could be more easily made compliant.

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as an example, section 127 sets out a host of other administrative sanctions that can be imposed without recourse to the courts, while section 122 makes any contravention of Ontario securities law an offence, giving the Ontario Securities Commission the ability to prosecute any matter it sees fit in the provincial courts.[98] In short, for both moderate and severe contraventions, securities regulators have a host of available tools at their disposal, and it is simply not accurate that the loss or curtailment of their AMP powers would render them merely an ineffectual "cost of doing business".[99]

The same will generally be true of regulators in other fields as well, and it is accordingly an overstatement to suggest that the untrammeled ability of regulators to impose AMPs is synonymous with their ability to effectively regulate.

(d) Refining the Design of AMPs

Third, even intractable inconsistencies between a given AMP and section 11 could be addressed by refining the design of AMPs to ameliorate some of their more problematic characteristics.

As noted, the most controversial AMPs tend to be broadly discretionary in nature, with only the most general preconditions attaching to their use.[100] When combined with these broad grants of discretion, the high maximum amounts imposable under such AMPs can result in enormous potential jeopardy faced by the accused. It is this large degree of jeopardy that makes AMPs problematic under *Wigglesworth* in the first place.

There is, however, no inherent reason why AMPs cannot be designed to avoid presenting the accused with such disproportionate jeopardy, while remaining responsive to contraventions occurring on a range of scales. For example, the broad discretion and high maximums presently characterizing many AMPs could in many cases be replaced with objective criteria and fixed formulas. Such formulas could be designed to be automatically responsive to the scale of the underlying contravention in question, which would allow the AMP to be context-appropriate while ameliorating the current situation in which the jeopardy posed by an AMP can be excessive in relation to the scale of the offence alleged. In fact, refined administrative sanctioning mechanisms of this nature are already common in Canada's tax and customs regimes. For example, multiple "formula-driven" AMPs are found in each of the *Excise Act, 2001*,[101] the *Excise Tax Act*,[102] and the *Income Tax Act*.[103]

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98 *Supra* note 16, ss. 122, 127. Maximum penalties under section 127 are a $5 million fine and 5 years in prison.

99 While an international comparison is beyond the scope of this paper, it should be noted that securities regulators in other countries, notably the United States, commonly prosecute contraventions of securities laws through the courts. See e.g. U.S. Securities and Exchange Commission, *FY 2010 Performance and Accountability Report*, Washington (DC): SEC, 2010), online: <http://www.sec.gov/about/secpar2010.shtml>, at 151–161.

100 See Part 2 above.

101 S.C. 2002, c. 22.

102 R.S.C. 1985, c. E-15.

103 R.S.C. 1985 (5th Supp), c. 1.

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In *Martineau c. Ministre du Revenu national*,[104] the Supreme Court considered one such AMP. The AMP in question, found in section 124 of the *Customs Act*,[105] was explicitly mandated to be calculated by reference to the value of the goods involved in the underlying customs contravention. As such, the size of the sanction was made to automatically reflect the scale of the contravention alleged, without the broad discretion and disproportionate potential maximums seen in cases involving discretionary AMPs. In finding that the AMP in question did not constitute a "true penal consequence", Fish J. distinguished the AMP from a penal fine on the basis that:

> [The AMP], being civil in nature and purely economic, is . . . arrived at by a simple mathematical calculation.[106]

By adopting similar controls, currently controversial AMPs could be refined to retain many of the characteristics that make them useful to regulators while ameliorating their more problematic aspects.[107]

As another ameliorative measure, AMP provisions could also expressly provide that courts or administrators are to consider the circumstances of the specific accused, and the effect on the accused of imposing an AMP. Notably, the AMP provision in the *Competition Act*[108] contains a provision to this effect. Subsection 74.1(5) of the *Competition Act* provides in part that:

> Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty . . . (h) the financial position of the person against whom the order is made.[109]

It is debatable whether the constraint in subsection 74.1(5) constitutes, by itself, enough of a constraint on the AMP power in question to save the provision from the requirements of section 11. Nonetheless, the provision illustrates the ability of Parliament to enact more limited AMP provisions should it wish to do so.[110]

7. CONCLUSION

As has been discussed above with respect to the example of the Ontario *Securities Act*, the Canadian regulatory legislation to which AMPs have been added often already contained provisions making it an offence to commit the same contraventions that are now sanctionable by AMPs. Accordingly, the true significance of the adoption of AMPs in many cases is not that they have *added* new fining powers to regulators' arsenals, but rather that they have *removed* the requirement of having to comply with due process obligations in seeking to impose fines.

It is no doubt true that regulators will generally seek to impose their new

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104 2004 CarswellNat 4564, 2004 CarswellNat 4565, [2004] 3 S.C.R. 737 (S.C.C.).

105 R.S.C. 1985, c. 1 (2nd Supp.), s. 124.

106 *Supra* note 104 at para. 62.

107 For a discussion of another alternative model oriented around a "regulatory pyramid" concept, see Archibald, "Regulatory and Corporate Liability", *supra* note 5 at 15:50.

108 *Supra* note 6.

109 *Ibid.*, s. 74.1(5)(h).

110 As well as arguably illustrating an awareness on the part of Parliament that unfettered AMP provisions are constitutionally problematic.

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AMPs with the appropriate regulatory intentions or purposes identified in *Wigglesworth*. However, while, state actors may be able to place themselves within the scope of the *Charter* by virtue of the nature of their intentions, the corollary should not be true: state actors should not be able to remove themselves from the responsibility of complying with the *Charter* by not "intending" to cause substantive consequences that they are in fact causing. It is axiomatic that the protections against state action provided in the *Charter* are not subject to whether the state actor in question "intends" itself to fall within the ambit of the *Charter*. Those protections belong to and are vested in the beneficiaries of the protections in question, and as such, the protections should properly exist whether the state acts purposefully and intends a given outcome or not.

Accordingly, the intentions or purposes of state actors are irrelevant to the question of whether the penalties they seek to impose are experienced as a "true penal consequence" by the parties being subjected to them. In ensuring that *Charter* rights such as those enumerated in section 11 are respected, it is therefore necessary to assess the impact of a state action not only by examining the purpose and intent of a state actor, but also by considering the substantive consequences that are actually imposed as an outcome of the state action in question.

It is submitted that the Supreme Court in *Wigglesworth* was recognizing this necessity when it created the "true penal consequences" branch of its test. By subsequently treating the "true penal consequences" branch as a largely indistinguishable rehash of the "by nature" branch, the contemporary jurisprudence on AMPs has overlooked this important purpose, and has risked disconnecting the fundamental *Charter* protections contained in section 11 from the type of severe state action they were designed to protect against. For this reason, the law on the application of section 11 to AMPs ought to be revisited, and revised.

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Found at Tab 46, Volume 8 of Google's BOA.

Julie Guindon *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Chartered Professional Accountants Canada and Canadian Constitution Foundation *Interveners*

Julie Guindon *Appelante*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario, procureure générale du Québec, Comptables professionnels agréés du Canada et Canadian Constitution Foundation *Intervenants*

Indexed as: Guindon *v.* Canada

2015 SCC 41

File No.: 35519.

2014: December 5; 2015: July 31.

Present: Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

Répertorié : Guindon *c.* Canada

2015 CSC 41

N° du greffe : 35519.

2014 : 5 décembre; 2015 : 31 juillet.

Présents : Les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner et Gascon.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Income tax — Penalty for misrepresentation — Individual assessed for penalties under s. 163.2 of Income Tax Act, which imposes monetary penalties on every person who makes false statement that could be used by another person for purpose of Act — Whether proceeding under s. 163.2 is criminal in nature or leads to imposition of true penal consequences — Whether individual assessed for penalties is person "charged with an offence" within meaning of s. 11 of Canadian Charter of Rights and Freedoms — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 163.2.

Constitutional law — Courts — Procedure — Notice of constitutional question given to attorneys general in this Court but not in courts below — Whether this Court should exercise its discretion to address merits of constitutional issue —Tax Court of Canada Act, R.S.C. 1985, c. T-2, s. 19.2.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Impôt sur le revenu — Pénalité pour faux énoncé — Cotisation établie à l'égard d'un particulier suivant l'art. 163.2 de la Loi de l'impôt sur le revenu, lequel rend passible d'une sanction pécuniaire toute personne qui fait un faux énoncé qu'un tiers pourrait utiliser dans le cadre de l'application de la Loi — La procédure qui découle de cet article est-elle de nature criminelle ou entraîne-t-elle de véritables conséquences pénales? — La personne qui se voit infliger une pénalité est-elle « inculpée » au sens de l'art. 11 de la Charte canadienne des droits et libertés? — Loi de l'impôt sur le revenu, L.R.C. 1985, c. 1 (5e suppl.), art. 163.2.

Droit constitutionnel — Tribunaux — Procédure — Avis de question constitutionnelle donné aux procureurs généraux dans l'instance devant la Cour, mais non dans les instances précédentes — Y a-t-il lieu que la Cour exerce le pouvoir discrétionnaire qui lui permet de connaître de la question constitutionnelle sur le fond? — Loi sur la Cour canadienne de l'impôt, L.R.C. 1985, c. T-2, art. 19.2.

2015 SCC 41 (CanLII)

1 C.T.C. 2007, [2012] T.C.J. No. 272 (QL), 2012 CarswellNat 3708 (WL Can.). Appeal dismissed.

Adam Aptowitzer, *Alexandra Tzannidakis*, *Arthur B. C. Drache*, *Q.C.*, and *Kenneth Jull*, for the appellant.

Gordon Bourgard and *Eric Noble*, for the respondent.

S. Zachary Green, for the intervener the Attorney General of Ontario.

Written submissions only by *Abdou Thiaw*, for the intervener the Attorney General of Quebec.

Dominic C. Belley and *Vincent Dionne*, for the intervener Chartered Professional Accountants Canada.

Written submissions only by *Darryl Cruz*, *Brandon Kain* and *Kate Findlay*, for the intervener the Canadian Constitution Foundation.

The judgment of Rothstein, Cromwell, Moldaver and Gascon JJ. was delivered by

ROTHSTEIN AND CROMWELL JJ. —

I. Introduction

[1] Income tax law is notoriously complex and many taxpayers rely on tax advisors to help them comply. Given the important role played by tax advisors and other individuals involved in transactions affected by income tax considerations, Parliament enacted s. 163.2 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), which imposes monetary penalties on every person who makes a false statement that could be used by another person for the purpose of the Act.

[2] Julie Guindon, the appellant, was assessed penalties under s. 163.2(4) totalling $546,747 in respect of false statements made by her in donation

[2013] 1 C.T.C. 2007, [2012] A.C.I. nº 272 (QL), 2012 CarswellNat 5562 (WL Can.). Pourvoi rejeté.

Adam Aptowitzer, *Alexandra Tzannidakis*, *Arthur B. C. Drache*, *c.r.*, et *Kenneth Jull*, pour l'appelante.

Gordon Bourgard et *Eric Noble*, pour l'intimée.

S. Zachary Green, pour l'intervenant le procureur général de l'Ontario.

Argumentation écrite seulement par *Abdou Thiaw*, pour l'intervenante la procureure générale du Québec.

Dominic C. Belley et *Vincent Dionne*, pour l'intervenante Comptables professionnels agréés du Canada.

Argumentation écrite seulement par *Darryl Cruz*, *Brandon Kain* et *Kate Findlay*, pour l'intervenante Canadian Constitution Foundation.

Version française du jugement des juges Rothstein, Cromwell, Moldaver et Gascon rendu par

LES JUGES ROTHSTEIN ET CROMWELL —

I. Introduction

[1] Le droit de l'impôt sur le revenu est d'une complexité notoire, et de nombreux contribuables recourent aux services de conseillers fiscaux pour en observer les règles. Étant donné le rôle important de ces conseillers et d'autres personnes dans le cadre d'opérations auxquelles s'appliquent des considérations d'ordre fiscal, le Parlement a adopté l'art. 163.2 de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, c. 1 (5e suppl.) (« *LIR* »), qui impose une sanction pécuniaire à toute personne qui fait un faux énoncé qu'un tiers pourrait utiliser dans le cadre de l'application de la Loi.

[2] L'appelante, Julie Guindon, a fait l'objet, sur le fondement du par. 163.2(4), de pénalités s'élevant au total à 546 747 $ pour de faux énoncés sur

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receipts issued by her on behalf of a charity which, it is alleged, she knew or would reasonably be expected to have known could be used by taxpayers to claim an unwarranted tax credit.

[3] Ms. Guindon says that the penalty imposed under s. 163.2(4) is criminal and that she is therefore a person "charged with an offence" who is entitled to the procedural safeguards provided for in s. 11 of the *Canadian Charter of Rights and Freedoms*. Accordingly, she argues that the matter should not have proceeded in the Tax Court of Canada and that the penalty against her should be vacated.

[4] She was successful in the Tax Court of Canada but the Federal Court of Appeal set that decision aside. Her final appeal to this Court raises two issues, one procedural and one substantive. The procedural issue concerns the consequences of Ms. Guindon's failure in the courts below to give the required notice of constitutional question in relation to her claims under s. 11 of the *Charter*. Proper notice has been given in this Court. The substantive issue is whether s. 163.2(4) creates a true criminal offence and therefore engages the protections provided for under s. 11.

[5] In our view, this Court has a well-established discretion, albeit one that is narrow and should be exercised sparingly, to address the merits of the constitutional issue when proper notice of constitutional question has been given in this Court, even though the issue was not properly raised in the courts below. We would exercise that discretion in this case. However, we would decide the substantive issue in favour of the respondent. In our view, proceedings under s. 163.2 are of an administrative nature. Ms. Guindon therefore is not a person "charged with an offence" and accordingly the protections under s. 11 of the *Charter* do not apply. In the result, we would dismiss the appeal.

des reçus officiels de dons qu'elle a délivrés au nom d'un organisme de bienfaisance et dont elle savait ou aurait dû raisonnablement savoir, allègue-t-on, qu'ils pourraient être utilisés par des contribuables pour l'obtention d'un crédit d'impôt injustifié.

[3] M^me^ Guindon affirme que la pénalité infligée en application du par. 163.2(4) est de nature criminelle, ce qui fait d'elle une « inculpé[e] » qui a droit aux garanties procédurales de l'art. 11 de la *Charte canadienne des droits et libertés*. Par conséquent, elle fait valoir que la Cour canadienne de l'impôt n'aurait pas dû être saisie de l'affaire et que la pénalité devrait être annulée.

[4] La Cour canadienne de l'impôt lui a donné raison, mais la Cour d'appel fédérale l'a déboutée. Le présent pourvoi soulève deux questions, une de procédure et une de fond. La question de procédure concerne les conséquences de l'omission de M^me^ Guindon de donner dûment avis, dans le cadre des instances devant les juridictions inférieures, de ses prétentions fondées sur l'art. 11 de la *Charte*. Un avis de question constitutionnelle a été dûment donné dans le cadre de la présente instance. La question de fond est celle de savoir si le par. 163.2(4) crée une véritable infraction criminelle et emporte ainsi l'application des protections de l'art. 11.

[5] Selon nous, la Cour possède un pouvoir discrétionnaire bien établi — quoique de portée limitée et devant être exercé avec modération — qui lui permet d'examiner la question constitutionnelle au fond lorsque l'avis requis est donné au stade du pourvoi, même si la question n'a pas été régulièrement soulevée devant les juridictions inférieures. Nous nous prononçons en faveur de l'exercice de ce pouvoir en l'espèce. Toutefois, nous inclinons à trancher la question de fond en faveur de l'intimée. Selon nous, les procédures découlant de l'application de l'art. 163.2 sont de nature administrative. M^me^ Guindon n'est donc pas une « inculpé[e] » au sens de l'art. 11 de la *Charte*, en sorte qu'elle ne bénéficie pas des protections que garantit cette disposition. Nous sommes donc d'avis de rejeter le pourvoi.

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II. Facts and Judicial History

[6] Julie Guindon is a lawyer, practising mainly in the area of family law and wills and estates; she has no expertise in income tax law. In May 2001, she was approached by promoters of a leveraged donation program. Each participant in the program would acquire timeshare units of a resort in the Turks and Caicos Islands. The participants would donate these units to a charity at a fair market value greater than their cash payment for the timeshares. Ms. Guindon agreed, for a fee of $1,000, to provide an opinion letter on the tax consequences of this program on the basis of a precedent provided by the promoters. She recommended that the promoters have a tax lawyer and an accountant review her opinion to ensure its accuracy, as the opinion did not fall within her field of expertise, but nonetheless provided the letter knowing that it was intended to be part of the promotional package for the scheme. She wrote that the transactions would be implemented based on supporting documents that she had been provided with and had reviewed. She had not reviewed the supporting documents.

[7] Ms. Guindon was also the president and administrator of a registered charity, Les Guides Franco-Canadiennes District d'Ottawa. In November 2001, this charity agreed to become the recipient of the donated timeshares. The promoters would then sell the timeshares on behalf of the charity which would receive a minimum of $500 per unit sold.

[8] The scheme was a sham: no timeshare units were created and no transfers from the donors to the charity occurred. The promoters prepared 135 tax receipts, which were issued by the charity and signed by Ms. Guindon and the treasurer of the charity. The total receipted amount was $3,972,775. The Minister of National Revenue disallowed the charitable donation tax credits claimed by the donors. On August 1, 2008, the Minister assessed Ms. Guindon for penalties under s. 163.2 of the

II. Faits et historique judiciaire

[6] Avocate, Julie Guindon exerce principalement en droit de la famille et en droit des successions. Elle ne possède aucune expertise dans le domaine de l'impôt sur le revenu. En mai 2001, les promoteurs d'un programme de dons financés par emprunt l'ont approchée. Chacun des participants au programme devait acquérir des parts de temps partagé d'un centre de villégiature situé dans les îles Turques-et-Caïques. Il faisait ensuite don des parts à un organisme de bienfaisance selon une juste valeur marchande supérieure à la somme versée au comptant pour en faire l'acquisition. Moyennant des honoraires de 1 000 $, M^me^ Guindon a convenu de rédiger une opinion sur les conséquences fiscales du programme à partir d'un précédent fourni par les promoteurs. Elle a recommandé à ces derniers de soumettre son opinion à l'examen d'un avocat fiscaliste et d'un comptable pour en garantir l'exactitude, car le sujet ne relevait pas de son domaine d'expertise. Elle a néanmoins fourni l'opinion en sachant qu'elle serait insérée dans une trousse promotionnelle. Elle y indiquait que les opérations seraient effectuées conformément à la documentation qui lui avait été remise et qu'elle avait examinée. Or, elle n'avait pas examiné cette documentation.

[7] M^me^ Guindon était également présidente et administratrice d'un organisme de bienfaisance enregistré, Les Guides Franco-Canadiennes District d'Ottawa. En novembre 2001, cet organisme de bienfaisance a convenu de devenir bénéficiaire des parts de temps partagé ayant fait l'objet de dons. Les promoteurs devaient ensuite vendre les parts en son nom et lui verser un minimum de 500 $ la part vendue.

[8] L'opération s'est révélée factice. Aucune part n'a été créée, et il n'y a eu aucun transfert des donateurs à l'organisme de bienfaisance. Les promoteurs ont préparé 135 reçus fiscaux officiels qui ont été délivrés par l'organisme de bienfaisance après que M^me^ Guindon et le trésorier de l'organisme y eurent apposé leurs signatures. La somme totale en cause s'élevait à 3 972 775 $. Le ministre du Revenu national a refusé les crédits d'impôt pour dons de bienfaisance demandés par les donateurs.

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ITA for each of the tax receipts issued on the basis that she knew, or would have known but for wilful disregard of the *ITA*, that the tax receipts constituted false statements.

[9] Ms. Guindon appealed this assessment to the Tax Court of Canada. Her counsel, for the first time, relied on s. 11 of the *Charter* during his oral submissions. It was submitted that s. 163.2 created a criminal offence and that, as a result, Ms. Guindon was a person "charged with an offence" entitled to the protections of s. 11 of the *Charter*. Her notice of appeal to the Tax Court did not raise any *Charter* issue and she did not provide notice of a constitutional question to the Attorney General of Canada and the provincial attorneys general as required by s. 19.2 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2. The respondent objected to the *Charter* point being raised, but was overruled.

[10] The Tax Court found that Ms. Guindon's conduct was culpable within the meaning of s. 163.2 of the *ITA*, but vacated the penalty assessment, ruling that the provision is both "by its very nature a criminal proceeding" and "involves a sanction that is a true penal consequence": 2012 TCC 287, 2012 DTC 1283, at para. 53. However, the Tax Court also found that, if the penalty were a civil one, it would be applicable to Ms. Guindon, as she engaged in culpable conduct.

[11] Before the Federal Court of Appeal, Ms. Guindon failed to give notice of a constitutional question to the provincial and federal attorneys general. She argued that no notice of constitutional question was required as she was not questioning the "constitutional validity, applicability or operability" of s. 163.2 of the *ITA*: *Tax Court of Canada Act*, s. 19.2. Instead, she claimed that s. 34(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, operates such that s. 163.2 of the *ITA* can be interpreted in a constitutionally compliant manner. Section 34(2) reads:

Le 1er août 2008, sur le fondement de l'art. 163.2 de la *LIR*, il a infligé à Mme Guindon une pénalité pour chacun des reçus fiscaux délivrés au motif qu'elle savait ou aurait dû savoir, n'eût été sa méconnaissance délibérée de la *LIR*, que les reçus fiscaux constituaient de faux énoncés.

[9] Mme Guindon a interjeté appel de la cotisation en Cour canadienne de l'impôt. Son avocat a invoqué pour la première fois l'art. 11 de la *Charte* au cours de sa plaidoirie. Il a soutenu que l'art. 163.2 créait une infraction criminelle, de sorte que Mme Guindon était une « inculpé[e] » et avait droit à ce titre aux protections de l'art. 11 de la *Charte*. L'avis d'appel à la Cour de l'impôt ne soulevait aucune question relative à la *Charte*, et nul avis d'une question constitutionnelle n'avait été signifié au procureur général du Canada et aux procureurs généraux des provinces comme l'exige l'art. 19.2 de la *Loi sur la Cour canadienne de l'impôt*, L.R.C. 1985, c. T-2. L'intimée s'est opposée à l'examen de la question constitutionnelle, mais son objection a été rejetée.

[10] La Cour de l'impôt conclut que Mme Guindon a eu une conduite coupable au sens de l'art. 163.2 de la *LIR*, mais elle annule la cotisation au motif que la disposition, « de par sa nature même, est une procédure criminelle » et qu'elle « est assortie d'une sanction qui est une véritable conséquence pénale » (2012 CCI 287, 2012 DTC 1283, par. 53). Elle ajoute cependant que si la pénalité était de nature administrative, elle s'appliquerait à Mme Guindon puisque cette dernière a eu une conduite coupable.

[11] En Cour d'appel fédérale, Mme Guindon a omis de signifier un avis de question constitutionnelle aux procureurs généraux fédéral et provinciaux. Elle a fait valoir que l'avis n'était pas requis puisqu'elle ne remettait pas en question « la validité, l'applicabilité ou l'effet » de l'art. 163.2 de la *LIR* (*Loi sur la Cour canadienne de l'impôt*, art. 19.2). Elle prétendait plutôt que le par. 34(2) de la *Loi d'interprétation*, L.R.C. 1985, c. I-21, permettait d'interpréter l'art. 163.2 de la *LIR* de manière à le rendre conforme à la Constitution. Le paragraphe 34(2) est libellé comme suit :

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obligation . . . by advancing the excuse" of her notice argument by employing "linguistic tactics at the expense of the public interest": paras. 94, 96, 97 and 136.

[39] Ms. Guindon did not fail to explain why she did not give notice. She advanced the argument that notice was not required and the Tax Court judge decided that issue. Bédard J. did not require notice of constitutional question to be served because he did not issue a declaration of invalidity following his conclusion that s. 163.2 constituted a criminal offence. Instead, he allowed the appeal and vacated the assessment. The learned Tax Court judge did not dismiss Ms. Guindon's argument on the basis of "semantics". The Federal Court of Appeal did not accept Ms. Guindon's position on this point. But it devoted several paragraphs of its judgment to the issue and did not characterize Ms. Guindon's position as merely "linguistic" or as an attempt to "evade" the notice requirement. No party or intervener at any point has advanced the interpretation of Ms. Guindon's conduct on which our colleagues rely and there is no support for it — none — in the record.

[40] We will now proceed to address the constitutional issue.

B. *Merits*

(1) Overview

[41] The substantive issue in this appeal is whether Ms. Guindon, by virtue of having been assessed a penalty under s. 163.2 of the *ITA*, is a "person charged with an offence" within the meaning of s. 11 of the *Charter*. If she is, then either she is entitled to the numerous protections accorded by that section or, if s. 163.2 cannot be read as providing for those protections, it would be constitutionally invalid. The basic question is whether, as Ms. Guindon submits, s. 163.2 creates "an offence" for the purposes of s. 11 and the answer depends, as we shall explain, on whether s. 163.2 is criminal in nature or provides for

en faisant valoir » sa thèse relative à l'avis par le recours à « une stratégie d'ordre linguistique au détriment de l'intérêt public » (par. 94, 96, 97 et 136).

[39] M^me^ Guindon n'a pas omis de préciser pourquoi elle n'avait pas donné d'avis. Elle a soutenu que l'avis n'était pas requis et que le juge de la Cour de l'impôt avait statué sur ce point. Le juge Bédard n'exige pas la signification d'un avis de question constitutionnelle puisqu'il n'invalide pas l'art. 163.2 après avoir conclu qu'il crée une infraction criminelle. Il accueille plutôt l'appel et annule la cotisation. Il n'écarte pas la thèse de M^me^ Guindon pour des motifs d'ordre « sémantique ». La Cour d'appel fédérale ne convient pas avec M^me^ Guindon de la non-exigence de l'avis. Elle consacre toutefois quelques paragraphes de ses motifs à la question et elle ne qualifie pas le point de vue de M^me^ Guindon de purement « sémantique » ou de tentative de « se soustraire » à l'exigence d'un avis. Aucune des parties et aucun des intervenants n'a fait valoir, à quelque étape, l'interprétation que font nos collègues des actes de M^me^ Guindon, et le dossier ne renferme pas d'élément — aucun — qui milite en faveur de cette interprétation.

[40] Passons maintenant à l'examen de la question constitutionnelle.

B. *Fond*

(1) Aperçu

[41] La question de fond qui se pose en l'espèce est celle de savoir si M^me^ Guindon, parce qu'elle s'est vu infliger une pénalité en application de l'art. 163.2 de la *LIR*, est une « inculpé[e] » au sens de l'art. 11 de la *Charte*. Si tel est le cas, soit elle a droit aux nombreuses protections garanties par cet article, soit l'art. 163.2 est inconstitutionnel s'il ne peut être interprété comme offrant ces protections. Fondamentalement, il faut se demander si, comme le soutient M^me^ Guindon, l'art. 163.2 crée « une infraction » pour les besoins de l'art. 11. Comme nous l'expliquons plus loin, la réponse dépend de ce que

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true penal consequences. In our view, neither is the case and s. 11 does not apply to these proceedings.

[42] We will first set out a brief overview of the legal principles, consider and reject some criticisms of this framework and then apply the principles to s. 163.2.

(2) *Wigglesworth* and *Martineau* Set Out the Tests to Determine Whether Section 11 of the *Charter* Is Engaged

[43] Section 11 of the *Charter* provides:

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished

l'art. 163.2 est de nature criminelle ou non ou de ce qu'il a de véritables conséquences pénales ou non. À notre sens, la réponse est négative dans les deux cas, de sorte que l'art. 11 ne s'applique pas.

[42] Nous faisons d'abord état brièvement des principes juridiques applicables, nous rejetons ensuite, après examen, certaines critiques du cadre qu'ils établissent et, enfin, nous appliquons les principes à l'art. 163.2.

(2) Les arrêts *Wigglesworth* et *Martineau* établissent les critères qui permettent de décider de l'applicabilité de l'art. 11 de la *Charte*

[43] L'article 11 de la *Charte* dispose ce qui suit :

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;

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

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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.

[44] This Court has deliberately adopted a "somewhat narrow definition of the opening words of s. 11" in order to avoid having to craft differing levels of protection under s. 11 for different sorts of proceedings: *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at p. 558. The Court has also acknowledged the difficulty in formulating a precise test to identify particular proceedings which give rise to s. 11 protections: see p. 559. Section 11 protections are available to those charged with criminal offences, not those subject to administrative sanctions: see *Wigglesworth*, at p. 554; *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737, at para. 19. The two parts test for determining which statutory infractions are criminal offences and which are administrative penalties was set out in *Wigglesworth*, at pp. 559-62. Additional analytical criteria were subsequently elaborated in *Martineau*, at paras. 19-24 and 57. As will be explained, an individual is entitled to the procedural protections of s. 11 of the *Charter* where the proceeding is, by its very nature, criminal, or where a "true penal consequence" flows from the sanction.

[45] A proceeding is criminal by its very nature when it is aimed at promoting public order and welfare within a public sphere of activity. Proceedings of an administrative nature, on the other hand, are primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity: see *Martineau*, at paras. 21-22; *Wigglesworth*, at p. 560. The focus of the inquiry is not on the nature of the act which is the subject of the proceedings, but on the nature of the proceedings themselves, taking into account their purpose as well as their procedure: *Martineau*, at paras. 24 and 28-32; *R. v. Shubley*, [1990] 1 S.C.R. 3, at pp. 18-19.

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.

[44] Notre Cour a délibérément retenu une « définition quelque peu restreinte de la disposition liminaire de l'art. 11 » afin de ne pas devoir établir au titre de cette disposition différents degrés de protection pour différents types de procédure (*R. c. Wigglesworth*, [1987] 2 R.C.S. 541, p. 558). La Cour a aussi reconnu la difficulté de formuler un critère précis pour déterminer si une procédure en particulier donne lieu ou non à l'application des protections de l'art. 11 (voir p. 559). Ces protections peuvent bénéficier à celui qui est accusé d'une infraction criminelle, mais pas à celui qui fait l'objet d'une sanction administrative (voir *Wigglesworth*, p. 554; *Martineau c. M.R.N.*, 2004 CSC 81, [2004] 3 R.C.S. 737, par. 19). Le critère à deux volets qui permet de discerner parmi les contraventions à une loi celles qui sont de nature criminelle et celles qui sont de nature administrative a été énoncé dans l'arrêt *Wigglesworth*, p. 559-562. D'autres critères analytiques se sont ajoutés dans l'arrêt *Martineau*, par. 19-24 et 57. Comme nous l'expliquons plus loin, une personne a droit aux protections procédurales de l'art. 11 de la *Charte* lorsque, de par sa nature même, la procédure est criminelle, ou lorsqu'une « véritable conséquence pénale » découle de la sanction.

[45] Une procédure est criminelle de par sa nature même lorsqu'elle vise à promouvoir l'ordre et le bien-être publics dans une sphère d'activité publique. Par contre, une procédure est de nature administrative lorsqu'elle vise principalement l'observation de règles ou la réglementation de la conduite dans une sphère d'activité limitée (voir *Martineau*, par. 21-22; *Wigglesworth*, p. 560). Il ne faut pas s'attacher à la nature de l'acte qui est à l'origine de la procédure, mais bien à la nature de la procédure comme telle, compte tenu de son objectif et de ses modalités (*Martineau*, par. 24 et 28-32; *R. c. Shubley*, [1990] 1 R.C.S. 3, p. 18-19). Une

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Proceedings have a criminal purpose when they seek to bring the subject of the proceedings "to account to society" for conduct "violating the public interest": *Shubley*, at p. 20.

[46] A "true penal consequence" 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 [a] limited sphere of activity": *Wigglesworth*, at p. 561; see also *Martineau*, at para. 57. There is inevitably some overlap between the analysis of the purpose of the scheme and the purpose of the sanction, but the jurisprudence has looked at both separately to the extent that is possible, recognizing that the proceeding will be an offence for s. 11 purposes if it meets either branch of the test, and that situations in which a proceeding meets one but not both branches will be rare: *ibid.*

[47] We will elaborate these principles further as we apply them to the provision in issue here. But first we turn to consider some of the criticisms of this approach to the analysis.

(3) Criticisms of the *Wigglesworth/Martineau* Tests

[48] The *Wigglesworth/Martineau* tests have been subject to criticism. It has been said that the distinction between the criminal in nature and true penal consequence tests is unclear, the reasoning is circular, or the tests cannot properly account for the particular context of modern administrative monetary penalties. (See, e.g., D. McLeod, "Facing the Consequences: Should the *Charter* Apply to Administrative Proceedings Involving Monetary Penalties?" (2012), 30 *N.J.C.L.* 59; factum of the intervener the Canadian Constitution Foundation ("CCF"); S. Aylward and L. Ritacca, "In Defence of Administrative Law: Procedural Fairness for Administrative Monetary Penalties" (2015), 28 *C.J.A.L.P.* 35.)

procédure a un objectif criminel lorsqu'elle vise à amener la personne en cause « à rendre compte à la société » d'une conduite « contraire à l'intérêt public » (*Shubley*, p. 20).

[46] Une « véritable conséquence pénale » s'entend de « l'emprisonnement ou [de l']amende qui par son importance semblerait imposée dans le but de réparer le tort causé à la société en général plutôt que pour maintenir la discipline à l'intérieur d'une sphère d'activité limitée » (*Wigglesworth*, p. 561; voir aussi *Martineau*, par. 57). Il existe inévitablement un certain chevauchement entre le régime et la sanction lorsqu'il s'agit d'analyser leur objet respectif, mais les tribunaux ont examiné les deux séparément dans la mesure du possible et reconnu que la procédure est pénale pour l'application de l'art. 11 lorsqu'elle satisfait à l'un ou l'autre des volets du critère, et que rares sont les situations dans lesquelles il est satisfait à l'un mais non aux deux volets (*ibid.*).

[47] Nous reviendrons plus en détail sur ces principes lorsque nous les appliquerons à la disposition considérée en l'espèce. Examinons d'abord certaines des critiques de cette démarche analytique.

(3) Critiques des critères issus des arrêts *Wigglesworth* et *Martineau*

[48] Les critères issus des arrêts *Wigglesworth* et *Martineau* ont fait l'objet de critiques. D'aucuns ont dit que la distinction entre le critère de la nature criminelle et celui de la véritable conséquence pénale n'était pas claire, que le raisonnement était circulaire ou que les critères ne permettaient pas de bien tenir compte du contexte particulier des sanctions pécuniaires administratives qui sont infligées de nos jours. (Voir p. ex. D. McLeod, « Facing the Consequences : Should the *Charter* Apply to Administrative Proceedings Involving Monetary Penalties? » (2012), 30 *R.N.D.C.* 59; mémoire de l'intervenante Canadian Constitution Foundation (« CCF »); S. Aylward et L. Ritacca, « In Defence of Administrative Law : Procedural Fairness for Administrative Monetary Penalties » (2015), 28 *R.C.D.A.P.* 35.)

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

[49] Lorsque l'on considère que le critère de la nature criminelle ne s'intéresse qu'à la procédure, la fonction propre à chacun des critères devient évidente. Le critère de la nature criminelle permet de circonscrire les dispositions qui sont de nature criminelle du fait que le Parlement ou la législature a établi une procédure dont les attributs et l'objet montrent que la sanction est infligée à l'issue d'une procédure de nature criminelle. Par contre, le critère de la véritable conséquence pénale consiste à se demander si une disposition d'apparence administrative ou réglementaire donne néanmoins droit aux protections de l'art. 11 de la *Charte* parce que son application peut entraîner une conséquence pénale. Un certain chevauchement est inévitable, mais il importe de prendre en compte toutes les considérations pertinentes et de se rappeler que les deux volets du critère ne conduisent que rarement à des conclusions différentes (comme dans *Wigglesworth*).

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

[50] De plus, l'analyse n'est pas circulaire : les deux critères appellent des questions distinctes qui apprécient les deux manières différentes dont une disposition pourrait créer une infraction criminelle pour l'application de l'art. 11. Le critère de la nature criminelle s'attache au processus, alors que celui de la conséquence pénale se focalise sur l'effet possible de la disposition sur la personne visée par la procédure.

(4) Is the Proceeding Under Section 163.2 "Criminal in Nature"?

(4) La procédure prévue à l'art. 163.2 est-elle « de nature criminelle »?

(a) *Principles*

a) *Principes*

[51] The criminal in nature test asks whether the proceedings by which a penalty is imposed are criminal. The test is not concerned with the nature of the underlying act. As Wilson J. stated in *Wigglesworth*, the test is whether a matter "fall[s] within s. 11 . . . because by its very nature it is a criminal proceeding": p. 559 (emphasis added). This was confirmed in *Shubley*, at pp. 18-19, where McLachlin J. (as she then was) stated explicitly: "The question of whether proceedings are criminal in nature is concerned not with the nature of the act

[51] Pour appliquer le critère de la nature criminelle il faut se demander si la procédure par laquelle une sanction est infligée est criminelle, peu importe la nature de l'acte sous-jacent. Comme le dit la juge Wilson dans l'arrêt *Wigglesworth*, la question est celle de savoir si l'affaire « rel[ève] de l'art. 11 [. . .] parce que, de par sa nature même, il s'agit d'une procédure criminelle » (p. 559 (nous soulignons)). La Cour le confirme dans l'arrêt *Shubley*, p. 18-19, où la juge McLachlin (maintenant Juge en chef) affirme sans ambages que « [l]a

which gave rise to the proceedings, but the nature of the proceedings themselves" (emphasis added). Fish J., writing for the Court in *Martineau*, reaffirmed the conclusion in *Shubley* that the criminal in nature test is concerned solely with the proceedings themselves: see paras. 18-19. The text of s. 11 supports this conclusion. As Wilson J. noted in *Wigglesworth*:

> Section 11 contains terms which are classically associated with criminal proceedings: "tried", "presumed innocent until proven guilty", "reasonable bail", "punishment for the offence", "acquitted of the offence" and "found guilty of the offence". Indeed, some of the rights guaranteed in s. 11 would seem to have no meaning outside the criminal or quasi-criminal context. [p. 555]

[52] Various indicia are useful in determining whether the proceedings are criminal in nature. Fish J., in finding that the civil forfeiture provision at issue in *Martineau* was not criminal in nature, observed that three criteria may be helpful in reviewing the case law in relation to the nature of the proceeding: the objectives of the legislation, the objectives of the sanction and the process leading to the imposition of the sanction (para. 24). This case deals with an administrative monetary penalty, not a civil collection mechanism as was the case in *Martineau*, and the analysis of the objectives of the sanction must be undertaken as part of considering whether the sanction is a true penal consequence. In order to avoid unnecessary repetition, we find it convenient to consider the first and last of these criteria here but leave consideration of the objectives of the sanction until we address the question of whether the sanction is a true penal consequence. We will look at how these criteria relate to the proceeding under s. 163.2 in turn.

détermination du caractère criminel des procédures dépend non pas de la nature de l'acte qui est à l'origine de ces procédures, mais de la nature des procédures elles-mêmes » (nous soulignons). Dans l'arrêt *Martineau*, le juge Fish, au nom de la Cour, reprend à son compte la conclusion tirée dans l'arrêt *Shubley*, à savoir que le critère de la nature criminelle s'intéresse uniquement à la procédure comme telle (voir par. 18-19). Le texte de l'art. 11 appuie d'ailleurs cette conclusion. Comme le fait remarquer la juge Wilson dans l'arrêt *Wigglesworth* :

> L'article 11 contient des termes habituellement associés aux procédures criminelles : « jugé », « présumé innocent tant qu'il n'est pas déclaré coupable », « cautionnement raisonnable », « peine [. . .] prévue pour l'infraction », « acquitté [. . .] [d']une infraction » et « infraction dont il est déclaré coupable ». En fait, certains des droits que garantit l'art. 11 sembleraient n'avoir aucune signification hors du contexte criminel ou quasi criminel. [p. 555]

[52] Divers indices permettent d'établir qu'une procédure est de nature criminelle ou non. Lorsqu'il conclut que la disposition en cause prévoyant la confiscation administrative n'est pas de nature criminelle, le juge Fish fait observer que trois considérations peuvent être utiles dans l'examen de la jurisprudence relative à la nature d'une procédure : l'objet de la loi, l'objectif de la sanction et le processus menant à la sanction (par. 24). Nous avons affaire en l'espèce à une sanction pécuniaire administrative, non à une mesure administrative de recouvrement comme dans *Martineau*, et les objectifs de la sanction doivent être analysés en fonction de la question de savoir si la sanction constitue ou non une véritable conséquence pénale. Pour éviter toute répétition inutile, il convient de se pencher sur la première et la dernière considérations à ce stade, puis sur l'objectif de la sanction au moment de se demander si celle-ci constitue une véritable conséquence pénale. Nous verrons comment chacune de ces considérations se rattache à la procédure découlant de l'art. 163.2.

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(b) *Application*

(i) The Legislative Scheme and the Provision in Issue

[53] The question is whether the objectives of the proceedings, examined in their full legislative context, have a regulatory or a penal purpose. As Wilson J. put it in *Wigglesworth*, "if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11": p. 560. She noted, by way of example, that proceedings of an "administrative nature instituted for the protection of the public in accordance with the policy of a statute" or which impose disqualifications "as part of a scheme for regulating an activity in order to protect the public" are generally not the sort of proceedings that engage s. 11: *ibid.*

[54] The *ITA* is "a self-reporting and self-assessing [scheme] which depends upon the honesty and integrity of the taxpayers for its success" in order to carry out its ultimate purpose, the raising of government revenues: *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at p. 636. Nonetheless, it contains a number of enforcement measures, including both civil and criminal penalties. Civil penalties are found in Part I, Division I, of the *ITA*, "Returns, Assessments, Payment and Appeals" and are assessed by the Canada Revenue Agency ("CRA"). Criminal offences, on the other hand, are found in Part XV, "Administration and Enforcement" and are prosecuted before a court of criminal jurisdiction.

[55] This appeal focuses on s. 163.2 of the *ITA*. Enacted in 2000, it contains two administrative penalties: the "planner penalty" in subs. (2) and the "preparer penalty" in subs. (4). The planner penalty is not at issue in this appeal. The preparer penalty reads:

b) *Application*

(i) Le régime législatif et la disposition en cause

[53] La question qui se pose est celle de savoir si l'objectif d'une procédure, considéré dans son contexte législatif global, est de nature réglementaire ou pénale. Comme le souligne la juge Wilson dans l'arrêt *Wigglesworth*, « si une affaire en particulier est de nature publique et vise à promouvoir l'ordre et le bien-être publics dans une sphère d'activité publique, alors cette affaire est du genre de celles qui relèvent de l'art. 11 » (p. 560). Elle fait remarquer à l'aide d'un exemple que les procédures « de nature administrative engagées pour protéger le public conformément à la politique générale d'une loi » ou qui imposent des disqualifications « dans le cadre d'un régime de réglementation d'une activité visant à protéger le public » ne sont généralement pas de celles qui emportent l'application de l'art. 11 (*ibid.*).

[54] La *LIR* est « un régime d'auto-déclaration et d'auto-cotisation dont le succès repose sur l'honnêteté et l'intégrité des contribuables », son but ultime étant l'obtention de recettes par l'État (*R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627, p. 636). Néanmoins, elle prévoit un certain nombre de mesures d'exécution, y compris des sanctions de nature tant administrative que criminelle. Les sanctions de nature administrative se trouvent dans la partie I, section I, de la *LIR*, « Déclarations, cotisations, paiement et appels », et elles font l'objet de cotisations établies par l'Agence du revenu du Canada (« ARC »). Les sanctions criminelles figurent pour leur part à la partie XV intitulée « Application et exécution », et les contrevenants sont poursuivis devant une cour de juridiction criminelle.

[55] Le pourvoi porte essentiellement sur l'art. 163.2 de la *LIR*. Édicté en 2000, cet article prévoit deux sanctions administratives, l'une infligée au planificateur (par. (2)), l'autre au spécialiste en déclarations (par. (4)). La « pénalité du planificateur » n'est pas en cause en l'espèce. Le texte de la disposition qui prévoit la « pénalité du spécialiste en déclarations » est le suivant :

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(4) Every person who makes, or participates in, assents to or acquiesces in the making of, a statement to, or by or on behalf of, another person (in this subsection, subsections (5) and (6), paragraph (12)(*c*) and subsection (15) referred to as the "other person") that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by or on behalf of the other person for a purpose of this Act is liable to a penalty in respect of the false statement.

[56] The CRA explains that the preparer penalty is intended to apply when an individual has made, participated in, assented to, or acquiesced in the making of a false statement. A specific person who could use the false statement must be identified (the provision uses the term "the other person"). According to the CRA, the penalty could apply, for example, to an individual preparing a fraudulent tax return for or providing deceptive tax advice to a specific taxpayer. (See CRA's information circular IC 01-1, "Third-Party Civil Penalties" (September 18, 2001 (online)), at paras. 6-7 and 9.)

[57] The preparer penalty is narrow: the false statement must be made knowingly or in circumstances amounting to culpable conduct. Culpable conduct is defined in s. 163.2(1) as

conduct, whether an act or a failure to act, that

(*a*) is tantamount to intentional conduct;

(*b*) shows an indifference as to whether this Act is complied with; or

(*c*) shows a wilful, reckless or wanton disregard of the law.

[58] This is clearly a high standard. "[W]ilful, reckless or wanton disregard of the law" refers to concepts well known to the law, commonly encountered as degrees of *mens rea* in criminal law: see, e.g., K. Roach, *Criminal Law* (5th ed. 2012), at pp. 180-84 and 191-92. The use of such terms

(4) La personne qui fait un énoncé à une autre personne ou qui participe, consent ou acquiesce à un énoncé fait par une autre personne, ou pour son compte, (ces autres personnes étant appelées « autre personne » au présent paragraphe, aux paragraphes (5) et (6), à l'alinéa (12)*c*) et au paragraphe (15)) dont elle sait ou aurait vraisemblablement su, n'eût été de circonstances équivalant à une conduite coupable, qu'il constitue un faux énoncé qui pourrait être utilisé par l'autre personne, ou pour son compte, à une fin quelconque de la présente loi est passible d'une pénalité relativement au faux énoncé.

[56] L'ARC explique que la pénalité du spécialiste en déclarations est censée s'appliquer lorsqu'une personne a fait un faux énoncé ou a participé, consenti ou acquiescé à un faux énoncé fait par une autre personne. L'identité de la personne qui pourrait utiliser le faux énoncé doit être déterminée, car la disposition emploie l'expression « l'autre personne ». Selon l'ARC, la pénalité pourrait être infligée, par exemple, à une personne qui a préparé une déclaration de revenus frauduleuse pour un contribuable en particulier ou qui a fourni à ce dernier des conseils fiscaux trompeurs. (Voir la circulaire d'information IC 01-1 de l'ARC intitulée « Pénalités administratives imposées à des tiers » (18 septembre 2001 (en ligne)), par. 6-7 et 9.)

[57] Le champ d'application de la pénalité du spécialiste en déclarations est restreint : le faux énoncé doit avoir été fait sciemment ou dans des circonstances équivalant à une conduite coupable, laquelle est définie comme suit au par. 163.2(1) :

Conduite — action ou défaut d'agir — qui, selon le cas :

a) équivaut à une conduite intentionnelle;

b) montre une indifférence quant à l'observation de la présente loi;

c) montre une insouciance délibérée, déréglée ou téméraire à l'égard de la loi.

[58] Il s'agit clairement d'une norme stricte. L'expression « insouciance délibérée, déréglée ou téméraire à l'égard de la loi » renvoie à des notions juridiques bien connues qui correspondent généralement à des degrés de *mens rea* en droit criminel (voir p. ex. K. Roach, *Criminal Law* (5e éd. 2012),

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evinces a clear intention that "culpable conduct" be a more exacting standard than simple negligence.

[59] The expressions "shows an indifference as to whether this Act is complied with" and "tantamount to intentional conduct" originated in the jurisprudence on the gross negligence penalty applicable directly to taxpayers in s. 163(2) of the *ITA*, which states:

> (2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of . . . . [Penalty calculations omitted.]

[60] The Minister states in her factum that "culpable conduct" in s. 163.2 of the *ITA* "was not intended to be different from the gross negligence standard in s. 163(2)": para. 79. The Federal Court in *Venne v. The Queen*, [1984] C.T.C. 223 (T.D.), in the context of a s. 163(2) penalty, explained that "an indifference as to whether the law is complied with" is more than simple carelessness or negligence; it involves "a high degree of negligence tantamount to intentional acting": p. 234. It is akin to burying one's head in the sand: *Sirois (L.C.) v. Canada*, 1995 CarswellNat 555 (WL Can.) (T.C.C.), at para. 13; *Keller v. Canada*, 1995 CarswellNat 569 (WL Can.) (T.C.C.). The Tax Court in *Sidhu v. R.*, 2004 TCC 174, [2004] 2 C.T.C. 3167, explaining the decision in *Venne*, elaborated on expressions "tantamount to intentional conduct" and "shows an indifference as to whether this Act is complied with":

> Actions "tantamount" to intentional actions are actions from which an imputed intention can be found such as actions demonstrating "an indifference as to whether the law is complied with or not". . . . The burden here is not to prove, beyond a reasonable doubt, *mens rea* to evade taxes. The burden is to prove on a balance of probability

p. 180-184 et 191-192). L'emploi de tels termes traduit l'intention évidente de faire en sorte que la « conduite coupable » commande l'application d'une norme plus stricte que ne le fait la simple négligence.

[59] Les expressions « montre une indifférence quant à l'observation de la présente loi » et « équivaut à une conduite intentionnelle » tirent leur origine de la jurisprudence sur la pénalité pour faute lourde qui s'applique directement au contribuable suivant le par. 163(2) de la *LIR*, lequel dispose :

> (2) Toute personne qui, sciemment ou dans des circonstances équivalant à faute lourde, fait un faux énoncé ou une omission dans une déclaration, un formulaire, un certificat, un état ou une réponse (appelé « déclaration » au présent article) rempli, produit ou présenté, selon le cas, pour une année d'imposition pour l'application de la présente loi, ou y participe, y consent ou y acquiesce est passible d'une pénalité . . . [Calcul du montant de la pénalité omis.]

[60] Dans son mémoire, la ministre soutient que la « conduite coupable » visée à l'art. 163.2 de la *LIR* [TRADUCTION] « n'est pas censée différer de la faute lourde et de la norme qui s'y rattache au par. 163(2) » (par. 79). Dans *Venne c. Canada (ministre du Revenu national — M.R.N.)*, [1984] A.C.F. nº 314 (QL) (1re inst.), une affaire relative à la pénalité prévue au par. 163(2), la Cour fédérale explique qu'« une indifférence au respect de la Loi » ne s'entend pas que d'une simple inattention ou négligence; elle suppose « un degré important de négligence qui corresponde à une action délibérée » (p. 11). Cela s'apparente en somme à faire l'autruche (*Sirois (L.C.) c. Canada*, 1995 CarswellNat 1974 (WL Can.) (C.C.I.), par. 13; *Keller c. Canada*, 1995 CarswellNat 569 (WL Can.) (C.C.I.)). Dans *Sidhu c. La Reine*, 2004 CCI 174, la Cour canadienne de l'impôt, pour expliquer sa décision dans *Venne*, développe les expressions « équivaut à une conduite intentionnelle » et « montre une indifférence quant à l'observation de la présente loi » :

> Les actions « qui correspondent » à des actions réalisées intentionnellement sont celles pour lesquelles on peut présumer une intention, comme les actions qui démontrent « une indifférence au respect de la Loi ». [. . .] Le fardeau de la preuve ne consiste pas à prouver au-delà du doute raisonnable l'intention coupable de se

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such an indifference to appropriate and reasonable diligence in a self-assessing system as belies or offends common sense. [para. 23]

soustraire au paiement de l'impôt, mais à prouver selon la prépondérance des probabilités une telle indifférence à l'égard de la diligence appropriée et raisonnable dans le contexte d'un système d'autocotisation qui contredit et insulte le sens commun. [par. 23 (CanLII)]

[61] Therefore, while there has been debate as to the scope of "culpable conduct" (as argued before the Tax Court in this matter), the standard must be at least as high as gross negligence under s. 163(2) of the *ITA*. The third party penalties are meant to capture serious conduct, not ordinary negligence or simple mistakes on the part of a tax preparer or planner.

[61] Par conséquent, bien que la portée de la définition de « conduite coupable » soit objet de débats (comme on l'a plaidé devant la Cour de l'impôt dans la présente affaire), la norme appliquée doit être au moins aussi stricte que pour la faute lourde au titre du par. 163(2) de la *LIR*. La pénalité infligée au tiers vise à sanctionner une conduite grave, non la négligence ordinaire ou la simple erreur du spécialiste en déclarations ou du planificateur.

[62] We can conclude that the purpose of this proceeding is to promote honesty and deter gross negligence, or worse, on the part of preparers, qualities that are essential to the self-reporting system of income taxation assessment.

[62] Nous pouvons conclure que l'objectif de la procédure en cause est de promouvoir l'honnêteté des spécialistes en déclarations et de les dissuader de commettre une faute lourde ou un acte encore plus grave, ce qui est essentiel dans le cadre d'un système d'autocotisation.

(ii) The Process

(ii) Le processus

[63] With respect to the process, the heart of the analysis is concerned with the extent to which it bears the traditional hallmarks of a criminal proceeding. Fish J. referred to some of the relevant considerations in *Martineau*, including whether the process involved the laying of a charge, an arrest, a summons to appear before a court of criminal jurisdiction, and whether a finding of responsibility leads to a criminal record: para. 45. The use of words traditionally associated with the criminal process, such as "guilt", "acquittal", "indictment", "summary conviction", "prosecution", and "accused", can be a helpful indication as to whether a provision refers to criminal proceedings.

[63] En ce qui a trait au processus, la question est foncièrement celle de savoir dans quelle mesure il présente les caractéristiques habituelles d'une procédure criminelle. Dans l'arrêt *Martineau*, le juge Fish mentionne certaines des considérations pertinentes, dont celle de savoir si le processus comprend le dépôt d'une accusation, une arrestation ou une assignation à comparaître devant une cour de juridiction criminelle, et celle de savoir si une conclusion de responsabilité conduit à un casier judiciaire (par. 45). L'emploi de termes habituellement liés au processus criminel, tels que « culpabilité », « acquittement », « acte d'accusation », « déclaration de culpabilité par procédure sommaire », « poursuivant » et « accusé » peut constituer une indication utile pour déterminer si une disposition renvoie à une procédure criminelle.

[64] The fact that the penalty is imposed by a judge in a criminal court is, of course, another sign that the offence is criminal in nature. But whether a proceeding is criminal by nature does not depend on the actual penalty imposed. For example, parking tickets can involve relatively small fines,

[64] Évidemment, l'infliction de la sanction par une cour criminelle tend également à indiquer que l'infraction est de nature criminelle. Or, la nature criminelle d'une procédure ne dépend pas de la sanction effectivement infligée. Par exemple, une contravention pour stationnement illégal peut

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but where they are imposed in conformity with the general criminal process (e.g. pleading guilty or contesting the fine before a judge, prosecution by a Crown attorney), s. 11 rights apply: *Wigglesworth*, at para. 559. Offences in the *Criminal Code*, the *Youth Criminal Justice Act*, S.C. 2002, c. 1, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and quasi-criminal offences under provincial legislation are the type of proceedings which are criminal in nature: see the *Constitution Act, 1867*, s. 92(15); *Wigglesworth*, at p. 560; *Martineau*, at para. 21.

donner lieu à une amende relativement minime, mais lorsque celle-ci est infligée en conformité avec le processus criminel en général (p. ex., inscription d'un plaidoyer de culpabilité ou contestation de l'amende devant le tribunal, poursuite par un procureur du ministère public), les droits garantis par l'art. 11 s'appliquent (*Wigglesworth*, par. 559). Les infractions créées par le *Code criminel*, la *Loi sur le système de justice pénale pour les adolescents*, L.C. 2002, c. 1, et la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, c. 19, ainsi que les infractions quasi criminelles créées par les lois provinciales, donnent lieu à des procédures de nature criminelle (voir la *Loi constitutionnelle de 1867*, par. 92(15); *Wigglesworth*, p. 560; *Martineau*, par. 21).

[65] If, considering all of these factors, the process is criminal in nature, it engages s. 11 of the *Charter*.

[65] Le processus qui, au regard de l'ensemble de ces considérations, est de nature criminelle emporte l'application de l'art. 11 de la *Charte*.

[66] The process leading to the imposition of the penalty is described in the CRA's IC 01-1, at paras. 79-89. CRA auditors conduct a penalty audit, advise the preparer or planner in writing of the audit, and consider any representation that the individual chooses to make before making a recommendation to the Third-Party Penalty Review Committee. If this Committee agrees with the recommendation to impose the penalty, it will give the planner or preparer another opportunity to make representations before making its decision.

[66] La circulaire IC 01-1 de l'ARC fait état, aux par. 79-89, du processus d'infliction de la pénalité. Les vérificateurs de l'ARC effectuent la vérification nécessaire, en informent par écrit le spécialiste en déclarations ou le planificateur et examinent toute observation de ce dernier avant de faire une recommandation au Comité d'examen des pénalités imposées à des tiers. Si le Comité accepte la recommandation d'imposer la pénalité, il offre au planificateur ou au spécialiste en déclarations une autre occasion de se faire entendre avant que la décision ne soit rendue.

[67] This administrative process can be contrasted with the process which applies to criminal offences in the *ITA*: ss. 238 and 239. Unlike the administrative penalties in s. 163.2, the criminal sanctions are imposed by a court of criminal jurisdiction after the laying of an information or complaint: see s. 244. For ease of reference, we repeat the criteria from *Martineau*. Just as in that case, in the context of s. 163.2:

[67] Comparons ce processus administratif avec le processus que prévoit la *LIR* pour une infraction criminelle (art. 238 et 239). Contrairement aux pénalités administratives de l'art. 163.2, les sanctions criminelles sont infligées par une cour de juridiction criminelle après le dépôt d'une dénonciation ou d'une plainte (voir art. 244). Par souci de commodité, nous rappelons les critères énoncés dans l'arrêt *Martineau*. Tout comme dans cette affaire, dans le contexte de l'art. 163.2 :

No one is charged . . . . No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the

. . . [le processus] n'inculpe personne. Aucune dénonciation n'est déposée contre qui que ce soit. Personne n'est arrêté. Personne n'est sommé de comparaître devant une cour de juridiction pénale. Aucun casier judiciaire n'en

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administrative proceeding is complete and all appeals are exhausted, if the [penalty] is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of a civil action. [para. 45]

Similarly, under s. 163.2(4), if the assessment is upheld and payment is not made, the Minister may only invoke civil collection procedures under the *ITA*.

[68] Ms. Guindon submits that where the same conduct can lead to either an administrative monetary penalty or a criminal sanction, the proceedings will be criminal in nature. Here, conduct which may form the basis of an administrative penalty under s. 163.2 could also be the basis for criminal prosecution under s. 239 of the *ITA*: see the Tax Court's reasons, at paras. 44-50. However, the same act could have more than one aspect. It follows that the fact that the same conduct which could form the basis of an administrative penalty could also lead to a criminal conviction is irrelevant to the characterization of the administrative penalty. As explained earlier, the test is that set out in *Wigglesworth* and *Martineau*.

[69] Should an individual be assessed an administrative monetary penalty and subsequently face criminal prosecution for the same conduct (or vice versa), that individual may argue that bringing the second proceedings in the particular circumstances is an abuse of process.[2] As nothing in the record before this Court indicates that Ms. Guindon is facing criminal prosecution, that issue is not before us.

[70] Ms. Guindon argues that s. 163.2(4) is not an administrative offence because it is not restricted to the regulated class in the *ITA* (taxpayers) and departs from the general purpose of the Act: the

[2] It should be noted that in the *ITA*, ss. 238(3) and 239(3) prevent an individual from being liable for any penalty assessed under the administrative monetary penalty provisions after the individual is convicted of an offence under the Act for the same conduct.

résulte. Au pire des cas, une fois la procédure administrative et les appels épuisés, si [la pénalité] est maintenu[e] et que la personne redevable refuse toujours de payer, cette dernière risque d'être contrainte civilement de le faire. [par. 45]

De même, pour les besoins du par. 163.2(4), si la cotisation est maintenue et que le paiement n'est pas effectué, le ministre ne peut recourir qu'à la procédure de recouvrement administrative de la *LIR*.

[68] M^me^ Guindon soutient que lorsqu'une même conduite peut mener soit à une sanction pécuniaire administrative, soit à une sanction criminelle, la procédure est de nature criminelle. En l'espèce, la conduite qui est susceptible d'entraîner une pénalité administrative au titre de l'art. 163.2 peut également donner lieu à une poursuite criminelle suivant l'art. 239 de la *LIR* (voir les motifs de la Cour de l'impôt, par. 44-50). Toutefois, la même conduite pourrait revêtir plus d'un aspect. Dès lors, le fait que la conduite qui justifie une pénalité administrative peut également donner lieu à une déclaration de culpabilité au pénal importe peu quant à la qualification à titre de pénalité administrative. Comme nous l'expliquons précédemment, le critère est celui énoncé dans les arrêts *Wigglesworth* et *Martineau*.

[69] La personne qui, pour une même conduite, fait l'objet d'une sanction pécuniaire administrative puis d'une poursuite criminelle (ou l'inverse) peut faire valoir que, dans les circonstances, la seconde mesure constitue un abus de procédure[2]. Comme aucun élément du dossier dont dispose notre Cour n'indique que M^me^ Guindon fait l'objet d'une poursuite criminelle, nous n'avons pas à examiner ce point.

[70] M^me^ Guindon fait valoir que le par. 163.2(4) ne crée pas une infraction administrative parce qu'il ne s'applique pas seulement aux personnes que vise la réglementation assurée par la *LIR* (les

[2] Il convient de noter que les par. 238(3) et 239(3) de la *LIR* empêchent qu'une personne se voie infliger une pénalité au titre des dispositions relatives aux sanctions pécuniaires administratives après qu'elle a été déclarée coupable d'une infraction à la Loi pour une même conduite.

collection of tax. While the individuals targeted by s. 163.2(4) of the *ITA* are not the taxpayers themselves, this does not detract from the provision's administrative nature. The *ITA* regulatory scheme encompasses more than those who pay taxes: employers, banks, brokers, charities, and other entities are required to file information returns and to produce information in order to verify taxpayer compliance. Provisions, such as administrative monetary penalties, that encourage compliance by these non-taxpayers are integral to the *ITA*'s regulatory regime and are not criminal in nature simply because the target is not the taxpayer.

contribuables) et qu'il déroge à l'objet général de la Loi, soit le recouvrement de l'impôt. Bien que les personnes visées au par. 163.2(4) de la *LIR* ne soient pas les contribuables eux-mêmes, la disposition n'en est pas moins de nature administrative. Le régime de réglementation de la *LIR* ne s'applique pas qu'à ceux qui paient des impôts, mais aussi aux employeurs, aux banques, aux courtiers, aux organismes de bienfaisance et aux autres entités qui sont tenues de produire des déclarations de renseignements et de fournir de l'information aux fins de vérification de la conformité des déclarations des contribuables. Les dispositions, y compris celles relatives aux sanctions pécuniaires administratives, qui favorisent l'observation de la loi par ces non-contribuables font partie intégrante du régime de réglementation de la *LIR* et ne sont pas de nature criminelle du simple fait qu'elles ne visent pas le contribuable.

[71] Ms. Guindon also submits that the use of the term "culpable conduct" in s. 163.2(4) indicates a *mens rea* requirement, which is classically criminal in nature. This is irrelevant to the analysis because, as discussed, the criminal in nature analysis is concerned with the process, not the conduct. The simple fact that there is a mental element that must be present in order for the penalty to be imposed does not render the provision criminal. For example, intentional torts require proof of intention, commonly understood as a subjective desire to cause the consequence of one's action: see P. H. Osborne, *The Law of Torts* (4th ed. 2011), at p. 251. In addition, some non-criminal statutory causes of action include mental elements such as recklessness or knowledge. For example, the statutory cause of action in s. 134(4) of Ontario's *Securities Act*, R.S.O. 1990, c. S.5, includes a knowledge requirement. Also, s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34, creates a cause of action for those who have suffered loss or damage as a result of conduct contrary to Part VI, which contains the Act's criminal offences. Given that these are criminal offences, all contain a *mens rea* element, but that does not render s. 36 proceedings criminal.

[71] M^me^ Guindon soutient également que l'emploi de l'expression « conduite coupable » au par. 163.2(4) indique l'exigence d'une *mens rea*, ce qui est propre au domaine criminel. Or, cet élément importe peu, car — nous l'avons dit — l'analyse relative à la nature criminelle s'attache au processus, non à la conduite. La seule exigence d'un élément moral pour que la pénalité puisse être infligée ne fait pas en sorte que la disposition soit de nature criminelle. Par exemple, le délit intentionnel requiert la preuve de l'intention, ce qui s'entend généralement du fait d'avoir subjectivement voulu les conséquences de ses actes (voir P. H. Osborne, *The Law of Torts* (4^e^ éd. 2011), p. 251). De plus, certaines causes d'action non criminelles prévues par la loi comprennent un élément moral comme l'insouciance ou la connaissance. Par exemple, la cause d'action prévue au par. 134(4) de la *Loi sur les valeurs mobilières* de l'Ontario, L.R.O. 1990, c. S.5, comprend une exigence de connaissance. De même, l'art. 36 de la *Loi sur la concurrence*, L.R.C. 1985, c. C-34, confère une cause d'action à celui qui subit une perte ou des dommages par suite d'un comportement allant à l'encontre d'une disposition de la partie VI, laquelle prévoit les infractions criminelles que crée la Loi. S'agissant d'infractions criminelles, elles requièrent toutes une certaine *mens rea*, mais l'art. 36 n'établit pas pour autant une procédure criminelle.

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[72] While some regulatory penalties are imposed without consideration of the person's state of mind, in other cases it is rational that the state would only wish to impose a penalty on those who engage in misconduct knowingly, recklessly, or with a particular intention. Providing a due diligence defence or including a mental element as a component of the penalty does not detract from the administrative nature of the penalty. (See the Federal Court of Appeal's reasons, at para. 48.)

(c) *Conclusion on the "Criminal in Nature" Test*

[73] We conclude that the s. 163.2 process is not criminal in nature.

(5) The True Penal Consequence Test

(a) *Introduction*

[74] As we have explained, the preparer penalty is designed to apply when an individual engages in conduct such as preparing a fraudulent tax return, conduct which undermines the self-reporting and self-assessing scheme which depends on honesty and diligence of taxpayers and those whom they engage to assist them. For the reasons that follow, we conclude that the penalty is not a true penal consequence.

(b) *Principles*

[75] Administrative monetary penalties are designed as sanctions to be imposed through an administrative process. They are not imposed in a criminal proceeding. Thus, the issue of whether a person who is the subject of an ostensibly administrative regime is in reality "charged with an offence" is addressed by the second *Wigglesworth*/*Martineau* test: Does the sanction impose a true penal consequence? *Wigglesworth* teaches that a true penal consequence is imprisonment or a fine which, having regard to its magnitude and other relevant

[72] Bien que, dans certains cas, une sanction réglementaire soit infligée sans que l'état d'esprit de la personne ne soit pris en compte, dans d'autres, il est logique que l'État ne veuille infliger une sanction qu'à celui qui, par insouciance ou animé d'une intention particulière, accomplit un acte fautif. La possibilité d'invoquer la diligence raisonnable en défense ou l'exigence d'un élément moral n'enlève rien à la nature administrative de la sanction. (Voir les motifs de la Cour d'appel fédérale, par. 48.)

c) *Conclusion sur le critère de la « nature criminelle »*

[73] Nous concluons que le processus correspondant à l'art. 163.2 n'est pas de nature criminelle.

(5) Le critère de la véritable conséquence pénale

a) *Introduction*

[74] Comme nous l'expliquons précédemment, la pénalité du spécialiste en déclarations est censée s'appliquer à la personne qui, par exemple, établit une déclaration de revenus frauduleuse et nuit ainsi au régime d'autodéclaration et d'autocotisation dont le bon fonctionnement repose sur l'honnêteté et la diligence des contribuables et de ceux dont ils retiennent les services pour les aider. Pour les motifs qui suivent, nous concluons que la pénalité ne constitue pas une véritable conséquence pénale.

b) *Principes*

[75] Les sanctions pécuniaires administratives sont des sanctions conçues pour être infligées à l'issue d'un processus administratif. Elles ne font pas suite à une procédure criminelle. Ainsi, pour savoir si la personne qui fait officiellement l'objet d'une mesure administrative est en réalité « inculpé[e] », le critère à utiliser est le second dégagé dans les arrêts *Wigglesworth* et *Martineau* : la sanction impose-t-elle une véritable conséquence pénale? Selon l'arrêt *Wigglesworth*, la véritable conséquence pénale s'entend de la peine d'emprisonnement ou

factors, is imposed to redress the wrong done to society at large rather than simply to secure compliance: see p. 561.

de l'amende qui, compte tenu de son importance et d'autres considérations pertinentes, est infligée dans le but de réparer le tort causé à la société en général plutôt que d'assurer l'observation de la loi (voir p. 561).

[76] Imprisonment is always a true penal consequence. A provision that includes the possibility of imprisonment will be criminal no matter the actual sanction imposed: see *Wigglesworth*, at p. 562. A monetary penalty may or may not be a true penal consequence. It will be so when it is, in purpose or effect, punitive. Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty: see, e.g., *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176, 333 D.L.R. (4th) 1, at paras. 76-77.

[76] L'emprisonnement constitue toujours une véritable conséquence pénale. La disposition qui prévoit la possibilité d'un emprisonnement est de nature criminelle, peu importe la sanction réellement imposée (voir *Wigglesworth*, p. 562). Une sanction pécuniaire peut ou non constituer une véritable conséquence pénale. C'est le cas lorsque, par son objet ou son effet, elle est punitive. Pour le savoir, il faut tenir compte de choses comme le montant de l'amende, son destinataire, le fait que son importance tient à des considérations réglementaires plutôt qu'à des principes de détermination de la peine en matière criminelle, et le fait que la sanction stigmatise ou non (voir p. ex. *Canada (Procureur général) c. United States Steel Corp.*, 2011 CAF 176, par. 76-77 (CanLII)).

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

[77] L'importance de la sanction n'est pas déterminante en soi. Toutefois, lorsque le montant en cause est disproportionné à celui qui permet d'atteindre les objectifs de la réglementation, il y a lieu de penser qu'il s'agit d'une véritable conséquence pénale, de sorte que la disposition emporte l'application de l'art. 11 de la *Charte*. Cela ne veut pas dire qu'une pénalité d'un montant très élevé ne puisse être infligée à titre de sanction pécuniaire administrative. Il arrive en effet parfois qu'une pénalité d'un montant substantiel soit nécessaire pour décourager l'inobservation d'un régime administratif (voir *Rowan c. Ontario Securities Commission*, 2012 ONCA 208, 110 O.R. (3d) 492, par. 49). Le montant de la pénalité doit refléter l'objectif de décourager l'inobservation du régime administratif ou de réglementation.

(c) *An Upper Limit on Administrative Penalties?*

c) *L'application d'un plafond à la pénalité administrative?*

[78] Ms. Guindon and the intervener the Canadian Constitution Foundation suggest that there should be an upper limit on the amount of an administrative monetary penalty. Citing the Ontario

[78] M^me^ Guindon et l'intervenante Canadian Constitution Foundation laissent entendre que le montant d'une sanction administrative pécuniaire devrait être plafonné. Citant le par. 54 de

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Court of Appeal decision in *Rowan*, at para. 54, which considered the imposition of an administrative penalty under the Ontario *Securities Act*, Ms. Guindon submits that the maximum amount that can be imposed under an administrative monetary penalty should be one fifth of the penalty which can be imposed by criminal prosecution. The CCF submits that there should be a monetary threshold beyond which administrative penalties are presumed to be criminal, suggesting $10,000 for an individual and $100,000 for a corporation: I.F., at para. 32.

[79] We cannot agree with these approaches. First, the one-to-five ratio suggested by Ms. Guindon is not a general standard. She derives the proposed rule from the Ontario Court of Appeal's decision in *Rowan*, yet in that decision, the court merely recognized the ratio between a particular administrative monetary penalty in the Ontario *Securities Act* and the maximum criminal penalty that could apply for the same misconduct: see *Securities Act*, ss. 122(1) and 127(1)9; *Rowan*, at para. 54. The Court of Appeal did not find that this was a general rule applicable to all administrative monetary penalties or that this was the only relevant consideration. Second, and most fundamentally, an arbitrary upper limit on administrative monetary penalties could undermine their goal: to deter actions which do not comply with the administrative regime. The analysis must ask whether the amount of the penalty, considered with the other relevant factors, is in keeping with the nature of the misconduct and the penalty necessary to serve regulatory purposes, such as promoting compliance and deterring non-compliance, not focus on an arbitrary threshold which may bear no relation to the particular administrative regime and policy goals: see *United States Steel Corp.*, at para. 74.

[80] Some statutes prescribe very high administrative monetary penalties, at times over a million dollars, and these have been upheld where it is demonstrated that the penalty serves regulatory purposes. In some cases, sizable penalties are

l'arrêt *Rowan* de la Cour d'appel de l'Ontario, qui porte sur une pénalité administrative infligée sous le régime de la *Loi sur les valeurs mobilières* de l'Ontario, M^me^ Guindon soutient que le montant maximum d'une sanction pécuniaire administrative devrait correspondre au cinquième de l'amende susceptible d'être infligée à l'issue d'une poursuite criminelle. La CCF préconise pour sa part l'établissement d'un plafond au-delà duquel une pénalité administrative serait présumée être de nature criminelle, et elle propose de fixer ce plafond à 10 000 $ pour un particulier et à 100 000 $ pour une personne morale (mémoire, par. 32).

[79] Nous ne pouvons souscrire à ces approches. Premièrement, la fraction d'un cinquième que propose M^me^ Guindon en se fondant sur l'arrêt *Rowan* de la Cour d'appel de l'Ontario ne constitue pas une norme générale. Dans cet arrêt, la Cour d'appel reconnaît simplement l'existence d'un rapport entre une sanction pécuniaire administrative prévue par la *Loi sur les valeurs mobilières* de l'Ontario et la peine maximale susceptible d'être infligée au pénal pour les mêmes actes (voir la *Loi sur les valeurs mobilières*, par. 122(1) et 127(1)9; *Rowan*, par. 54). La Cour d'appel ne voit pas là une règle générale applicable à toute sanction pécuniaire administrative, ni la seule considération pertinente. Deuxièmement, et plus fondamentalement, plafonner les sanctions pécuniaires administratives pourrait aller à l'encontre de leur objectif, à savoir décourager l'inobservation du régime administratif. Il faut se demander si le montant de la pénalité, compte tenu des autres considérations pertinentes, est compatible avec la nature de l'acte fautif et si la pénalité est nécessaire à la réalisation des objectifs de la réglementation que sont par exemple la promotion de l'observation de la loi et la prévention de son inobservation, et non fixer une limite arbitraire pouvant n'avoir aucun lien avec le régime administratif en cause et ses objectifs généraux (voir *United States Steel Corp.*, par. 74).

[80] Quelques lois prévoient des sanctions pécuniaires administratives d'un montant très élevé, parfois plus d'un million de dollars, que les tribunaux confirment lorsqu'il est établi qu'elles servent les fins de la réglementation. Dans certains cas, leur

necessary so the penalty is not simply considered a cost of doing business: see the Federal Court of Appeal's reasons, at para. 47. For example, an administrative penalty of $1 million per infraction in the Alberta *Securities Act*, R.S.A. 2000, c. S-4, was upheld in *Lavallee v. Alberta Securities Commission*, 2010 ABCA 48, 474 A.R. 295. The Federal Court of Appeal upheld a provision of the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.), which allowed for penalties of up to $10,000 per day for failure to comply with a ministerial directive: see *United States Steel Corp*. The Ontario Superior Court found that a $10 million administrative monetary penalty in the *Competition Act* for deceptive marketing practices did not engage s. 11 of the *Charter*: *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5315, 288 C.R.R. (2d) 297. The Ontario Court of Appeal in *Rowan*, noting that the amount of the penalty is determined by regulatory considerations distinct from the principles of criminal liability and sentencing, that no criminal record results and the proceeds are used for the benefit of third parties, stated that

> [p]enalties of up to $1 million per infraction are, in my view, entirely in keeping with the Commission's mandate to regulate the capital markets where enormous sums of money are involved and where substantial penalties are necessary to remove economic incentives for non-compliance with market rules. [para. 49]

[81] In all of these cases, the courts found that high administrative monetary penalties were required to encourage compliance with the administrative regime. The relevant question is not the amount of the penalty in absolute terms, it is whether the amount serves regulatory rather than penal purposes.

(d) *Application*

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

montant doit être assez important afin qu'elles ne soient pas simplement considérées comme un coût de fonctionnement (voir les motifs de la Cour d'appel fédérale, par. 47). Par exemple, une sanction administrative d'un million de dollars par infraction prévue par la *Securities Act* de l'Alberta, R.S.A. 2000, c. S-4, est confirmée dans l'arrêt *Lavallee c. Alberta Securities Commission*, 2010 ABCA 48, 474 A.R. 295. Dans *United States Steel Corp.*, la Cour d'appel fédérale confirme une disposition de la *Loi sur Investissement Canada*, L.R.C. 1985, c. 28 (1er suppl.), qui prévoit des pénalités allant jusqu'à 10 000 $ par jour en cas d'omission de se conformer à une directive ministérielle. Dans *Canada (Commissioner of Competition) c. Chatr Wireless Inc.*, 2013 ONSC 5315, 288 C.R.R. (2d) 297, la Cour supérieure de justice de l'Ontario conclut que la sanction pécuniaire administrative de 10 millions de dollars prévue par la *Loi sur la concurrence* pour pratiques commerciales trompeuses n'emporte pas l'application de l'art. 11 de la *Charte*. Dans l'arrêt *Rowan*, faisant remarquer que le montant de la sanction est fixé en fonction de considérations de réglementation distinctes des principes de la responsabilité criminelle et de la détermination de la peine, qu'aucun casier judiciaire n'en résulte et que les sommes sont perçues au bénéfice de tiers, la Cour d'appel de l'Ontario déclare ce qui suit :

> [TRADUCTION] Les sanctions allant jusqu'à un million de dollars par infraction sont, à mon avis, entièrement compatibles avec le mandat de la Commission qui consiste à réguler les marchés financiers où circulent des sommes considérables, de sorte que des sanctions substantielles s'imposent pour supprimer l'incitation financière à l'inobservation des règles. [par. 49]

[81] Dans toutes ces affaires, les cours concluent que des sanctions pécuniaires administratives d'un montant élevé sont nécessaires pour inciter à l'observation du régime administratif. Le débat ne porte pas sur leur montant dans l'absolu, mais bien sur la question de savoir si l'objectif qui sous-tend la fixation de leur montant est réglementaire ou pénal.

d) *Application*

[82] L'article 163.2 de la *LIR* n'impose aucune « véritable conséquence pénale ».

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[83] Considering first the purpose of the penalty, s. 163.2 was enacted in 2000 to discourage individuals from making false statements on behalf of others or from counselling others to make false statements: see the Tax Court's reasons, at paras. 36-37. Thus its purpose is to promote compliance with the scheme. The fact that the penalty is intended to have a deterrent effect does not take it out of the realm of administrative penalties. As Fish J. pointed out in *Martineau*, penalties which are clearly not penal in nature, such as damages imposed in relation to civil liability and penalties imposed in disciplinary proceedings, have deterrent aspects: see para. 38.

[84] The magnitude of penalties under s. 163.2(4) is directly tied to the objective of deterring non-compliance with the *ITA*. The amount is calculated pursuant to s. 163.2(5) and takes into account the penalty to which the other person (for whom or to whom the violator has made the false statement) would be liable in addition to the violator's gross compensation in respect of the false statement. These factors speak to the magnitude of the tax that could potentially be avoided and the violator's personal gain, both of which are relevant in deterring such misconduct. The amount is fixed without regard to other general criminal sentencing principles and no stigma comparable to that attached to a criminal conviction flows from the imposition of the penalty.

[85] Ms. Guindon was assessed a penalty of $546,747. This amount is very high for an individual. However, in the circumstances it does not constitute a true penal consequence: the Tax Court found that there were 135 violations (see paras. 1 and 112). In addition, that court found that Ms. Guindon was dishonest in her initial legal opinion when she stated that she had reviewed the supporting documents. She then compounded this dishonesty by signing charitable receipts that she should reasonably have known were tainted by her own failure to verify the legal basis of the program: paras. 107-9. Such dishonesty cannot be countenanced in a self-reporting system. As noted by the Federal Court of Appeal, "[s]ometimes administrative penalties must be large in order

[83] Examinons d'abord l'objectif de la pénalité. L'article 163.2 a été édicté en 2000 pour dissuader toute personne de faire un faux énoncé pour le compte d'autrui ou de conseiller à une autre personne d'en faire un (voir les motifs de la Cour de l'impôt, par. 36-37). Il vise donc à promouvoir l'observation du régime. Même si la pénalité se veut dissuasive, sa nature demeure administrative. Comme le signale le juge Fish dans l'arrêt *Martineau*, les sanctions qui ne sont manifestement pas de nature pénale, tels les dommages-intérêts pour responsabilité civile et les sanctions disciplinaires, ont un effet dissuasif (voir par. 38).

[84] L'importance de la pénalité prévue au par. 163.2(4) est directement liée à l'objectif de décourager l'inobservation de la *LIR*. Son montant est calculé en application du par. 163.2(5), et il est tenu en compte de la pénalité à laquelle l'autre personne (celle pour qui ou à qui est fait le faux énoncé) serait tenue en plus de la rétribution brute du contrevenant pour le faux énoncé. Ces éléments témoignent de l'importance de l'impôt susceptible d'être évité et du gain personnel obtenu par le contrevenant, les deux devant être pris en compte pour décourager un tel acte fautif. Le montant de la pénalité est fixé sans égard aux principes généraux de détermination de la peine en matière criminelle et il n'en résulte aucune stigmatisation comparable à celle découlant d'une déclaration de culpabilité au pénal.

[85] M^me^ Guindon s'est vu infliger une pénalité de 546 747 $, ce qui représente une somme très élevée dans le cas d'un particulier. Toutefois, dans les circonstances, il ne s'agit pas d'une véritable conséquence pénale. La Cour de l'impôt relève 135 contraventions (voir par. 1 et 112) et elle conclut que M^me^ Guindon a fait preuve de malhonnêteté dans sa première opinion juridique en y déclarant avoir examiné les documents à l'appui. M^me^ Guindon a ensuite ajouté à sa malhonnêteté en signant les reçus pour dons de bienfaisance dont elle aurait dû raisonnablement savoir qu'ils étaient viciés par son omission de vérifier le fondement juridique du programme (par. 107-109). Une telle malhonnêteté ne saurait être admise dans un système

to deter conduct detrimental to the administrative scheme and the policies furthered by it": para. 46.

[86] The Tax Court found that Ms. Guindon wrote and endorsed a legal opinion that she knew was "flawed and misleading": in the opinion, she stated that she had reviewed supporting material which had in fact never been provided to her (para. 105). Later, when she signed charitable tax receipts as part of the program, she chose to "rely on her own legal opinion which she knew to be incomplete": para. 107. The Tax Court found that Ms. Guindon's conduct was "indicative either of complete disregard of the law and whether it was complied with or not or of wilful blindness": para. 108.

[87] We agree with the Federal Court of Appeal that a maximum penalty for a person making a false statement of $100,000 plus the person's gross compensation in relation to that statement

does not demonstrate a purpose extending beyond deterrence to denunciation and punishment of the offender for the "wrong done to society": *Wigglesworth*, *supra*, at page 561. Rather, in light of the possibility of false statements going undetected, penalties of such magnitude are necessary to prevent them from being regarded as just "another cost of doing business": *United States Steel Corp.*, *supra*, at paragraph 77. [para. 47]

[88] In this case, the penalty of $546,747 assessed against Ms. Guindon does not impose a true penal consequence — the magnitude reflects the objective of deterring conduct of the type she engaged in. Although the penalty is paid ultimately into the Consolidated Revenue Fund, none of the other relevant considerations supports the view that this penalty is a true penal consequence.

(6) Conclusion

[89] We conclude that the proceeding under s. 163.2 is not criminal in nature and does not lead

d'autocotisation. Comme le fait remarquer la Cour d'appel fédérale, « [l]es pénalités administratives doivent parfois être élevées pour dissuader une conduite préjudiciable au régime administratif mis en place et aux politiques qu'il met en œuvre » (par. 46).

[86] La Cour de l'impôt conclut que M^me^ Guindon a rédigé et signé une opinion juridique qu'elle savait « lacunaire et trompeu[se] » car elle y affirmait avoir examiné des documents à l'appui qui, en réalité, ne lui avaient jamais été remis (par. 105). Plus tard, lorsqu'elle a signé les reçus fiscaux pour dons de bienfaisance dans le cadre du programme, elle a décidé de « se fier à s[a] propre [opinion] juridique qu'elle savait incompl[ète] » (par. 107). La Cour de l'impôt conclut que la conduite de M^me^ Guindon « témoigne d'une indifférence complète à l'égard de la loi et de la question de savoir si elle est respectée ou non, ou d'un aveuglement volontaire » (par. 108).

[87] Nous convenons avec la Cour d'appel fédérale que la pénalité maximale dont est passible l'auteur d'un faux énoncé, soit 100 000 $ plus sa rétribution brute pour cet énoncé,

ne dénote pas un objectif de réprobation et de punition du contrevenant pour le « tort causé à la société » (*Wigglesworth*, précité, à la page 561). Il s'agit plutôt de prévoir des pénalités de nature à faire en sorte qu'elles « ne soient pas considérées comme une simple dépense d'affaire » (*United States Steel Corp.*, précité, au paragraphe 77), compte tenu du fait qu'il est possible que les faux énoncés passent inaperçus. [par. 47]

[88] En l'espèce, la pénalité de 546 747 $ infligée à M^me^ Guindon ne constitue pas une véritable conséquence pénale, car son montant élevé reflète l'objectif de décourager des actes comme ceux qui ont été accomplis. La pénalité est certes versée au Trésor au bout du compte, mais aucune autre considération pertinente n'appuie l'idée qu'il s'agit d'une véritable conséquence pénale.

(6) Conclusion

[89] Nous concluons que la procédure découlant de l'art. 163.2 n'est pas de nature criminelle

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Found at Tab 45, Volume 8 of Google's BOA.

Richard James Goodwin *Appellant*

v.

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Respondents*

- and -

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Appellants*

v.

Jamie Allen Chisholm *Respondent*

- and -

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Appellants*

v.

Scott Roberts *Respondent*

- and -

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Appellants*

v.

Carol Marion Beam *Respondent*

- and -

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Appellants*

v.

Richard James Goodwin *Appelant*

c.

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Intimés*

- et -

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Appelants*

c.

Jamie Allen Chisholm *Intimé*

- et -

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Appelants*

c.

Scott Roberts *Intimé*

- et -

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Appelants*

c.

Carol Marion Beam *Intimée*

- et -

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Appelants*

c.

2015 SCC 46 (CanLII)

PUBLIC 500 1679

The judgment of Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ. was delivered by

KARAKATSANIS J. —

I. Introduction

[1] The devastating consequences of impaired driving reverberate throughout Canadian society. Impaired driving renders roads unsafe, destroys lives, and imposes costs throughout the health care system. The federal and provincial governments have all acted in response to this pressing danger. The federal government has made both impaired driving and driving with a blood alcohol concentration above 0.08 offences contrary to the *Criminal Code*, R.S.C. 1985, c. C-46. Across Canada, provincial governments have also addressed this concern through provincial legislation governing driver licensing.

[2] In 2010, British Columbia created the automatic roadside prohibition (ARP) scheme. It marked a continuation of British Columbia's longstanding efforts to remove impaired drivers from the province's roads through the use of licence suspensions, penalties and remedial programs.

[3] In the first appeal, Richard Goodwin, who was issued a driving prohibition pursuant to this new ARP scheme, asks this Court to decide whether it oversteps the bounds of provincial legislative competence and invades the federal government's exclusive jurisdiction over criminal law (the Goodwin appeal). Mr. Goodwin further asks for a determination of whether the provincial regime engages and violates the presumption of innocence guaranteed by s. 11 of the *Canadian Charter of Rights and Freedoms*. The second appeal was brought by British Columbia (Superintendent of Motor Vehicles) and the Attorney General of British Columbia (collectively the Province) and questions whether the ARP regime engages and violates the protection against

Version française du jugement des juges Cromwell, Moldaver, Karakatsanis, Wagner, Gascon et Côté rendu par

LA JUGE KARAKATSANIS —

I. Introduction

[1] Les conséquences dévastatrices de la conduite avec facultés affaiblies se font sentir dans toute la société canadienne. La conduite avec facultés affaiblies rend les routes dangereuses, détruit des vies et entraîne des coûts pour l'ensemble du système de santé. Les gouvernements fédéral et provinciaux ont tous fait face à ce danger pressant. Le gouvernement fédéral a érigé en infractions au *Code criminel*, L.R.C. 1985, c. C-46, la conduite avec facultés affaiblies et la conduite avec une alcoolémie supérieure à 0,08. Partout au Canada, les gouvernements provinciaux se sont également attaqués à cet enjeu par leurs dispositions législatives régissant la délivrance des permis de conduire.

[2] En 2010, la Colombie-Britannique a créé le régime d'interdiction automatique de conduire (RIAC). Ce régime représente le prolongement des efforts déployés depuis longtemps par la Colombie-Britannique pour chasser les conducteurs aux facultés affaiblies de ses routes par l'imposition de suspensions de permis, de sanctions et de programmes correctifs.

[3] Dans le premier pourvoi, Richard Goodwin, qui a été condamné à une interdiction de conduire en application de ce nouveau RIAC, prie la Cour de décider s'il excède la compétence législative de la province et empiète sur la compétence exclusive du gouvernement fédéral en matière de droit criminel (le pourvoi de M. Goodwin). Monsieur Goodwin nous demande aussi de déterminer si le régime provincial fait intervenir et viole la présomption d'innocence garantie par l'art. 11 de la *Charte canadienne des droits et libertés*. Le deuxième pourvoi a été interjeté par la Colombie-Britannique (Superintendent of Motor Vehicles) (« Surintendant ») et le procureur général de cette province (collectivement la Province). Il soulève la question de savoir si le

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[34] The chambers judge reviewed the evidence and concluded that "there is a legitimate, substantial and pressing reason for the Province to regulate highway safety and the licensing of drivers to remove impaired drivers from the roads": chambers judge's reasons, at para. 84. I agree. The chambers judge concluded that the pith and substance of the ARP scheme is the licensing of drivers, the enhancement of traffic safety and the deterrence of persons from driving while impaired by alcohol. Again, I agree. While the ARP scheme represents a more aggressive approach by the Province than the ADP scheme, it nonetheless retains its character. As this Court noted in *Chatterjee*, deterrence can be a purpose of provincial law: para. 3. There can be no doubt that the matter falls within the provincial power over property and civil rights in the province. From a division of powers standpoint, the legislation is valid.

B. *Does the ARP Scheme Create an "Offence" Within the Meaning of Section 11 of the Charter?*

[35] Section 11 of the *Charter* guarantees certain procedural protections to individuals charged with an offence. Section 11(*d*) provides:

> **11.** Any person charged with an offence has the right
>
> . . .
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[36] The chambers judge concluded that the ARP scheme does not create an offence within the meaning of s. 11(*d*). The Court of Appeal upheld that decision.

[37] Mr. Goodwin submits that the ARP scheme both engages and infringes his rights under s. 11(*d*) of the *Charter*. He argues that the test for an "offence" under s. 11 must be purposive; the form of

[34] Le juge en chambre a examiné la preuve et conclu que [TRADUCTION] « la Province a des motifs légitimes, sérieux et urgents de réglementer la sécurité routière et la délivrance de permis de conduire afin de chasser les conducteurs aux facultés affaiblies des routes » : motifs du juge en chambre, par. 84. Je partage son avis. Le juge en chambre a conclu que le RIAC, de par son caractère véritable, vise à délivrer des permis de conduire, à renforcer la sécurité routière et à dissuader les gens de conduire avec les facultés affaiblies par l'alcool. Là encore, je suis d'accord. Bien que le RIAC constitue une mesure provinciale plus musclée que le régime d'IAC, il conserve néanmoins son caractère. Comme l'a fait remarquer la Cour dans *Chatterjee*, la dissuasion peut être un objectif du droit provincial : par. 3. Il ne fait aucun doute que la matière relève de la compétence provinciale sur la propriété et les droits civils dans la province. Du point de vue du partage des pouvoirs, la loi est valide.

B. *Le RIAC crée-t-il une infraction visée par l'art. 11 de la Charte?*

[35] L'article 11 de la *Charte* garantit certaines mesures de protection procédurales aux inculpés. Il prévoit ce qui suit à son al. *d*) :

> **11.** Tout inculpé a le droit :
>
> . . .
>
> *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;

[36] Le juge en chambre a conclu que le RIAC ne crée pas une infraction visée par l'al. 11*d*). La Cour d'appel a confirmé cette décision.

[37] Monsieur Goodwin soutient que le RIAC fait intervenir ses droits garantis par l'al. 11*d*) de la *Charte* et y porte atteinte. Il affirme que le critère servant à déterminer s'il existe une infraction visée

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proceedings should not be given undue weight; and the analysis should focus on whether the law's effects engage the public interest in suppressing crime and promoting public order and welfare: A.F., at paras. 88 and 91. In his view, the lower courts applied the analytical guide set out by this Court in *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737, in a formalistic way. Properly understood, Mr. Goodwin argues, the purpose of crime suppression engages s. 11 in hybrid regimes like the ARP scheme. He argues that the cumulative impact of the penalties demonstrates that the ARP scheme creates an offence.

par l'art. 11 doit être téléologique, qu'il ne faudrait pas accorder trop de poids à la forme des procédures et que l'analyse devrait être axée sur la question de savoir si les effets de la loi mettent en jeu l'intérêt public à réprimer la criminalité et à promouvoir l'ordre et le bien-être publics : m.a., par. 88 et 91. À son avis, les tribunaux d'instance inférieure ont appliqué d'une façon formaliste le guide d'analyse établi par la Cour dans *Martineau c. M.R.N.*, 2004 CSC 81, [2004] 3 R.C.S. 737. Monsieur Goodwin estime que, lorsqu'on l'interprète correctement, l'objectif de répression de la criminalité fait intervenir l'art. 11 dans le cas des régimes hybrides comme le RIAC. Toujours selon lui, l'effet cumulatif des sanctions démontre que ce régime crée une infraction.

[38] For its part, the Province submits that this Court's decision in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, has already established that "proceedings undertaken to determine fitness to obtain or maintain a licence" are not offences under s. 11: p. 560. In its view, this is dispositive of the s. 11 issue. The ARP scheme is not by nature a penal or criminal proceeding and does not impose true penal consequences.

[38] Pour sa part, la Province soutient que la Cour a déjà établi, dans *R. c. Wigglesworth*, [1987] 2 R.C.S. 541, que « les procédures engagées pour déterminer l'aptitude à obtenir ou à conserver un permis » ne constituent pas des infractions visées par l'art. 11 : p. 560. À son avis, cela règle la question de l'art. 11. Le RIAC n'est pas, de par sa nature même, une procédure pénale ou criminelle et n'impose pas de véritables conséquences pénales.

[39] I would not give effect to this ground of appeal. I agree with the courts below that the ARP scheme does not create an "offence" within the meaning of s. 11 of the *Charter*.

[39] Je suis d'avis de ne pas retenir ce moyen d'appel. Je conviens avec les tribunaux d'instance inférieure que le RIAC ne crée pas une infraction visée par l'art. 11 de la *Charte*.

[40] This Court recently reviewed and reaffirmed the s. 11 analytical framework developed in *Wigglesworth* and *Martineau*: see *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3. In *Wigglesworth*, this Court concluded that s. 11 protections only apply to persons "prosecuted by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted": p. 554. Writing for the majority, Wilson J. stated that a matter falls within s. 11 where "by its very nature it is a criminal proceeding" or where a conviction "may lead to a true penal consequence": p. 559. By contrast, administrative matters "instituted for the

[40] La Cour a récemment examiné et confirmé le cadre d'analyse fondé sur l'art. 11 établi dans les arrêts *Wigglesworth* et *Martineau* : voir *Guindon c. Canada*, 2015 CSC 41, [2015] 3 R.C.S. 3. Dans l'arrêt *Wigglesworth*, la Cour a conclu que les mesures de protection de l'art. 11 s'appliquent uniquement aux personnes « que l'État poursuit pour des infractions publiques comportant des sanctions punitives, c.-à-d. des infractions criminelles, quasi criminelles et de nature réglementaire, qu'elles aient été édictées par le gouvernement fédéral ou par les provinces » : p. 554. S'exprimant au nom de la majorité, la juge Wilson a affirmé qu'une affaire relève de l'art. 11 lorsque, « de par sa nature même,

protection of the public in accordance with the policy of a statute" do not attract s. 11 protections: p. 560.

il s'agit d'une procédure criminelle » ou lorsqu'une déclaration de culpabilité « est susceptible d'entraîner une véritable conséquence pénale » : p. 559. À l'opposé, les procédures de nature administrative « engagées pour protéger le public conformément à la politique générale d'une loi » ne font pas intervenir les mesures de protection prévues à l'art. 11 : p. 560.

[41] While administrative and criminal proceedings both have public purposes, they are fundamentally different. Administrative regimes "are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity": *Wigglesworth*, at p. 560. Criminal matters, on the other hand, are public in nature, and aim to redress the wrong done to society by applying the principles of retribution and denunciation in an open courtroom. In *Martineau*, Fish J. set out three factors to consider when determining whether a proceeding is criminal in nature:

[41] Bien que les procédures criminelles et celles de nature administrative servent toutes deux des objectifs publics, elles sont fondamentalement différentes. Les régimes administratifs « sont principalement destiné[s] à maintenir la discipline, l'intégrité professionnelle ainsi que certaines normes professionnelles, ou à réglementer la conduite dans une sphère d'activité privée et limitée » : *Wigglesworth*, p. 560. Les poursuites criminelles, en revanche, sont de nature publique et visent à réparer le tort causé à la société en appliquant les principes du châtiment et de la réprobation en audience publique. Dans *Martineau*, le juge Fish a énoncé trois facteurs à prendre en compte au moment de déterminer si une procédure est de nature criminelle :

> To determine the nature of the proceeding, the case law must be reviewed in light of the following criteria: (1) the objectives of the [legislation]; (2) the purpose of the sanction; and (3) the process leading to imposition of the sanction. [para. 24]

> Pour déterminer la nature de la procédure, un examen de la jurisprudence sous l'éclairage des critères suivants s'impose : (1) les objectifs de la [loi]; (2) le but visé par la sanction; (3) le processus menant à la sanction. [par. 24]

[42] In my view, the chambers judge properly applied the *Wigglesworth* and *Martineau* considerations. While I agree that an offence is defined by both procedural and substantive elements, I cannot view a proceeding under the ARP as "by its very nature . . . a criminal proceeding".

[42] À mon sens, le juge en chambre a correctement appliqué les facteurs établis dans *Wigglesworth* et *Martineau*. Je reconnais qu'une infraction est définie tant par des éléments de procédure que des éléments de fond, mais je ne saurais considérer que la poursuite engagée en application du RIAC est, « de par sa nature même, [. . .] une procédure criminelle ».

[43] The ARP scheme imposes a driving prohibition coupled with a monetary penalty. It is not concerned with addressing the harm done to society in a public forum; instead, its focus is on the regulation of drivers and licensing, and the maintenance of highway safety. Although it has a relationship with the criminal law, in the sense that it relies on *Criminal Code* seizure powers and is administered

[43] Le RIAC impose une interdiction de conduire de même qu'une sanction pécuniaire. Il ne vise pas à réparer en audience publique le tort causé à la société; il vise plutôt à encadrer les conducteurs et la délivrance de permis et à assurer la sécurité routière. Même si le régime a un lien avec le droit criminel, en ce sens qu'il dépend des pouvoirs de saisie prévus par le *Code criminel* et est appliqué par la police, il

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by police, the scheme is more accurately characterized as a proceeding of an administrative nature. As the chambers judge noted, the proceedings arising under the ARP scheme do not take the form of prosecutions. No criminal records result. The proceedings are initiated by the drivers themselves. It is evident that the process is not criminal in the manner contemplated in *Martineau*: para. 45; see also *Guindon*, at paras. 63-65.

[44] Administrative regimes do not attract s. 11 protections: *Martineau*, at paras. 22-23. "This Court has often cautioned against the direct application of criminal justice standards in the administrative law area": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 88.

[45] Nor are the consequences truly penal. While a 90-day suspension is a meaningful consequence for a licensing violation, and the approximately $4,000 in possible costs and penalties are significant, they are not sufficient to engage the fair-trial rights embodied by s. 11 — rights that, after all, are some of the most fundamental in our legal system. I note that financial penalties considerably more severe than those at issue here have been found to not constitute true penal consequences: see, e.g., *Rowan v. Ontario Securities Commission*, 2012 ONCA 208, 110 O.R. (3d) 492; *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176, 333 D.L.R. (4th) 1; *Lavallee v. Alberta Securities Commission*, 2010 ABCA 48, 474 A.R. 295.

[46] Whether such penalties amount to penal consequences must of course be assessed relative to the conduct in question and the regulatory objective. The driving prohibition relates directly to the regulatory terms and conditions under which a person may be licensed to drive. Vehicle impoundment is directly related to the removal of drivers from the road, and drivers may apply to the Superintendent for review, including on compassionate and economic hardship grounds: *MVA*, ss. 262 and 263. The

est plus exact de le qualifier de procédure de nature administrative. Comme l'a noté le juge en chambre, les procédures découlant du RIAC ne prennent pas la forme de poursuites pénales. Aucun casier judiciaire n'en résulte. Les procédures sont engagées par les conducteurs eux-mêmes. De toute évidence, le processus n'est pas de nature criminelle suivant les critères énoncés dans *Martineau* : par. 45; voir aussi *Guindon*, par. 63-65.

[44] Les régimes administratifs ne font pas intervenir les mesures de protection de l'art. 11 : *Martineau*, par. 22-23. « Notre Cour a souvent fait des mises en garde contre l'application directe en droit administratif des normes de la justice criminelle » : *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307, par. 88.

[45] Les conséquences ne sont pas non plus véritablement pénales. Bien qu'une suspension de 90 jours représente une conséquence importante pour quiconque viole un régime de permis, et que l'imposition potentielle d'environ 4 000 $ en frais et sanctions soit sévère, ces conséquences ne sont pas suffisantes pour mettre en jeu les droits à un procès équitable consacrés à l'art. 11 — des droits qui, après tout, sont parmi les plus fondamentaux de notre système juridique. Je signale que des sanctions pécuniaires bien plus sévères que celles en cause dans la présente affaire n'ont pas été considérées comme de véritables conséquences pénales : voir, p. ex., *Rowan c. Ontario Securities Commission*, 2012 ONCA 208, 110 O.R. (3d) 492; *United States Steel Corp. c. Canada (Procureur général)*, 2011 CAF 176; *Lavallee c. Alberta Securities Commission*, 2010 ABCA 48, 474 A.R. 295.

[46] Bien entendu, la question de savoir si de telles pénalités sont assimilables à des conséquences pénales doit être évaluée à l'aune du comportement en cause et de l'objectif de réglementation. L'interdiction de conduire se rapporte directement aux modalités et conditions réglementaires selon lesquelles une personne peut être autorisée à conduire. La saisie de véhicule est directement liée à l'objectif de débarrasser la route de certains conducteurs, et les conducteurs peuvent présenter une demande de révision au

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fine is capped at $500: *Motor Vehicle Act Regulations*, B.C. Reg. 26/58, s. 43.09. The remaining costs are tied to the various remedial programs, including installation of an ignition interlock device, and are incidental to the scheme's objective of getting drivers and vehicles off the road. Such costs can hardly be considered to be penal, particularly when viewed in light of the public interest in removing a drunk driver from a roadway once detected.

[47] In summary, the ARP scheme does not create an "offence" within the meaning of s. 11 of the *Charter*. Thus, the protections of s. 11 are not engaged in this case.

C. *Does the ARP Scheme Infringe Section 8 of the Charter?*

[48] Section 8 of the *Charter* provides that "[e]veryone has the right to be secure against unreasonable search or seizure." This right is engaged where the state conducts a search or seizure that interferes with an individual's reasonable expectation of privacy. The expectation of privacy is a normative concept, reflecting the level of privacy that we, as a society, should reasonably expect in a given circumstance: *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 44; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 42. It is not merely a function of how much privacy a person may expect or enjoy with respect to their person, space or belongings. Where a search or seizure engages the protection of s. 8, a reviewing court must determine whether the search or seizure is reasonable. In this regard, (1) the search or seizure must be authorized by law, (2) the law itself must be reasonable, and (3) the search or seizure must be carried out in a reasonable manner: *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 10; *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278. It is argued that neither of the first two requirements is met in this case.

Surintendant, notamment pour des motifs de compassion et de difficultés financières : *MVA*, art. 262 et 263. L'amende est plafonnée à 500 $: *Motor Vehicle Act Regulations*, B.C. Reg. 26/58, art. 43.09. Les autres frais sont liés aux divers programmes correctifs, y compris l'installation d'un antidémarreur, et ils sont accessoires à l'objectif du régime qui consiste à chasser certains conducteurs et véhicules de la route. On peut difficilement considérer ces frais comme étant d'ordre pénal, surtout à la lumière de l'intérêt du public à ce qu'un conducteur en état d'ébriété, une fois identifié, ne puisse pas prendre la route.

[47] En somme, le RIAC ne crée pas une infraction visée par l'art. 11 de la *Charte*. Par conséquent, les mesures de protection de l'art. 11 n'entrent pas en jeu en l'espèce.

C. *Le RIAC porte-t-il atteinte à l'art. 8 de la Charte?*

[48] L'article 8 de la *Charte* prévoit que « [c]hacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives. » Ce droit entre en jeu lorsque l'État fait une fouille, une perquisition ou une saisie qui porte atteinte à l'attente raisonnable d'une personne en matière de vie privée. L'attente en matière de vie privée est un concept normatif qui reflète le niveau de protection de la vie privée auquel nous devrions, en tant que société, raisonnablement nous attendre dans une situation donnée : *R. c. Quesnelle*, 2014 CSC 46, [2014] 2 R.C.S. 390, par. 44; *R. c. Tessling*, 2004 CSC 67, [2004] 3 R.C.S. 432, par. 42. Il ne s'agit pas simplement du degré de protection de la vie privée auquel un particulier peut s'attendre ou dont il peut jouir à l'égard de sa personne, de son espace ou de ses biens. Lorsqu'une fouille, une perquisition ou une saisie met en jeu la protection de l'art. 8, la cour de révision doit décider si la fouille, la perquisition ou la saisie est raisonnable. À cet égard, (1) la fouille, perquisition ou saisie doit être autorisée par la loi; (2) la loi elle-même doit n'avoir rien d'abusif; (3) la fouille, perquisition ou saisie ne doit pas être effectuée d'une manière abusive : *R. c. Caslake*, [1998] 1 R.C.S. 51, par. 10; *R. c. Collins*, [1987] 1 R.C.S. 265, p. 278. On soutient que ni l'une ni l'autre des deux premières conditions n'est remplie en l'espèce.

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

Erika Anschuetz and *Alexa Biscaro*, for the intervener the Canadian Civil Liberties Association.

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

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

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

THE CHIEF JUSTICE —

I. Introduction

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

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

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

(1) Scope of Section 11

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

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

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

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

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

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

(2) Legal Status of *Shubley*

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

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

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Magnitude of Previous Fines and Principles of Criminal Sentencing

APPENDIX A: TOTAL FINES IMPOSED UNDER THE CRIMINAL PROVISIONS OF THE *COMPETITION ACT*[226]

CASE NAME	DATE	QUANTUM	ADDITIONAL PENALTIES
SECTION 45: CONSPIRACY			
R. v. BASF Aktiengesellschaft, 1999 CarswellNat 6381[227]	1999-09-22	$85,500,000	Order of Prohibition
R. v. Canada Bread Company Limited, 2023 ONSC 3790	2023-06-21	$50,000,000	n.a.
Airline Cargo Surcharge Fines [Includes: *R. v. Cathay Pacific Airways Ltd.*, 2013 CarswellOnt 18740]	2000s – 2010s	$25,000,000	n.a. (multiple cases)
Lysine Fines	1990s	$17,570,000	n.a. (multiple cases)
R. v. Domfoam Inc., 2012 CarswellOnt 17498	2012-01-05	$12,500,000	n.a.
Citric Acid Fines	1990s	$11,750,000	n.a. (multiple cases)
Sorbates Fines [Includes: *R. c. Ueno Fine Chemicals Industry Ltd.*, 2001 CarswellQue 2916]	1990s – 2000s	$7,240,000	n.a. (multiple cases)
Choline Chloride Fines	1990s – 2000s	$6,750,000	n.a. (multiple cases)
R. c. Ciment Quebec Inc., 1996 CarswellQue 889	1996-08-19	$5,800,000	n.a.
Retail Gasoline Fines [Includes:	2000s – 2010s	$4,124,083	n.a. (multiple cases)

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226 This Appendix seeks to include major fines (*i.e.*, larger than $500,000) issued under the criminal offence provisions of the *Competition Act* since the 1990s for which (a) a reported decision was identified, or (b) news coverage was identified that documented the imposition of the fine. Smaller fines are also included in some instances. While significant efforts were expended in ensuring the comprehensiveness of this Appendix, it does not purport to be an exhaustive list.

227 Fines in the amounts of $48 million, $19 million, $14 million, $2 million and $2.5 million were levied against five corporate accused, respectively (cumulatively $85.5 million), who pleaded guilty to their particular involvement in eight counts of unlawfully conspiring, combining, agreeing or arranging to prevent or lessen, unduly, competition in production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of product in the vitamins industry.

CASE NAME	DATE	QUANTUM	ADDITIONAL PENALTIES
R. c. Pétroles Global inc., 2015 QCCS 1618 *R. c. Irving Oil Limited*, 2017 QCCS 5098 *R. c. Gosselin*, 2013 QCCS 4040[228] *R. c. Dubreuil*, 2009 QCCS 5816 *R. c. Lapointe-Cabana*, 2011 QCCS 2798 *R. c. Darby*, 2012 QCCS 26 *R. c. Leblond*, 2008 QCCS 6751 *R. c. Houde*, 2013 QCCS 4041]			
R. v. Nestle Canada Inc., 2015 ONSC 810	2015-02-04	$4,000,000	n.a.
Fax Paper Fines [Includes: *R. v. Kanzaki Specialty Papers Inc.*, 1994 CarswellNat 394]	1990s	$3,448,000	n.a. (multiple cases)
Chemical Insecticide Fines	1990s	$2,500,000	n.a. (multiple cases)
R. v. Canada Pipe Co., 1995 CarswellNat 1763	1995-09-27	$2,500,000	Order of Prohibition
R. v. Canadian Oxygen Ltd., 1991 CarswellOnt 1978	1991-09-06	$2,400,000	Order of Prohibition
R. c. Assoc. quebecoise des pharmaciens proprietaires, 1995 CarswellQue 2219	1995-05-19	$2,000,000	n.a.
Sodium Gluconate Fines [Includes: *R. v. Fujisawa Pharmaceutical Co.*, 1999 CarswellNat 264]	1990s	$1,860,000	n.a. (multiple cases)
R. v. Davis Wire Industries Ltd., 1992 CarswellBC 1163	1992-11-05	$1,600,000	Order of Prohibition
R. v. Panasonic	2010	$1,500,000	n.a.
R. v. Embraco	2010	$1,500,000	n.a.

[228] Affirmed on appeal in *R. c. Gosselin*, 2017 QCCA 244.

CASE NAME	DATE	QUANTUM	ADDITIONAL PENALTIES
R. v. Maxzone Auto Parts (Canada) Corp., 2012 FC 1117	2012-09-24	$1,500,000	n.a.
R. v. Lancione	2014	$1,000,000	n.a.
R. v. Overseas Container Forwarding Inc. (2014)	2014	$675,000	n.a.
R. v. Canadian General Electric Co., 1977 CarswellOnt 51	1977-04-13	$550,000	Order of Prohibition
R. v. Kason Industries Inc., 2011 FC 281	2011-03-09	$250,000	n.a.
R. v. Hart, 2005 FC 316	2005-03-02	$50,000	n.a.
SECTION 45 TOTAL		**$253,567,083**	
SECTION 46: FOREIGN DIRECTIVES			
Graphite Electrode Fines [Includes: *R. v. UCAR Inc.*, 1999 CarswellNat 389 (FC)]	1990s	$23,500,000	n.a. (multiple cases)
R. v. Mitsubishi Corp., 2005 CarswellOnt 2525 (ONSC)	2005-05-12	$1,000,000	n.a.
SECTION 46 TOTAL		**$24,500,000**	

CASE NAME	DATE	QUANTUM	ADDITIONAL PENALTIES
SECTION 47: BID-RIGGING			
Auto Parts Fines [Includes: *R. v. Yazaki Corp., 2013 CarswellOnt 15673* *R. v. Furukawa Electric Co., 2013 CarswellOnt 18744* *R. v. JTEKT Corp., 2013 CarswellQue 14438* *R. v. NSK Ltd., 2014 CarswellQue 1041*]	2010s	$86,000,000	n.a. (multiple cases)
R. v. WSP Canada	2019	$4,000,000	n.a.
R. v. SNC-Lavalin	2020	$1,900,000	n.a.
R. v. Dessau	2019	$1,900,000	n.a.
R. v. CPL Interiors Ltd.	2022	$761,967	n.a.
R. v. Nora Stello Inc.	2020	$750,000	n.a.
R. v. BPR Infrastructure	2023	$485,000	n.a.
R. v. Corporate Research Group Ltd., 2012 CarswellOnt 17495 (ONSC)	2012-07-30	$125,000	n.a.
R. v. Constructions GTRL, 2012 QCCS 4755	2012-10-11	$100,000	n.a.
R. c. Paulhus, 2022 QCCQ 6809	2022-10-12	$25,000	n.a.
R. v. Daunais, 2025 QCCS 54	2025-01-14	$20,000	n.a.
SECTION 47 TOTAL		**$96,066,967**	
SECTION 52: FALSE OR MISLEADING REPRESENTATIONS			
R. v. 1806369 Alberta Limited, 2021 ONCJ 179	2021-03-29	$15,000,000	Prohibition Order

CASE NAME	DATE	QUANTUM	ADDITIONAL PENALTIES
R. v. Datacom Marketing Inc., 2009 CarswellOnt 17176	2009-12-14	$15,000,000	n.a.
R. v. Simpson-Sears Ltd., 1983 CarswellOnt 2197	1983-06-30	$1,000,000	n.a.
R. v. Benlolo, 2006 CarswellOnt 3467	2006-06-08	$850,000	99 months imprisonment; Prohibition Order
R. v. Medi-Man Rehabilitation Products Inc., 1998 CarswellOnt 2703	1998-06-12	$200,000	n.a.
R. v. Hudson's Bay Co., 1991 CarswellOnt 3238	1991-01-01	$190,000	n.a.
R. v. Fuel Base Industries Inc., 1992 CarswellAlta 118	1992-08-04	$50,000	n.a.
SECTION 52 TOTAL		**$32,290,000**	
SECTION 55: MULTI-LEVEL MARKETING PLAN AND PYRAMID SELLING OFFENCES			
R. v. Friskie, 2001 CarswellSask 602 (SKPC) [229]	2001-09-24	$20,000	n.a.
SECTION 55 TOTAL		**$20,000**	
CRIMINAL OFFENCE PROVISIONS TOTAL		**$406,444,050**	

[229] Affirmed on appeal in *R. v. Friskie*, 2003 SKCA 72.

Found at **Tab 63, Volume 12** of Google's BOA.

1999 CarswellNat 6381
Federal Court of Canada — Trial Division

R. v. BASF Aktiengesellschaft

1999 CarswellNat 6381

Her Majesty the Queen, Applicant and Basf Aktiengesellschaft, Accused and F. Hoffmann-Laroche Ltd., Accused and Rhone-Poulenc S.A., Accused and Eisai Co. Ltd., Accused and Daiichi Pharmaceutical Co. Ltd., Accused

Sharlow J. **As she then was**

Judgment: September 22, 1999
Docket: T-1664-99, T-1665-99, T-1666-99, T-1666-99, T-16667-99, T-16668-99

Counsel: D. Martin Low, Q.C., for Applicant
David Kent, for Accused, BASF
William Vanveen, for Accused, Hoffman-LaRoche
Calvin Goldman, Q.C., Brian Facey, for Accused, Rhone-Poulenc S.A.
Katherine Kay, for Accused, Eisai Co. Ltd.
Calvin Goldman, Q.C, Mark Katz, Q.C., for Daiichi Pharmaceutical Co. Ltd.

Subject: Contracts; Corporate and Commercial; Criminal; Customs; International

Headnote

International trade and customs --- Offences and penalties — Practice and procedure — Sentence

Five Corporate accused pleaded guilty to their particular involvement in eight counts of unlawfully conspiring, combining, agreeing or arranging to prevent or lessen, unduly, competition in production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of product — Each count related to separate vitamin product — Accused collectively controlled world supply of those eight vitamins — Sentencing hearing held — Accused sentenced to fine of $48 million, $19 million, $14 million, $2 million and $2.5 million, respectively — Fine proposed was three times amount of previous record penalty in prosecution under Competition Act and would be highest fine that had ever been imposed in criminal case in Canada — These conspiracies were in view of Crown most widespread, detailed and successful anti-competitive conspiracies that had ever been encountered in Canada by Competition Bureau and involved largest volume of sales of very significant products, over longest period of time, most detailed level of organization among conspirators of any conspiracy that had ever been detected and prosecuted — It affected Canadian businesses, feed producers, livestock and poultry farmers and affected makers of food for human consumption as well as pharmaceutical producers — There was very, very limited number of

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producers of these vitamins in world — There were no Canadian producers and there were no Canadian production facilities of any of participants — All supplies to Canadian market were imports — Accused were virtually entire sources of supply to our markets and by virtue of these conspiracies, those companies were very, very closely coordinated on production, distribution, marketing, sales and prices of these products — Over at least nine years, range of bulk vitamins were object of illegal conspiracies with different participants and different durations on different vitamins — Canada was important not for size of its market but because of its contribution to whole of conspiracy through NAFTA — Foreign penalties had led Crown to temper severity of penalty that it would seek — First corporate accused accepted responsibility fully, had disciplined senior managers involved and had implemented new compliance duties on its senior employees to avoid repeat — Second accused played central, essential role, but had no prior Competition convictions — Level of third accused's cooperation with investigation was unparalleled — Fourth and fifth accused did not cooperate early with investigation but had more limited role than others.

Table of Authorities

Statutes considered:

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

Generally — referred to

s. 11 — referred to

s. 45 — referred to

s. 45(1)(c) — pursuant to

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

s. 655 — referred to

s. 718(a) — considered

s. 718.1 [en. R.S.C. 1985, c. 27 (1st Supp.), s. 156] — considered

s. 718.2(b) [en. 1995, c. 22, s. 6 — considered

SENTENCING HEARING held for five corporate accused who pleaded guilty to their particular involvement in eight counts of unlawfully conspiring, combining, agreeing or arranging to prevent or lessen, unduly, competition in production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of product.

***Sharlow J.*:**

1

THE REGISTRAR: This special sitting of the Federal Court of Canada at Toronto is now in session. The Honourable Madame Justice Sharlow is presiding.

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The Court calls File T-1665-99, the *Competition Act v. Hoffmann-LaRoche Ltd.*, For the applicant, Mr. D. Martin Low, Q.C.; for the respondent, Mr. William Vanveen.

MR. LOW: Good afternoon, my Lady. This is an indictment of the accused Hoffmann-LaRoche by the Crown. We come before the Court after some discussions between counsel for the accused and the Crown by which the accused is prepared to plead guilty to the offences that have been charged in the indictment that is before the Court. If it please the Court, it would be appropriate for the Clerk to arraign the accused and ask for the plea.

THE COURT: Yes.

THE REGISTRAR: The accused stands charged:

1. THAT it did, between January, 1990 and February, 1999, the exact dates being unknown, in various locations outside Canada, unlawfully conspire, combine, agree or arrange with BASF Aktiengesellschaft and Rhone-Poulenc S.A., the one with the other or others of them, together with a person or persons known on unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely, vitamin A, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.

2. THAT it did, between January, 1990 and February, 1999, the exact dates being unknown, in various locations outside Canada, unlawfully conspire, combine, agree or arrange with BASF Aktiengesellschaft, Rhone-Poulenc S.A., and Eisai Co. Ltd., the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely, vitamin E, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.

3. THAT it did, between 1991 and December, 1997, the exact dates being unknown, in various locations outside Canada, unlawfully conspire, combine, agree or arrange with BASF Aktiengesellschaft, the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely, vitamin premixes, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.

4. THAT it did, between January, 1991 and the Fall of 1995, the exact dates being unknown, in various locations outside Canada, unlawfully conspire, combine, agree or arrange with BASF Aktiengesellschaft, Merck KGaA and Takeda Chemical Industries, Ltd., the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely,

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vitamin C, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.

5. THAT it did, between July, 1991 and Fall 1995, the exact dates being unknown, in various locations outside Canada, unlawfully conspire, combine, agree or arrange with BASF Aktiengesellschaft, and Takeda Chemical Industries, Ltd., the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely, vitamin B2, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.

6. THAT it did, between January, 1991 and December, 1998, the exact dates being unknown, in various locations outside Canada, unlawfully conspire, combine, agree or arrange with BASF Aktiengesellschaft, and Daiichi Pharmaceutical Co., Ltd., the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely, vitamin B5 (Calpan), in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.

7. THAT it did, between Fall, 1991 and December, 1998, the exact dates being unknown, in various locations outside Canada, unlawfully conspire, combine, agree or arrange with BASF Aktiengesellschaft, the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely, beta carotene, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.

8. THAT it did, between July, 1991 and June 27, 1995, in Toronto and various other locations, unlawfully conspire, combine, agree or arrange with Haarmann & Reimer Corporation, Jungbunzlauer International AG. and Archer Daniels Midland Company, the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely, citric acid, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.

How do you plead, guilty or not guilty?

MR. VANVEEN: On behalf of Hoffmann-LaRoche Ltd., I plead guilty to all counts.

THE COURT: Thank you, counsel. I will endorse the indictment with the guilty plea and subject to your comments, I've read the statement of agreed facts and agree that the

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statement of agreed facts indicates the commission of offences under the *Act*. So unless there's something further to say, I will endorse the conviction in the indictment.

MR. LOW: That will be fine, my Lady.

Submissions by Mr. Low:

2

MR. LOW: On the conviction of the accused, the Crown has a number of submissions to make on the appropriate sentence.

I should say to you that the accused and the Crown have jointly agreed on the appropriate sentence, but clearly you have the responsibility to ensure that what we propose is consistent with the sentencing principles that are laid down in the Criminal Code.

The fine that we will propose to you is three times the amount of a previous record penalty in a prosecution under the *Competition Act*. If accepted by the Court, it would be the highest fine that has ever been imposed in a criminal case in Canada.

My submissions will try to explain why a fine of this magnitude is neither too high nor too low. Pursuant to s.718.1 of the Criminal Code, we must satisfy the Court that the sentence is proportionate to the gravity of the offence and the degree of responsibility of the offender.

My submissions will reflect the view of the Competition Bureau, the investigators of these offences, and the position of the Crown as to the implications that can properly be drawn from the facts that have been admitted.

There are aggravating circumstances in this case and there are in the case of this accused some significant mitigating factors that have led to the conclusion by the Crown that the penalty we will propose is a proper one. I emphasize, of course, that my submissions are no more than that and that the only facts that can be taken and be proven are those that are set out in the agreed statement of facts.

THE COURT: At this point it occurs to me that we might be wise to mark that statement as an exhibit.

MR. LOW: My view, my Lady, is that it need not be an exhibit. It is on the record and the Court can properly take account of it as admissions which are for the purpose of dispensing with the proof under s.655 of the Criminal Code, so it is not technically an exhibit, but it is something that you can take into account.

THE COURT: Mr. Vanveen, do you agree with that?

MR. VANVEEN: Yes, I concur.

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MR. LOW: If that's satisfactory, my Lady, the accused has admitted its participation in the offences charged which have been described by the Supreme Court of Canada in the conspiracy provisions of the *Competition Act* as the core of the criminal provisions of that *Act*, as the epitome of competition law.

3 And these conpiracies were in the view of the Crown the most widespread, detailed and successful anti-competitive conspiracies that have ever been encountered in Canada by the Competition Bureau. They involve the largest volume of sales of very significant products, over the longest period of time, the most detailed level of organization among the conspirators of any conspiracy that has ever been detected and prosecuted in this country.

4 It affected Canadian businesses, feed producers, livestock and poultry farmers. It affected the makers of food for human consumption.

5 It had effect on the producers of pharmaceutical products. Vitamins are essential components of human and animal nutrition and they contribute to the health, well-being and proper development of humans and animals. A consequence of deficiencies are inadequate nutrition, inefficient feed processing by animals that are raised for agricultural purposes, less than optimal production of animal products, meat, poultry, eggs and milk. And the necessary nutritional requirements of vitamins either cannot at all or cannot economically be obtained from natural sources in the recommended amounts.

6 The production processes for vitamins are highly capital intensive, based on proprietary technology and patented processes, and they require very sophisticated manufacturing facilities. As a consequence, there are very, very limited number of producers of these vitamins in the world. There are no Canadian producers and there are no Canadian production facilities of any of the participants. All the supplies to the Canadian market were imports.

7 Now, throughout the period of these offences, there were some minor offshore producers but their entire capacity appears to have been absorbed outside Canada. And there was no noticeable imports into Canada according to the information that the Bureau has obtained.

8 Later in the life of some of these conspiracies, other products, other sources began to appear, vitamin C in particular, but not in Canada at the time that the conspiracy was ongoing.

9 The companies who are pleading guilty today were virtually the entire sources of supply to our markets and by virtue of these conspiracies, those companies were very, very closely coordinated on the production, distribution, marketing, sales and prices of these products.

10 Now, these vitamins are in the nature of commodities. There are not very many distinguishing features or characteristics. They're used as inputs in the production of other products. For example, these bulk vitamins are the core ingredient in vitamin supplements that are sold as tablets or

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capsules. Animal feeds have to be enhanced with vitamins and this is done either directly or through what are called premixes which are multiple formulations which are specific for the particular users for specific kinds of animal nutrition.

11 Human food loses vitamins through processing and common foods that are very low in vitamins are enriched or supplemented, for example, flour which is enriched to produce enriched bread. Cereal, cheese, or orange juice, milk, all of these have vitamins added to them.

12 Over at least nine years, a range of those bulk vitamins were the object of illegal conspiracies with different participants and different durations on different vitamins. Parties agreed on the volume of sales or sales quotas in different regions throughout the world and they also agreed to fix and increase the prices at which their vitamins would be sold. For all of these products there were no alternative Canadian sources of supply to the buyers who are intermediate users who then produced end products for use in animal nutrition, processed foods or pharmaceutical products.

13 As an economic matter, the effect of these conspiracies on the Canadian buyers of bulk vitamins, therefore had to be one of two options. If an intermediate producer passed on the price increase to the end user, then the end user paid an increased price for feed, food or pharmaceuticals. Alternatively the intermediate producer could choose to absorb the price increase and thereby reduce the profit margin that he received on the sale of the end product.

14 Now, there's no doubt that the price increases on any individual's daily requirements for a given vitamin or any animal's requirement would be probably impossible to compute. The recommended daily intake, which is how they are measured on the side of your cereal box, for example, is measured in milligrams. So any dosage, any particular dosage, the costs and the value of the vitimins is very, very slight. But on the sales of vitamins to Canadian business users that were in the order of $650-million, a very small percentage price increase produces a very significant dollar return at the expense of the Canadian business people and to the detriment, in our submission, to their overall competitiveness.

15 Now, at the outset Roche together with BASF and Rhone-Poulenc entered into agreements to stablize the market after a period that had been characterized by some volatility and limited profitibility in the late 1980s. Through their worldwide contacts in the industry, key executives in each company cooperated with one another to manage these products and where necessary to bring other producers into the fold. So far as the Crown is aware, none of the participants had to be forced to participate. It was all voluntary on the part of all of the participants in the conspiracies. The initial agreements related to vitamins A and E which are major components of animal feed and other applications. From at least the beginning of 1990, these agreements operated among the three European producers. With respect to vitamin E, Eisai was brought into the conspiracy through meetings that occurred the end of 1990 or the beginning of 1991.

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16 And the parties then controlled virtually the entire world production. They set budgets or sales quotas for each of the parties on an annual basis by senior executives. They did that based on estimates of worldwide demand which in turn were produced for them at more frequent meetings among lower level representatives from each of the companies.

17 Price levels or targets were set on a periodic basis, having regard to market conditions in different regions and different countries. The Canadian market was specifically discussed at some of these periodic meetings and these agreements on these products went on until early in 1999.

18 For the other products, premix, vitamins B2, B5, C, beta carotene, the nature of the agreements were very similar and I won't go over the matters that are set out in the agreed statement of facts.

19 For vitamins B2 and C, which terminated in 1995, we understand that it was a decision on the part of this accused, Hoffmann-LaRoche, that led to the end of those conspiracies. There's no doubt that the effect of these conspiracies on each of these products was to unduly lessen or prevent competition in Canada. It's equally true that the offence was complete once the parties entered into the agreement and without regard to whether they, in fact, implemented it in this country.

20 But in my submission, it is apparent from paragraph 15 of the agreed statement of facts that these conspiracies were implemented in Canada. While that may not be an essential ingredient of the offence, it is relevant to the sentence to be imposed.

21 Sales by Roche in Canada throughout the period of these conspiracies on a consolidated basis - we haven't gone into the individual sales for the individual products - that total sales were in the order of $382-million, with a total sales of all the producers who are indicted today being something around $668-million over the period.

22 It's important to understand the worldwide scale of these offences which have been described - and we have no way of verifying this - but have been described publicly as involving billions of dollars.

23 The Canadian market is really tiny if that's true, but Canada had some real importance to these conspirators because of the openness of the North American economy. The ability of products to flow from Canada to other parts of North America under the NAFTA agreement would have the effect that if there were disruptions in the prices in Canada, as there were in the early days, the effect of this agreement elsewhere might have been disrupted. So Canada was important not for the size of its market but because of its contribution to the whole of the conspiracy.

24 The fines that we will jointly recommend on this prosecution is precedentially high, but the accused have been or may be penalized in some other jurisdictions. It is already the case that in the United States, Roche and BASF have paid a total of $725-million U.S. Eisai and Daiichi

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have paid $65-million. There may be proceedings in other jurisdictions. When the parties to an international cartel simultaneously commit offences that are directed at multiple countries, they obviously expose themselves to liability under the laws of those countries. That doesn't affect their exposure to prosecution in this country, but in the particular circumstances of this case, these foreign penalties have led the Crown to temper the severity of the penalty that we would seek. And I'll explain that very shortly.

25 The principles that govern sentencing, in the submission of the Crown, under s.45 of the *Competition Act* principally are predicated on the concept deterrence, both specific deterrence to inhibit repetition of the offence by the party concerned, and more generally, deterrence that this will inhibit the commission of similar offences by other parties.

26 In 1986, Parliament increased the fine from a level of $1-million per count to $10-million per count. And the sentencing policy behind that change is pretty evident in my view. The Court has the ability to take the profit out of these competition offences to send the message that these kinds of economic crimes do not pay.

27 There have been speculation about whether or not it's realistic for a court to expect that an economic penalty will really deter a party from these kinds of offences if the returns are high enough. Justice LaForet once voiced some thought on that line. Other Courts have insisted that in these kinds of cases, the fine has to be sufficient that it will hurt. And the question of whether or not deterrence operates here remains, but we believe that this case will clearly answer that question.

28 It's our submission that from this time on, any rational business executive who sees the conviction of these companies in Canada and the imposition of a fine of the magnitude that we will propose, who sees the fines that have been imposed in the United States and the potential for other penalties elsewhere, must recognize the devastating consequences to the firm that they represent of engaging in price-fixing and volume agreements.

29 We say that these proceedings, given the risk of downstream liability for these companies, with multiple legal fees to be paid, we say that these proceedings will drive home that deterrent message. The message really is this, this kind of international cartel can be detected. It will be pursued and it will be prosecuted. Conducting conspiratorial activity offshore will no longer ensure safety for a cartel. The consequences of being caught, the shame and the bad press, the commercial disadvantage of being perceived as a company that is prepared to disregard the laws of the place where they do business, all those are components of an overall deterrent message.

30 The particular sentencing factors that have been laid down in previous cases under s.45 are obviously relevant here. The factors - and I won't dwell on the cases - but the factor include consideration of the size and the influence of the accused, both among the conspirators and generally in terms of their market share, sales and volume of commerce.

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31 The value of the commerce in this case was unprecedented, and these are extremely substantial world scale corporations. The role of the party concerned, whether it initiated or resisted participation in the conspiracy, is important in sentencing. The duration of the offences is critical. Here, of course, the length of the offences was unusually extended. Geographical scope is a factor that the courts have thought about, and clearly we are dealing with an offence that applied throughout Canada and elsewhere.

32 The level of the persons who acted on behalf of the companies concerned is a pertinent sentencing element because, of course, the seniority of the people who took part clearly indicate whether or not this is affecting the guiding minds of the corporation. Clearly, the seniority of the officials here engaged the responsibility of the corporation beyond any reasonable doubt.

33 Whether the parties acted in a covert or clandestine fashion showing a consciousness of guilt is a factor. And we say that the parties went to considerable lengths to avoid detection, and they were successful in that for an extended period.

34 Let me turn briefly to the substance of the citric acid conspiracy, the conspiracy that is charged in Count 8. The co-conspirators of the accused have already been convicted and sentenced in this Court in 1998. Summarily, the charge is that Roche and their co-conspirators met and agreed on a pretty sophisticated price-fixing conspiracy for citric acid which is a very wide spread product in human food and cleaning materials.

35 They allocated volumes and the amount that was to be sold and in the period of the offence for which it is charged, Roche sold about $11-million of citric acid, of a total volume of commerce of all sales in Canada of about $100-million.

36 Let me turn to the issue of mitigation, my Lady, because it will be the submission of the Crown that the most recent conduct of Roche involves some important mitigating circumstances. It came forward unconditionally to cooperate with the Competition Bureau. And it did that at a time when the Crown did not have evidence sufficient to prove the case against it, although the circumstances were such that we were dealing simultaneously with another party.

37 But that being said, this accused came forward very early to assist. Since that time it has provided a level of cooperation, including particular information about other products and other parties unknown to the Commissioner, that has been unusually helpful to the ongoing inquiry.

38 The company also decided - and this is a significant factor that applies to the other accused that are before the court today - it decided not to take advantage of the jurisdictional and procedural advantages that it might have utilized in a contested case. Instead it has returned voluntarily to the jurisdiction of the Court for the purpose of this proceeding alone. It has agreed to plead guilty and to pay a fine and it could have decided to contest this matter.

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48 The total of these fines on $382-million of commerce is $48-million. That is a proportion of the commerce of Roche which is substantially less than it might otherwise have had to contend with in a contested case. That proportion, as a rule of thumb, we would normally seek a fine in the order of 20 per cent. We think that in the circumstances of this case with the value of the cooperation and the demonstration of a recognition of its misconduct, that it is appropriate to impose a total fine of $48-million for its role in the vitamins.

49 On the citric acid, we're recommending a fine of $2,900,000. Roche in this case was the last party to come forward and to try to resolve its exposure long after the other parties had pleaded guilty. The Crown was put to the difficulty and the cost of preparing a case to state what charges would be laid and the fine levelled in this case represents about 26 per cent of the commerce of Roche. And we say that that is a proper amount in this case.

50 Now, my Lady, the Court has to assess those fines in light of the gravity of the offence and the responsibility of the offender and it is your discretion. Under the law you have the discretion to accept that penalty or not.

51 It is also the law that a joint recommended sentence by the Crown and the accused should not be rejected unless the court is satisfied on the evidence that the sentence that is proposed would be an abuse of process, would bring the administration of justice into disrepute. We say that a fine at this level could be characterized as nothing else than precedential. $48-million, taken in conjunction with the other exposure of this company, is a serious financial penalty even to a major company like Roche.

52 These penalties will not go unnoticed. The economic effect on the bottom line of a company like Roche will be influential in promoting a spirit of conformity with the *Competition Act* and its counterparts around the world. We say that it seems evident to the Crown that Roche has learned a lesson and that is the primary objective of sentencing in a case like this. We think Roche will be a fair competitor in the future and that justifies the fine that is recommended to you.

53 Those are my submissions. This is a severe sentence but it is responsible and fair and we would ask you to impose the fines that I have recommended to you.

THE COURT: Thank you.

Mr. Vanveen?

MR. VANVEEN: Thank you, my Lady.

Submissions by Mr. Vanveen:

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61 It's clearly not a licence. It is a deterrent to it. Certainly it does not want to go through this again. It's certainly a deterrent to others. One of the principles of sentencing that I would like to emphasize to your Lady is the totality principle whereby the court is to consider the totality of the sentence when there are multiple charges as there are in this case.

62 Here, when you take the fine in its totality, it is very substantial. For most of the counts, there are five counts, my Lady, where the fine is $8-million. The maximum is $10-million per count so on most of the counts, the fine is near the maximum which acknowledges the seriousness of the matter, but also as Mr. Low has stated, gives appropriate allowance for the substantial mitigation that is present.

63 The Attorney General and the Commissioner of Competition, the Competition Bureau, my Lady, have a public policy of favourable treatment to encourage companies to come in and disclose wrongdoing and provide assistance to investigators. This is an important and valuable public policy which benefits the public. The Courts, I submit, should support this policy and encourage it by accepting a reasonable joint recommendation as here for companies that came within the policy and disclosed because that benefits the public and the administration of justice. Otherwise, companies may not support in future this policy and it is a valuable public policy to encourage companies to come in and clear the air and provide help.

64 And so I urge my Lady to support that policy and accept the joint recommendation that is put before you by the Crown and the defence.

THE COURT: Thank you, Mr. Vanveen.

Anything further?

MR. LOW: Nothing at all, my Lady. The total is $50.9-million I'm afraid.

Decision of the Court:

65

THE COURT: I have listened very carefully to the submissions. I have, as I indicated earlier, read the statement of agreed facts and the particulars of the unlawful agreements to which Roche is a party and I have considered also very carefully the very strong mitigating factors that were outlined by both counsel.

I note that one piece of information that's missing is that I do not know the profit, if any, that Roche gained from these activities. I know only its gross sales, Canadian sales, from the products in question. I take it from the fact that that information is not there that either the Crown thought it not helpful or it was too complex to determine. I only note that that

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THE COURT: Thank you. Counsel, I have read the order. I think it is an appropriate order and I will sign it.

MR. LOW: Thank you, my Lady. That terminates matters as it relates to this particular prosecution.

THE REGISTRAR: The Court calls File T-1664-99, the *Competition Act v. BASF Aktiengesellschaft*. For the applicant, Mr. D. Martin Low, Q.C.; for the defendant, Mr. David Kent.

MR. LOW: My Lady, I hope that the proceedings henceforth will be substantially briefer. My friend I think is free to waive the reading of the indictment, to take it as read, and to enter a plea if requested. And it's my hope that I will be able to adopt some of what I've said as being applicable to BASF.

MR. KENT: My Lady, I'm quite happy to waive the reading of the indictment if I could.

THE COURT: Are you content?

MR. KENT: Yes, I am. If I just take a look at what the Registrar has in his hands so I make sure that it all lines up.

That's fine, my Lady. I'm happy to waive it and take it as read.

THE COURT: Thank you. The indictment is taken as read.

And the plea?

MR. KENT: Guilty, my Lady.

THE COURT: Thank you. The plea is entered.

MR. LOW: My Lady, submissions on sentence? I take it that the conviction will be entered as against BASF?

THE COURT: Yes.

Submissions by Mr. Low:

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MR. LOW: I've described the nature and the degree of the conspiracies in the preceding case, and I would ask if your Ladyship would accept my adoption of the submissions that I have made as to the seriousness of the offence, the nature of the products and the need for a deterrent sentence, and just go on to deal in particular with mitigation in connection with BASF.

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Court, once again for purposes of this proceeding, and it will plead guilty to these offences — it has pleaded guilty to these charges.

80 As with Roche, if it had taken another course, there would have been very significant difficulty and expense in bringing it to trial. At the time that they offered their cooperation with Roche, the Commissioner needed the cooperation in order to move an investigation which had been going on for many months without having probative evidence that would break the case. BASF helped to do that.

81 After some very careful consideration, in all of these cases, the Crown decided that for Roche as well the appropriate fine as a proportion of their sales in Canada would be a fine that would be at the order of twelve and a half per cent. And that recognizes the value of their cooperation to the Crown and the clear deterrent effect of the consequences that BASF is facing, not only in Canada, but elsewhere.

82 We will be proposing a fine in the total amount of $19-million. Of that amount, $18-million is related to the offences encompassed by the vitamins' inquiry which are Counts 1 to 7.

83 And on Count 8 we propose a fine of $1-million as a purely deterrent denunciatory penalty.

84 On Counts 1 and 2, the jointly proposed fine is $4-million each.

85 On Counts 3 to 7, the fine that we recommend is $2-million on each count.

86 Now, those fines are obviously not precisely correlated with the amount of sales of each product again, although they do recognize the higher sales or higher value of vitamins A and E in Canada.

87 On the whole, my Lady, for the reasons that were given in the previous case, having regard to the exemplary help that BASF and its counsel have provided, we are prepared to recommend a fine in that amount.

88 Thank you very much. Those are my submissions.

THE COURT: Mr. Low, just before you sit down, could you tell me again about the civil actions. I wasn't quite clear on whether you were suggesting that they were not a factor because they're not concluded or whether...

MR. LOW: My Lady, we take the view that while a corporation may have an aggressively defensive attitude or an entirely open attitude to claims by civil parties, it is a factor that the Court may take into account. There have been previous cases in which as a matter prior to the plea the Crown and the accused saw to it that restitution in particular specific outcomes would be provided. In this case these are very, very complicated factual issues.

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MR. KENT: It was thirty but I would be quite happy to move to ninety days if that would give my friend any — if it kept his paperwork straight.

MR. LOW: My Lady, the Crown is happy enough with the amount of the fine, my Lady, but I won't forego the interest for the 60 days but I'm happy to extend that to 90 days if that's satisfactory.

THE COURT: Thank you.

MR. LOW: And there is the issue of the prohibition order again, my Lady, and I've asked that if you would be prepared to impose that order.

MR. KENT: That's satisfactory, my Lady.

THE COURT: And again I've read the order and I think it's appropriate and I will sign it.

MR. LOW: Thank you.

MR. KENT: Thank you, my Lady.

MR. LOW: If we could perhaps move to the third item this afternoon, the matter of Rhone-Poulenc.

THE REGISTRAR: The Court calls File T-1666-99, the *Competition Act v. Rhone-Poulenc, S.A.*. For the applicant, Mr. E. Martin Low, Q.C.; for the respondent, Mr. Calvin Goldman, Q.C. and Mr. Brian Facey.

MR. LOW: My Lady, in this case the indictment is briefer but once again it might be that my friend would like to have it waived in the interests of time.

THE COURT: Thank you. Mr. Goldman?

MR. GOLDMAN: Thank you, my Lady. If I could just look at the indictment, please. That's fine. Thank you.

THE COURT: The reading of the indictment is waived.

MR. LOW: Thank you, my Lady. Would you ask for the plea then?

THE COURT: Yes.

MR. GOLDMAN: Yes, on behalf of the accused corporation I'm authorized to state that it pleads guilty to the two counts under s.45(1)(c) as set forth in the indictment presented to the Court today.

THE COURT: Thank you. The indictment will be so endorsed.

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Rhone-Poulenc's commerce that would be exacted as a fine was based on the proposition that is set out again in the Criminal Code, that the Court is really required under s.718.2(b) of the Code to consider the imposition of a sentence that is similar to the sentences that are imposed on similar offenders for similar offences committed in similar circumstances.

116 But for the novelty of a company getting caught in the race when it was cooperating elsewhere, but for some indication perhaps that the company and its advisors felt that it was perhaps to their detriment to come forward any earlier than they did, the fine would have been higher because their value to the investigation would have been proportionately reduced. But we believe that in the circumstances an appropriate fine is a fine of $14-million, having regard to the commerce of Rhone-Poulenc of $112-million in Canada in the feed business. We recommend jointly that a fine of $7-million on each of Counts 1 and 2 should be imposed.

117 Those are my submissions, my Lady.

THE COURT: Thank you.

Mr. Goldman?

MR. GOLDMAN: Thank you, my Lady.

Submissions by Mr. Goldman:

118

MR. GOLDMAN: May I initially make a few comments on the agreed statement of facts that has been filed with the Court before I turn to support for the joint submission that Mr. Low has made to you.

119 First, certain of the facts which relate to the other parties, for example, paragraphs 4 to 6, are not necessarily known or specifically agreed to. They identify other parties -I just want to make it clear for the record - as are acknowledged in that document. We don't dispute them but we're not in a position to agree to those particular facts.

120 Also as Mr. Low indicated, while vitamins are used for animal feed, food and pharmaceuticals, I must emphasize that Rhone-Poulenc is only involved in animal feed products and is not involved with respect to premixes even within the animal feed segment, so Rhone-Poulenc has more limited involvement than some others.

121 Going to the matter of appropriate sentence - and I do support the submission that Mr. Low has conveyed to you - the Commissioner is continuing to conduct an extensive inquiry into the bulk vitamins industry. We have been informed of that. Rhone-Poulenc has provided full, frank and truthful disclosure to the Competition Bureau. In an effort to assist that ongoing inquiry, it's

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THE COURT: Thank you. The submissions of counsel in this case indicate that there's an additional factor here relating to the U.S. involvement of this corporation that played a role in the determination to give a mitigating factor on the point of disclosure and cooperation. I'm far from clear that every sentencing judge would agree with that additional credit being given but in my view there's no error in principle in taking that view and in light of the agreement of counsel on both sides and the fact that the fine is substantial in light of the sales, I will accept the joint recommendation for this party and the indictment will be so endorsed.

MR. LOW: Thank you, my Lady. The prohibition order will go as before?

THE COURT: Yes.

MR. GOLDMAN: My Lady, we would ask for the same time to pay as the other two accused.

THE COURT: The undertaking, Mr. Low?

MR. LOW: That's fine, my Lady, I'll give that undertaking, 90 days.

THE COURT: Thank you.

MR. GOLDMAN: Thank you, my Lady.

MR. LOW: The next matter is Eisai Co.

THE REGISTRAR: The Court calls File T-1667-99, *Her Majesty the Queen v. Eisai Co. Ltd.*. For applicant, Mr. D. Martin Low, Q.C.; for the respondent, Ms. Katherine Kay.

MS. KAY: My Lady, if I can just check the indictment, I think we can save a bit of time.

THE COURT: Yes.

MS. KAY: We can treat it as having been read if that's satisfactory to your Ladyship.

THE COURT: Thank you, Ms. Kay. And the plea?

MS. KAY: Guilty.

THE COURT: Thank you. The indictment will be endorsed with the guilty plea and conviction.

MR. LOW: Thank you, my Lady.

Submissions by Mr. Low:

127

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standard which I've advanced in a dozen or so of these cases over the last four or five years and judges of this court have had no difficulty with that proposition.

133 And so, my Lady, briefly, we would propose that the sentence that will properly deter is a fine at a slightly higher level in terms of volume of commerce but it will be a fine much lower in overall magnitude of $2-million.

134 Thank you, my Lady.

THE COURT: Thank you.

MS. KAY : Thank you, my Lady.

Submissions by Ms. Kay:

135

MS. KAY: To the extent that my friend has spoken of facts that are not in the agreed statement of facts, you'll understand that my client hasn't agreed with them.

136 Having said that, we have a joint submission on sentencing and our submission is that the penalty proposed is appropriate. Please allow me to express on behalf of the company its remorse for having committed the offence and restate the nature of their involvement as Mr. Goldman has inferred which is they were latecomers and they were deemed essential but they were brought along as opposed to having been an instigator.

137 There are issues about that and clearly jurisdictional issues, which as my friend said with respect to the other defendants, expensive and lengthy litigation regarding those issues has been avoided by their decision to attorn to this jurisdiction for the purposes of this proceeding.

138 And they are also - ray friend hasn't mentioned it but as the others will, it is proposing to have a prohibition order entered against it which brings home the severity of this and the ongoing need for compliance.

139 So for all these reasons, I agree with what my friend is submitting with respect to penalty.

THE COURT: Thank you. Anything further, Mr. Low?

MR. LOW: Nothing, my Lady. Thank you.

Decision of the Court:

140

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THE COURT: In this case I again agree with the joint submissions and I will endorse the indictment with a fine of $2-million.

MR. LOW: Thank you, my Lady. And the prohibition order?

THE COURT: Prohibition order will go.

MR. LOW: Thank you very much.

MS. KAY: And my friend's generosity as to time will extend?

MR. LOW: My Lady, I've obviously out negotiated myself in this matter. The Queen could use the money as quickly as it could be brought in. I would make that offer to everyone. But if there are difficulties in making payment before ninety days, I'm prepared in the circumstance of this case to give an undertaking not to try to levy execution against this nonresident corporation for that period.

THE COURT: All right.

MS. KAY: Thank you, my Lady.

MR. LOW: My Lady, we're almost there. This is the next case, the matter of Queen and Daiichi Pharmaceutical Co. Ltd.

THE REGISTRAR: The Court calls File T-1668-99, the *Competition Act v. Daiichi Pharmaceutical Co. Ltd.*, For the applicant, Mr. D. Martin Low, Q.C.; for the respondent, Mr. Calvin Goldman, Q.C., and Mr. Mark Katz.

THE COURT: Mr. Goldman, on the indictment?

MR. GOLDMAN: Yes, my Lady. May I just read it, please. Thank you.

THE COURT: Do you waive the reading, Mr. Goldman?

MR. GOLDMAN: Yes, I do, my Lady?

THE COURT: And the plea?

MR. GOLDMAN: On behalf of the accused corporation, I'm authorized to plead guilty to the two offences stated in the indictment presented to the Court today.

THE COURT: Thank you. The indictment will be so endorsed.

Mr. Low?

MR. LOW: Thank you, my Lady.

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149 Now, once again we have not broken down the precise amount of their actual sales in Canada on each of these products on the basis of specified import records. Your Ladyship will know that as a result of the decision of this court in a matter involving Glaxo that the Commissioner would have had to get an order from the Court under s.11 of the *Competition Act* in order to obtain the precise verifiable information on how much product had come in from Daiichi. And we were not prepared to open up the fact of this inquiry even to that extent, and so we have an estimate of the amount of sales. But we do say that the fine that is proposed in total is proportional with the fines that have been imposed in similar cases, including the fine that has just been imposed on Eisai, where aggravating and mitigating circumstances are in relative balance.

150 Once again it's the rule of thumb approach to taking the profit away of a fine that's somewhere in the order of about 20 per cent. In the circumstances, we would say that an appropriate fine on Count 1, relating to vitamin B5, would be a fine of $2.4-million.

151 On Count 2, we would ask for the imposition of a fine of $100,000.

152 Those are my submissions, my Lady, unless you have some questions.

THE COURT: Thank you.

Mr. Goldman?

MR. GOLDMAN: Thank you, my Lady.

Submissions by Mr. Goldman:

153

MR. GOLDMAN: Again by way of joint submission, I fully support what my friend has stated to the Court today.

154 Daiichi also submits that a total fine of $2.5-million is fair and appropriate in the circumstances at hand for both counts. That is approximately 20 per cent of the effect of commerce and that's at the higher end of ranges in recent years, not the highest but certainly not at the low end.

155 In these circumstances Daiichi certainly regrets, it sincerely regrets its involvement in the matter. All such activities I can advise the Court have been terminated and it is taking steps to ensure that there will be compliance in full with Canadian competition law and it is agreed to be bound by the order of prohibition that is before the Court today.

156 Other mitigating factors include the fact that Daiichi did voluntarily come forward to the Bureau. Again it's a corporation that is not in this jurisdiction. It has made full, frank and truthful

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Found at Tab 85, Volume 17 of Google's BOA.

David Malmo-Levine *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, British Columbia Civil Liberties Association and Canadian Civil Liberties Association *Interveners*

and between

Victor Eugene Caine *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, British Columbia Civil Liberties Association and Canadian Civil Liberties Association *Interveners*

David Malmo-Levine *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario, British Columbia Civil Liberties Association et Association canadienne des libertés civiles *Intervenants*

et entre

Victor Eugene Caine *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario, British Columbia Civil Liberties Association et Association canadienne des libertés civiles *Intervenants*

2003 SCC 74 (CanLII)

INDEXED AS: R. *v.* MALMO-LEVINE; R. *v.* CAINE

Neutral citation: 2003 SCC 74.

File Nos.: 28026, 28148.

2003: May 6; 2003: December 23.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

RÉPERTORIÉ : R. *c.* MALMO-LEVINE; R. *c.* CAINE

Référence neutre : 2003 CSC 74.

N^os^ du greffe : 28026, 28148.

2003 : 6 mai; 2003 : 23 décembre.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Fundamental justice — Liberty and security of person — Narcotic Control Act prohibiting possession of marihuana — Imprisonment available as penalty for simple possession — Whether prohibition infringes s. 7 of Canadian

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

Droit constitutionnel — Charte des droits — Justice fondamentale — Liberté et sécurité de la personne — Dispositions de la Loi sur les stupéfiants interdisant la possession de marihuana — Possibilité d'emprisonnement en cas de déclaration de culpabilité pour simple

PUBLIC 537 3991

Malmo-Levine (1998), 54 C.R.R. (2d) 291, [1998] B.C.J. No. 1025 (QL), and the decision of the Provincial Court in *R. v. Caine*, [1998] B.C.J. No. 885 (QL). Appeal in *Malmo-Levine* dismissed. Appeal in *Caine* dismissed, Arbour, LeBel and Deschamps JJ. dissenting.

David Malmo-Levine, on his own behalf.

John W. Conroy, *Q.C.*, for the appellant Caine.

S. David Frankel, *Q.C.*, *Kevin Wilson* and *W. Paul Riley*, for the respondent.

Milan Rupic, for the intervener the Attorney General of Ontario.

Joseph J. Arvay, *Q.C.*, for the intervener the British Columbia Civil Liberties Association.

Andrew K. Lokan and *Andrew C. Lewis*, for the intervener the Canadian Civil Liberties Association.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache and Binnie JJ. was delivered by

GONTHIER AND BINNIE JJ. — In these appeals, the Court is required to consider whether Parliament has the legislative authority to criminalize simple possession of marihuana and, if so, whether that power has been exercised in a manner that is contrary to the *Canadian Charter of Rights and Freedoms*. The appellant Caine argues in particular that it is a violation of the principles of fundamental justice for Parliament to provide for a term of imprisonment as a sentence for conduct which he says results in little or no harm to other people. The appellant Malmo-Levine puts in issue the constitutional validity of the prohibition against possession for the purpose of trafficking in marihuana.

The British Columbia Court of Appeal rejected the appellants' challenges to the relevant provisions of the *Narcotic Control Act*, R.S.C. 1985, c. N-1 ("NCA"), and, in our view, it was right to do so. Upholding as we do the constitutional validity of the simple possession offence, it follows, for the same reasons, that Malmo-Levine's challenge to the

dans *R. c. Malmo-Levine* (1998), 54 C.R.R. (2d) 291, [1998] B.C.J. No. 1025 (QL), et la décision de la Cour provinciale dans *R. c. Caine*, [1998] B.C.J. No. 885 (QL). Pourvoi rejeté dans *Malmo-Levine*. Pourvoi rejeté dans *Caine*, les juges Arbour, LeBel et Deschamps sont dissidents.

David Malmo-Levine, en personne.

John W. Conroy, *c.r.*, pour l'appelant Caine.

S. David Frankel, *c.r.*, *Kevin Wilson* et *W. Paul Riley*, pour l'intimée.

Milan Rupic, pour l'intervenant le procureur général de l'Ontario.

Joseph J. Arvay, *c.r.*, pour l'intervenante British Columbia Civil Liberties Association.

Andrew K. Lokan et *Andrew C. Lewis*, pour l'intervenante, l'Association canadienne des libertés civiles.

Version française du jugement de la juge en chef McLachlin et des juges Gonthier, Iacobucci, Major, Bastarache et Binnie rendu par

1 LES JUGES GONTHIER ET BINNIE — Dans les présents pourvois, notre Cour est appelée à décider si le Parlement a le pouvoir de légiférer pour criminaliser la simple possession de marihuana et, dans l'affirmative, s'il a exercé ce pouvoir d'une manière contraire à la *Charte canadienne des droits et libertés*. L'appelant Caine soutient en particulier que le Parlement a violé les principes de justice fondamentale en créant une peine d'emprisonnement pour un acte qui ne cause que peu ou pas de préjudice à autrui. L'appelant Malmo-Levine conteste la question de la validité constitutionnelle de l'interdiction visant la possession de marihuana en vue d'en faire le trafic.

2 La Cour d'appel de la Colombie-Britannique a rejeté la contestation par les appelants des dispositions pertinentes de la *Loi sur les stupéfiants*, L.R.C. 1985, ch. N-1 (la « Loi ») et, à notre avis, elle a eu raison de le faire. Comme nous confirmons la constitutionnalité de l'infraction de simple possession de marihuana, les prétentions de M. Malmo-Levine

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proportionality suffices under s. 7 would render incoherent the scheme of interconnected "legal rights" set out in ss. 7 to 14 of the *Charter* by attributing contradictory standards to ss. 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable.

Accordingly, even if we were persuaded by our colleague Arbour J. that punishment should be considered under s. 7 instead of s. 12, the result would remain the same. In both cases, the constitutional standard is gross disproportionality. In neither case is the standard met.

Further, even if the penalty of imprisonment were found to violate the gross disproportionality standard, the constitutional remedy would have to address the range of available penalties rather than the decriminalization of the underlying conduct of marihuana possession.

(c) *Proportionality in Sentencing*

At this point, we turn from the *Charter* to the *Criminal Code*, in which Parliament has made the idea of proportionality central to the principles of sentencing. Section 718.1 of the *Criminal Code* provides that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." The importance of proportionality in punishment has been discussed on several occasions by this Court. See, for instance, *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, at para. 82, where Lamer C.J., writing for the Court, referred to "the fundamental principle of sentencing, which provides that a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender". See also *R. v. Wust*, [2000] 1 S.C.R. 455, 2000 SCC 18, at para. 18; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 40; and *Re B.C. Motor Vehicle Act*, *supra*, *per* Wilson J. (concurring), at p. 533.

The requirement of proportionality in sentencing undermines rather than advances the appellants' argument. There is no need to turn to the *Charter* for relief against an unfit sentence. If imprisonment

atteinte à l'art. 12, mais qu'un degré de disproportion moindre suffit pour qu'il y ait atteinte à l'art. 7 rendrait incohérent l'ensemble des « garanties juridiques » interreliées énoncées aux art. 7 à 14 de la *Charte* en assignant aux art. 12 et 7 des normes contradictoires pour une même question. Un tel résultat serait selon nous inacceptable.

161 Par conséquent, même si notre collègue la juge Arbour nous convainquait que la peine doit être examinée au regard de l'art. 7 et non de l'art. 12, le résultat serait le même. Dans les deux cas, la norme constitutionnelle applicable est la disproportion exagérée et, dans les deux cas, on n'y a pas satisfait.

162 Qui plus est, même si l'emprisonnement était jugé une peine disproportionnément exagérée, la réparation constitutionnelle devrait être déterminée en choisissant parmi la gamme des peines applicables, et non en envisageant la décriminalisation de la possession de marihuana.

c) *La proportionnalité de la peine*

163 À ce stade-ci, nous délaissons la *Charte* pour nous attacher au *Code criminel*, dans lequel le Parlement a indiqué que la notion de proportionnalité est l'élément central des principes de détermination de la peine. L'article 718.1 du *Code criminel* énonce que « [l]a peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant. » Notre Cour a examiné à plusieurs occasions l'importance de la proportionnalité de la peine. Voir, par exemple, *R. c. Proulx*, [2000] 1 R.C.S. 61, 2000 CSC 5, par. 82, où le juge en chef Lamer, s'exprimant pour la Cour, a fait état du « principe fondamental de détermination de la peine suivant lequel la peine doit être proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant ». Voir aussi *R. c. Wust*, [2000] 1 R.C.S. 455, 2000 CSC 18, par. 18; *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500, par. 40; et *Renvoi : Motor Vehicle Act de la C.-B.*, précité, la juge Wilson (motifs concourants), p. 533.

164 L'exigence de proportionnalité de la peine a davantage pour effet d'affaiblir la thèse des appelants que de l'étayer. Point n'est besoin d'invoquer la *Charte* pour obtenir réparation à l'encontre d'une

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

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

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

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

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

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

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

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

(*a*) to denounce unlawful conduct;

a) dénoncer le comportement illégal;

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

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

(*d*) to assist in rehabilitating offenders;

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

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

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

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

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

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

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

d) favoriser la réinsertion sociale des délinquants;

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

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

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

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

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

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

. . .

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

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

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

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

. . .

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

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

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

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Found at **Tab 99, Volume 19** of Google's BOA.

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Volkswagen AG*, 2020 ONCJ 398
DATE: 2020 09 08

2020 ONCJ 398 (CanLII)

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

VOLKSWAGEN AKTIENGESELLSCHAFT

Before Justice Rondinelli
Reasons released on September 8, 2020

T. Lemon, J. Morische and B. Gluckman..... counse
D. Humphrey, S. Weinstein and M. Biddulph ..... counsel for the Defendant

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Rondinelli J.:

[1] On January 22, 2020, Volkswagen Aktiengesellschaft ("VW AG"), a German-based car manufacturer, pleaded guilty before me to 60 charges for offences under the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 ("CEPA"). VW AG pleaded guilty to 58 counts of contravening section 154 of the CEPA by unlawfully importing into Canada vehicles that do not conform to prescribed vehicle emissions standards, which is an offence under paragraph 272(1)(a) of CEPA. The company further pleaded guilty to two counts of providing misleading information, an offence under paragraph 272(1)(k) of CEPA.

[2] Also on January 22, 2020, I delivered brief oral reasons for sentence, ordering VW AG to pay a fine of $196,500,000, payable in 30 days, with detailed reasons to follow. These are those reasons.

Agreed Statement of Facts

[3] As part of the guilty plea proceedings, the following agreed statement of facts was read into the record.

[4] Emissions regulations, vehicle standards and diesel engine variants vary significantly from country to country. The matters addressed herein relate solely to this proceeding in Canada, and nothing contained herein shall be construed as any admission in other proceedings, including with respect to Volkswagen

element of design, system, or emission control device installed or incorporated in the Volkswagen Group's new motor vehicles or new motor vehicle engines, for the purpose of complying with standards prescribed under section 202 of the Clean Air Act, will not, to the best of the Volkswagen Group's information and belief, cause or contribute to an unreasonable risk to public safety.

…

All vehicles have been tested in accordance with good engineering practice to ascertain that such test vehicles meet the requirement of this section for the useful life of the vehicle.

[28] Based on the representations in the Applications, the EPA issued certificates of conformity for these vehicles (the "EPA Certificates"), allowing the equivalent Subject Vehicles to be sold in the United States.

[29] When the Subject Vehicles were imported into Canada for the purpose of sale, the EPA Certificates were relied upon as valid evidence of the vehicles' conformity with the Prescribed EPA NOx Standards, and VW affixed or caused to be affixed an emissions label to each of the Subject Vehicles' engines. These labels stated that the vehicles conformed to the Prescribed EPA NOx Standards. In addition, a National Emissions Mark ("NEM") was affixed to MY 2015-2016 VW and Audi Subject Vehicles.

Conduct at Issue

[30] VW, through certain employees, deceived the EPA, which, due to the harmonization of CEPA and the Regulations with the EPA emissions regime for new light-duty vehicles, had the effect of also deceiving ECCC, about whether the Subject Vehicles and the Porsche Vehicles, which were imported into North America from approximately December 2008 to approximately November 2015, complied with the Prescribed EPA NOx Standards. During their involvement with design, marketing and/or importation of the Subject Vehicles and the Porsche Vehicles in North America, certain VW supervisors and other employees: (a) knew that the Subject Vehicles and the Porsche Vehicles did not meet the Prescribed EPA NOx Standards; (b) knew that VW was using software to cheat the U.S. testing process by making it appear as if the Subject Vehicles and the Porsche Vehicles met the Prescribed EPA NOx Standards when, in fact, they satisfied the U.S. testing only by using a defeat device; and (c) attempted to and did conceal these facts from U.S. regulators and, therefore, ECCC.

The 2.0 Litre Defeat Device in the United States and Canada

[31] In or about 2006, VW AG employees were designing the new EA 189 2.0 litre diesel engine (later known as the Generation 1 or "Gen 1") for use in North America that would be the cornerstone of a new project to sell passenger diesel vehicles in the United States. Selling diesel vehicles in the U.S. market was a strategic goal of VW AG. This project became known within VW AG as the "US'07" project. The same diesel vehicles sold in the U.S. market would also be sold in Canada.

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[32] Certain VW AG supervisors and employees, however, realized that they could not design a diesel engine that would both meet the Prescribed EPA NOx Standards that would become effective in the U.S. in 2007 and attract sufficient customer demand in the U.S. market. Instead of bringing to market a diesel vehicle that could legitimately meet the Prescribed EPA NOx Standards, VW AG employees acting at the direction of certain supervisors designed, created, and implemented a software function to detect, evade and defeat these U.S. emissions standards, which also applied in Canada.

[33] Certain VW AG supervisors and employees knew that U.S. regulators, including the EPA, would measure VW's diesel vehicles' emissions through standard U.S. tests with specific, published drive cycles. ECCC relies on these same prescribed cycles when measuring emissions during its own independent testing. VW AG employees acting at the direction of these supervisors and employees designed the 2.0 litre defeat device to recognize whether the vehicle was undergoing standard U.S. emissions testing on a dynamometer (or "dyno") or whether the vehicle was being driven on the road under normal driving conditions. The defeat device accomplished this by recognizing the standard drive cycles used by U.S. and Canadian regulators. If the vehicle's software detected that it was being tested, the vehicle performed in one mode, which satisfied the Prescribed EPA NOx Standards. If the defeat device detected that the vehicle was not being tested, it operated in a different mode, in which the effectiveness of the vehicle's emissions control systems was reduced substantially, causing the vehicle to emit substantially higher NOx, up to sometimes 27 times higher than the prescribed standard as determined by ECCC testing.

[34] In or around 2006, a certain VW AG supervisor authorized certain VW AG engineers to use the defeat device in the development of the US'07 project, despite concerns expressed by particular VW AG employees about the propriety of designing and activating the defeat device software.

[35] Starting with the first MY 2009 of the new engine for the 2.0 Litre Subject Vehicles through MY 2015, certain VW AG supervisors and employees then caused the defeat device software to be installed in the 2.0 Litre Subject Vehicles imported for purpose of sale in the United States and Canada.

The 3.0 Litre Defeat Device in the United States and Canada

[36] Starting in or around 2006, AUDI AG engineers designed a 3.0 litre diesel engine for the U.S. market. The 3.0 litre engine was more powerful than the 2.0 litre engine, and was included in larger and higher-end model vehicles. The 3.0 litre engine was ultimately placed in the 3.0 Litre Subject Vehicles and the Porsche Vehicles. In order to pass U.S. emissions tests, certain AUDI AG engineers designed and installed software designed to detect, evade and defeat U.S. emissions standards, which constituted a defeat device under U.S. law and under CEPA and the Regulations.

[37] Specifically, these AUDI AG engineers calibrated a defeat device for the 3.0 Litre Subject Vehicles and the Porsche Vehicles that varied injection levels of a solution consisting of urea and water ("AdBlue") into the exhaust gas system based on whether the vehicle was being tested or not, with less NOx reduction occurring during regular driving conditions. In this way, the vehicle consumed less AdBlue, and avoided a

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The Governing Sentencing Principles

[64] The sentencing principles in CEPA are set out in s. 287.1 of the Act:

Sentencing principles

287.1 (1) In addition to the principles and factors that the court is otherwise required to consider, including those set out in sections 718.1 to 718.21 of the *Criminal Code*, the court shall consider the following principles when sentencing a person who is convicted of an offence under this Act:

(a) the amount of the fine should be increased to account for every aggravating factor associated with the offence, including the aggravating factors set out in subsection (2); and

(b) the amount of the fine should reflect the gravity of each aggravating factor associated with the offence.

Aggravating factors

(2) The aggravating factors are the following:

(a) the offence caused damage or risk of damage to the environment or environmental quality;

(b) the offence caused damage or risk of damage to any unique, rare, particularly important or vulnerable component of the environment;

(c) the offence caused harm or risk of harm to human health;

(d) the damage or harm caused by the offence is extensive, persistent or irreparable;

(e) the offender committed the offence intentionally or recklessly;

(f) the offender failed to take reasonable steps to prevent the commission of the offence despite having the financial means to do so;

(g) by committing the offence or failing to take action to prevent its commission, the offender increased revenue or decreased costs or intended to increase revenue or decrease costs;

(h) the offender committed the offence despite having been warned by an enforcement officer of the circumstances that subsequently became the subject of the offence;

(i) the offender has a history of non-compliance with federal or provincial legislation that relates to environmental or wildlife conservation or protection; and

(j) after the commission of the offence, the offender

(i) attempted to conceal its commission,

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(ii) failed to take prompt action to prevent, mitigate or remediate its effects, or

(iii) failed to take prompt action to reduce the risk of committing similar offences in the future.

[65] By operation of s. 287.1(1) of CEPA, further consideration is to be made of the principles contained in s. 718.21 of the *Criminal Code*. That is:

> **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;
>
> (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.

Aggravating Factors

[66] It is clear that the aggravating factors set out in s. 287.1(2)(a), (c), (e), (f), (g), and (j) of CEPA apply in this case. This was a very sophisticated illegal scheme. It was far from a simple plan like surreptitiously dumping pollutants in a river under cover of darkness. The deception in this case was prolonged, involved complex technology, and

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spanned throughout the global. Much to the detriment of the environment and human health, and primarily for the benefit of the company's bottom line.

Mitigating Factors

[67] VW AG has no prior infractions in Canada. The company instituted resolution discussions from the outset of the Canadian investigation with a view of resolving this matter without a trial. There is little doubt that a trial in this matter would have been lengthy due to the anticipated expert testimony and the number of triable issues to be resolved. With courtroom time being a scarce commodity, it goes without saying that the saving of court time is an important factor in mitigation.

[68] Further, VW AG's commitment to resolve this matter went beyond simply admitting wrongdoing and paying a fine. As described in paragraphs 60-63 above, VW AG has undertaken significant remedial action in Canada that includes settling consumer claims and instituting a more rigorous global compliance program.

The Joint Position

[69] The Crown and VW AG have jointly submitted that a fine totaling $196,500,000 be imposed.

[70] In *R. v. Anthony-Cook*, 2016 SCC 43, the Supreme Court of Canada held that a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. The Court noted at para. 34, "[r]ejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down."

[71] Although *Anthony-Cook* dealt with a joint position in a criminal proceeding, CEPA has been declared to be valid legislation under the criminal law power: see *R. v. Hydro-Québec*, 1997 CanLII 318 (SCC), [1997] 3 SCR 213 at para. 110. As such, the principles stipulated in *Anthony-Cook* apply in this case.

[72] In considering the joint position, I cannot overlook the risk of damage to the environment and risk of harm to human health that was created by VW AG's actions. As Justice La Forest put it in *Hydro-Québec* at para. 123, environmental legislation is "a public purpose of superordinate importance; it constitutes one of the major challenges of our time." The importance of environmental protection has been recognized in legislative provisions such as the Declaration and Preamble of CEPA. Those provisions are worth repeating here:

Declaration

2020 ONCJ 398 (CanLII)

It is hereby declared that the protection of the environment is essential to the well-being of Canadians and that the primary purpose of this Act is to contribute to sustainable development through pollution prevention.

Preamble

Whereas the Government of Canada seeks to achieve sustainable development that is based on an ecologically efficient use of natural, social and economic resources and acknowledges the need to integrate environmental, economic and social factors in the making of all decisions by government and private entities;

Whereas the Government of Canada is committed to implementing pollution prevention as a national goal and as the priority approach to environmental protection;

Whereas the Government of Canada acknowledges the need to virtually eliminate the most persistent and bioaccumulative toxic substances and the need to control and manage pollutants and wastes if their release into the environment cannot be prevented;

Whereas the Government of Canada recognizes the importance of an ecosystem approach;

Whereas the Government of Canada will continue to demonstrate national leadership in establishing environmental standards, ecosystem objectives and environmental quality guidelines and codes of practice;

Whereas the Government of Canada is committed to implementing the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation;

Whereas the Government of Canada recognizes that all governments in Canada have authority that enables them to protect the environment and recognizes that all governments face environmental problems that can benefit from cooperative resolution;

Whereas the Government of Canada recognizes the importance of endeavouring, in cooperation with provinces, territories and aboriginal peoples, to achieve the highest level of environmental quality for all Canadians and ultimately contribute to sustainable development;

Whereas the Government of Canada recognizes that the risk of toxic substances in the environment is a matter of national concern and that toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries;

Whereas the Government of Canada recognizes the integral role of science, as well as the role of traditional aboriginal knowledge, in the process of making decisions relating to the protection of the environment and human health and that environmental or health risks and social, economic and technical matters are to be considered in that process;

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Whereas the Government of Canada recognizes the responsibility of users and producers in relation to toxic substances and pollutants and wastes, and has adopted the "polluter pays" principle;

Whereas the Government of Canada is committed to ensuring that its operations and activities on federal and aboriginal lands are carried out in a manner that is consistent with the principles of pollution prevention and the protection of the environment and human health;

Whereas the Government of Canada will endeavour to remove threats to biological diversity through pollution prevention, the control and management of the risk of any adverse effects of the use and release of toxic substances, pollutants and wastes, and the virtual elimination of persistent and bioaccumulative toxic substances;

Whereas the Government of Canada recognizes the need to protect the environment, including its biological diversity, and human health, by ensuring the safe and effective use of biotechnology;

And whereas the Government of Canada must be able to fulfil its international obligations in respect of the environment.

[73] The proposed fine in this case lends legitimacy to Canada's role in fulfilling its international obligation in respect of the environment. It is difficult to see how the quantum of the proposed fine could be construed merely as "the price of doing business" – even in light of the size of this global corporate offender. It is approximately 26 times more than the largest fine ever imposed for environmental infractions in Canada to date.[1] In my view, the proposed fine signals a new era of substantial fines for environmental infractions and is sufficient in achieving the required deterrence and denunciation.

Conclusion

[74] Very experienced counsel have presented a joint position that has been meticulously crafted over a significant period of time. In my view, the proposed sentence adequately addresses the sentencing principles set out in both CEPA and the *Criminal Code*. Further, it provides an adequate degree of deterrence and denunciation in seeking to protect the environment and the health of Canadians.

[75] For the above reasons, I accede to the joint submission and the fine imposed is as follows: for counts 1 to 19, a fine of $754,000 per count; for counts 20 to 58, a fine of $4,466,000 per count; and for counts 59 to 60, a fine of $4,000,000 per count. The total amount of the fine is $196,500,000, payable in 30 days.

[1] See, "Bloom Lake General Partner must pay $7.5 million for environmental infractions," December 24, 2014, Government of Canada website: https://www.canada.ca/en/environment-climate-change/services/environmental-enforcement/notifications/bloom-lake-general-partner-infractions.html

2020 ONCJ 398 (CanLII)

CITATION: R. v. Canada Bread Company Limited, 2023 ONSC 3790
COURT FILE NO.: CR-23-90000422-0000
DATE: 20230621

Found at **Tab 68, Volume 13** of Google's BOA.

2023 ONSC 3790 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
HIS MAJESTY THE KING	)	**François Blanchette, Gary Caracciolo and Sébastien Lafrance**, for the Crown
- and -	)	
CANADA BREAD COMPANY, LIMITED	)	**J. Thomas Curry, Eli Lederman and Nikolas DeStefano**, for Canada Bread Company, Limited
	)	**HEARD:** June 21, 2023

M. FORESTELL J.

REASONS FOR SENTENCE

[1] Canada Bread Company, Limited ("Canada Bread") has entered guilty pleas to four offences: two counts of violations of paragraph 45(1)(c) of the *Competition Act* as it existed in 2007; and two counts of violations of paragraph 45(1)(a) of the Act as amended in 2010.

[2] The circumstances of the offences are set out in detail in the Statement of Agreed Facts filed on this hearing.

[3] Briefly stated, Canada Bread has admitted that on a total of four occasions in 2007, in 2010 and in 2011 it entered into agreements with Weston Food Canada Inc. to increase wholesale fresh commercial bread prices to grocery retailers. The conduct resulted in two price increases.

[4] Other relevant facts set out in the Statement of Agreed Facts in this case are as follows:

> 28. Canada Bread has cooperated with the Bureau from the outset of its involvement in this matter and its cooperation has continued throughout the period of the Bureau's investigation. It has responded to requests from the Bureau and provided Bureau investigators with documents over and above those seized in the search of Canada Bread. Canada Bread has also made nine witnesses available for interviews by the Bureau.

[5] Counsel have proposed a joint submission on sentence. That joint submission is for a total fine of 50 million dollars, allocated as follows: 7.5 million dollars on each of Counts 1 and 2 and 17.5 million dollars on each of Counts 3 and 4.

[6] The sentence is proposed by experienced counsel and is the result of pretrial discussions between counsel who are aware of the circumstances of the offences and the strengths and weaknesses of the prosecution case and the circumstances of the offending company. It is also the result of judicial pre-trial discussions with me.

[7] The Supreme Court of Canada, in *R. v. Anthony-Cook*, 2016 SCC 43, quoting from the earlier case of *R. v. Nixon*, 2011 SCC 34, observed that "not only do joint submissions 'help to resolve the vast majority of criminal cases in Canada', but "in doing so, [they] contribute to a fair and efficient criminal justice system" (para. 47).

[8] The Supreme Court went on to say that "a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest."

[9] I have concluded that the proposed sentence would not bring the administration of justice into disrepute, nor is it contrary to the public interest.

[10] I have carefully considered the circumstances of the offences and of the offender and I have concluded that the sentence proposed is consistent with the applicable sentencing principles.

[11] In arriving at this conclusion, I have considered the leniency programme of the Competition Bureau; I have considered the general purposes, principles and objectives of sentencing as set out in the *Criminal Code*, R.S.C., 1985, c. C-46, and I have considered the principles and objectives of sentence arising from the common law.

[12] The leniency program is a program whereby a person can obtain total immunity from prosecution or leniency or partial relief from fines. The program encourages participants to admit to the offending conduct and to cooperate with the investigation by the Competition Bureau. The program provides a benefit to the public by encouraging cooperation with the authorities and serving as a deterrent to other offenders. Much of the conduct would go undetected if not for the cooperation of participants in the program.

[13] In accordance with the established practice under the program, the Bureau in this case calculated the quantum of the fines that would otherwise have been sought, assessed the cooperation of Canada Bread, and arrived at a recommended discount of approximately 30%.

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[14] This process underlies the ultimate recommended sentence that has been proposed to me. My role is to assess whether that proposed fine is consistent with the relevant sentencing principles and objectives. The cooperation of the offender is a factor that I take into account in this determination, but I do not engage in a mathematical exercise in assessing the adequacy of the fine in the context of the relevant sentencing principles.

[15] The fundamental principle of sentencing set out in s. 718.1 of the *Criminal Code* and as set out in the caselaw is that the sentence should be proportionate to the gravity of the offence and the degree of responsibility — or the moral blameworthiness — of the offender.

[16] The assessment of the gravity of the offence and the moral blameworthiness of the offender in the context of a corporation involves the consideration of some factors that are specific to the sentencing of an organization.

[17] In imposing a sentence on an organization, s. 718.21 of the *Code* requires that I take into account any advantage realized by the organization, the degree of planning and the duration and complexity of the offence, whether the organization has attempted to conceal its assets, the impact of the sentence on the economic viability of the organization, the cost to public authorities of the investigation and prosecution, any prior similar conduct by the organization and any measures taken by the organization to reduce the likelihood of it committing a subsequent offence.

[18] I must also impose a sentence that advances the purpose or objectives of sentencing. The fundamental purpose of sentencing is to contribute to respect for the law and maintenance of a just, peaceful and safe society by imposing just sanctions that advance one or more of the relevant sentencing objectives. The relevant sentencing objectives in this case are the denunciation of the conduct and the harm done to the victims or the community, deterrence of the offender and others, rehabilitation of the offender and the promotion of a sense of responsibility and acknowledgment of the harm done to victims and to the community.

[19] The offences in this case were extremely serious. Price-fixing was aptly described in *R. v. Maxone Auto Parts*, 2012 FC 1117 at paragraph 54 as analogous to fraud and theft. Effectively, this was a fraud on the public. The offences had a far-reaching and long-standing impact on the victims. Bread is a dietary staple for many and these offences affected millions of consumers.

[20] Other aggravating factors are that there was a high degree of planning and coordination by the former senior officer of Canada Bread and that the company realized an advantage as demonstrated by the sales levels during the relevant time periods.

[21] There are, however, mitigating factors in relation to this offender. There has been no effort to conceal assets or avoid the consequences of the conduct. The shares in Canada Bread were sold to Grupo Bimbo after the commission of the offences. There is no history of similar conduct. It is an agreed fact that the current owner and directing mind of Canada Bread has a reputation for ethical conduct. Since the change in ownership, Canada Bread has developed and implemented a competition law compliance and training programme thus taking measures to reduce the likelihood of it committing similar offences.

2023 ONSC 3790 (CanLII)

[22] Canada Bread has fully cooperated with the investigation. This is a highly mitigating factor. It has saved considerable time and costs. In addition to the time and resources saved in the investigatory stage, the guilty pleas entered today come at a time when these courts are overburdened with a backlog of serious criminal cases from the COVID-19 pandemic and at a time when judicial resources are particularly scarce. The pleas have avoided a lengthy trial at a time when court resources are severely strained.

[23] The guilty pleas also represent an acknowledgement of the harm done to the public. Canada Bread, through its pleas, has taken responsibility for the conduct.

[24] In arriving at an appropriate sentence, I must also consider the objectives of sentencing.

[25] Denunciation and deterrence are the predominant sentencing objectives in sentencing for price fixing.

[26] To achieve these objectives, the fines imposed in these cases must be at a level that eliminates the profit of the conduct. The fine cannot merely represent the "cost of doing business".

[27] I am satisfied that the aggregate fine recommended in this case is significant and achieves the objectives of deterrence and denunciation. While reduced from the maximum, the reduction is not inconsistent with the relevant sentencing principles. It achieves deterrence and denunciation while recognizing the cooperation of Canada Bread in the investigation, its acknowledgement of the harm done, and the very significant steps taken to prevent a recurrence of the conduct.

[28] The recommended fines in my view are consistent with the principles and objectives of sentencing.

[29] Therefore, I impose the sentence recommended by both parties:

(1) a fine of $7.5 million on each of Counts 1 and 2; and

(2) a fine of $17.5 million on each of Counts 3 and 4.

There will be 30 days to pay.

Forestell J.

Released: June 21, 2023

2023 ONSC 3790 (CanLII)

Found at **Tab 9, Volume 3** of Google's Reply BOA.

Competition Tribunal Tribunal de la concurrence

REVISED PUBLIC VERSION[1]

2024 CanLII 93716 (CT)

Reference: *Canada (Commissioner of Competition) v Cineplex Inc*, 2024 Comp Trib 5
File No.: CT-2023-003
Registry Document No.: 84

IN THE MATTER OF an Application by the Commissioner of Competition for an order under sections 74.01 and 74.1 of the *Competition Act*, RSC 1985, c C-34.

BETWEEN:

Commissioner of Competition
(applicant)

and

Cineplex Inc
(respondent)

Dates of hearing: February 14-16, 20-21 and 28-29, 2024
Before: Mr Justice Andrew D. Little (Chairperson)
Date of Reasons for Order and Order: September 23, 2024

REASONS FOR ORDER AND ORDER

[1] Revised as of February 14, 2025, pursuant to the Errata Note published on same day.

[472] Relatedly, while Cineplex continued its representations (i.e., did not self-correct) in the face of the Commissioner's application, there is no evidence that leads me to believe Cineplex will not self-correct by appropriately modifying its website and App after it learns that the Tribunal has found that it has engaged in reviewable conduct.

[473] As analyzed above, the Tribunal will not make an order under paragraph 74.1(1)(*d*), owing mainly to practical concerns about the implementation of such an order. The Tribunal's decision not to do so, and why, is relevant as a factor related to the amount of an AMP under paragraph 74.1(5)(*j*). In assessing an AMP, I have accounted for the facts and arguments already analyzed under paragraph 74.1(1)(*d*). In this case, these considerations complement and support an AMP in the amount of the Online Booking Fees collected by Cineplex.

[474] The Ontario Superior Court in *Chatr 2014* held that the amount of an AMP to be paid by a respondent must be considered through a lens of proportionality: *Chatr 2014,* at paras 12-16. Justice Marrocco stated:

> [15] Proportionality also requires keeping in mind the counterbalancing effects of the respondents' reviewable conduct, such as loss of reputation. Genuine companies like the respondents are loathe to see their reputations damaged and it can be assumed they will take steps to prevent this from happening again in the future. In this way, the counterbalancing effects of reviewable conduct will generally have a conformist effect and thus will reduce the amount of the monetary penalty.
>
> [16] In applying the principle of proportionality the court also has to keep in mind that there is no notion of general deterrence in subsection 74.1(4).

[475] I accept that Cineplex's reputation will be negatively affected by the outcome of this proceeding and the orders that will be made.

[476] The most influential factors related to an AMP are: the quantum Cineplex collected from its reviewable conduct (which could have been the subject of a concurrent order under paragraph 74.1(1)(*d*) but is not in this case, for reasons already discussed); the geographic scope, frequency, extent and duration of the reviewable conduct (including the absence of self-correction after this proceeding started) all of which are aggravating factors; and the relative size of Cineplex's

2024 CanLII 93716 (CT)

business. I recognize that there is some conceptual overlap within these items (such as the geographic scope of the conduct and the size of Cineplex's business).

[477] Finally, I return to the Commissioner's submissions. In final argument, he submitted that the Tribunal should impose an AMP in the amount Cineplex has gained from engaging in the misleading conduct. As a matter of fairness to Cineplex during the Tribunal process, I will not impose an AMP in this case that exceeds the proven financial gains it collected through the Online Booking Fee from June 2022 to December 31, 2023.

[478] Considering the parties' submissions, the purpose of an order and limitations on it under subsection 74.1(4), the factors under subsection 74.1(5), and the range of minimum and maximum monetary penalty that may be ordered, I conclude that the Tribunal should impose an AMP in the amount of $38.978 million under paragraph 74.1(1)(*c*).

(5) Subsection 74.1(4) and Overall Proportionality of the Tribunal's Order

[479] In my view, the Tribunal's overall order is proportional and respects Parliament's directions in subsection 74.1(4). In my view, its terms are proportional to the nature of Cineplex's reviewable conduct (including its severity, frequency, duration, materiality, and geographic scope), the number and proportion of Cineplex consumers affected, the quantum of Online Booking Fees collected, and Cineplex's financial position. In addition:

(a) This is not a case in which the conduct was designed deliberately to deceive members of the public, nor were the representations directed at a vulnerable segment of the public.

(b) Cineplex will suffer harm to its reputation and, as in *Chatr 2014*, will likely take steps to end the reviewable conduct.

(c) No evidence suggested that Cineplex has any history of non-compliance with the *Competition Act*.

(d) While the reviewable conduct had been occurring for more than 19 months at the time of the hearing, Cineplex requested a prompt hearing on the merits of the Commissioner's application, which occurred.

2024 CanLII 93716 (CT)

Who is the Monetary Sanction Paid to?

2017 BCCA 415 (CanLII)

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

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

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

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

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

2017 BCCA 415 (CanLII)

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

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

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

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

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

Criminal sentencing principles

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

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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

2017 BCCA 415 (CanLII)

[208] Earlier in this judgment, I referred to judgments of this Court culminating in *Walker* that explained that ss. 161 and 162 are not penal in nature.

[209] The Court in *Walker* was dealing with a version of s. 162 that specified lower maximum administrative monetary penalties than the statute at issue in this appeal. The current s. 162 authorizes penalties to a maximum of $1 million per contravention. While the allowable penalty has increased, the principle in *Walker* remains sound.

[210] As previously noted, both the Alberta Court of Appeal in *Lavallee* and the Ontario Court of Appeal in *Rowan* have held that the comparable sections of their Securities Acts that include the same $1 million per contravention provision do not amount to true penal consequences.

[211] I agree, and would apply the same reasoning to s. 162. As the Supreme Court of Canada stated in *Guindon* at para. 80: “In some cases, sizable penalties are necessary so that the penalty is not simply considered a cost of doing business.”

[212] As well, unlike fines arising from s. 155 proceedings, administrative monetary penalties are paid to the Commission to be used for costs involved in the administration and enforcement of the *Act* and for any costs involved in operating the Commission: *Securities Act*, s. 15. In *Wigglesworth*, Wilson J. held that “One *indicium* of the purpose of a particular fine is how the body is to dispose of the fines that it collects”: at 561. The fact that the monetary penalties are to be used for the benefit of the Commission is a further indication of legislative intent that the monetary penalties are not penal in nature.

[213] Accordingly, in my opinion, neither s. 161 nor s. 162 authorize the Securities Commission to impose penalties that have true penal consequences. That being so, when Ms. Samji became the subject of proceedings under s. 161, she was not charged with an offence within the meaning of s. 11. As a result, there is no foundation for a stay pursuant to s. 11(h) and the appeal on that basis must be dismissed.

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Competition Bureau Canada | Bureau de la concurrence Canada

Found at **Tab H(90), Volume 21** of Google's Motion Record.

THE 4 Cs OF COMPETITION



ANNUAL REPORT OF THE COMMISSIONER OF COMPETITION FOR THE YEAR ENDING MARCH 31, 2014

Canada

"A MORE STRATEGIC APPROACH IN THE USE OF ECONOMIC AND INDUSTRY EXPERTS ALSO RESULTED IN FURTHER SAVINGS."

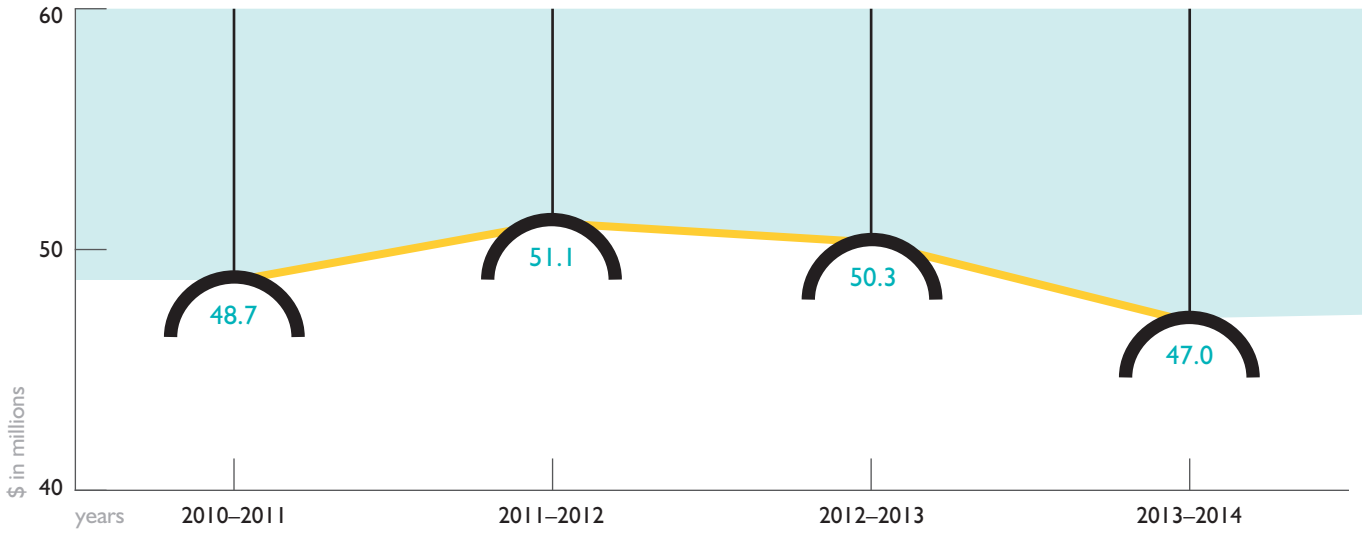
Savings to the Bureau from the Government's *Deficit Reduction Action Plan* were fully implemented and realized in 2013–2014. Additional cost reductions were achieved through the Bureau's ongoing strategy to build a strong in-house legal team within the Competition Bureau Legal Services Unit of the Department of Justice and to reduce reliance on external legal counsel. A more strategic approach in the use of economic and industry experts also resulted in further savings. These concrete Bureau actions provided increased financial flexibility that enabled strategic investments to improve the Bureau's information technology.

The Bureau also continued to work closely with Industry Canada and the Public Prosecution Service of Canada to control rising costs in the area of legal support for criminal cases.

The Bureau has administrative responsibility for collecting fines imposed by the courts as well as AMPs issued by the Competition Tribunal or the courts. In 2013–2014, approximately $55 million in fines were imposed and $0.5 million in AMPs were issued. Fines and AMPs are not considered Bureau revenue and instead are remitted to the Government of Canada's Consolidated Revenue Fund.

Figure 1 illustrates the Bureau's spending trend from 2010–2011 to 2013–2014.

FIGURE 1: BUREAU SPENDING TREND[2]



[2] Does not include Work Force Adjustment budget and expenditures.

Reputational Harm and Stigma

Found at **Tab 2, Volume 1** of Google's BOA.

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absolute principles in political, philosophical, ethical or theological matters. **2** the principle of absolute government; despotism. □ **ab·so·lut·ist** *noun & adjective*

ab·solve /əbˈzɒlv, əbˈsɒlv/ *transitive verb* **1** (often foll. by *from*, *of*) **a** set or pronounce free from blame or obligation etc. **b** acquit; pronounce not guilty. **2** pardon or give absolution for (a sin etc.). □ **ab·solv·er** *noun* [Latin *absolvere* (as AB-, *solvere solut-* loosen)]

ab·sorb *transitive verb* **1** include or incorporate as part of itself or oneself (*the country successfully absorbed its immigrants*). **2** take in; suck up (liquid, heat, knowledge, etc.) (*she quickly absorbed all she was taught*). **3** reduce the effect or intensity of; deal easily with (an impact, sound, difficulty, etc.). **4** consume (income, time, resources, etc.) (*his debts absorbed half his income*). **5** engross the attention of (*television absorbs them completely*). □ **ab·sorb·able** *adjective* **ab·sorb·abil·ity** /-ˈbɪlɪti/ *noun* **ab·sorb·er** *noun* [Latin *absorbēre absorpt-* (as AB-, *sorbēre* suck in)]

ab·sorbed *predicative adjective* intensely engaged or interested (*she was absorbed in her work*). □ **ab·sorb·ed·ly** /-bədli/ *adverb*

ab·sorb·ent ● *adjective* having a tendency to absorb. ● *noun* a substance that absorbs esp. liquids. □ **ab·sorb·ency** *noun* [Latin *absorbent-* from *absorbēre* ABSORB]

ab·sorb·ing *adjective* engrossing; intensely interesting. □ **ab·sorb·ing·ly** *adverb*

ab·sorp·tion *noun* **1** the process or action of absorbing or being absorbed. **2** disappearance through incorporation into something else. **3** mental engrossment. □ **ab·sorp·tive** *adjective* [Latin *absorptio* (as ABSORB)]

absorption spectrum *noun Physics* a spectrum of electromagnetic radiation transmitted through a substance, with dark lines or bands showing absorption at specific wavelengths.

ab·stain *intransitive verb* **1 a** (usu. foll. by *from*) restrain oneself; refrain from indulging in (*abstained from meat*; *abstained from mentioning it*). **b** refrain from drinking alcohol. **2** formally decline to use one's vote. □ **ab·stain·er** *noun* [Latin *abstinēre abstent-* (as AB-, *tenēre* hold)]

ab·stemi·ous /abˈstiːmiəs/ *adjective* (of a person, habit, etc.) moderate, not self-indulgent, esp. in eating and drinking. □ **ab·stemi·ous·ly** *adverb* **ab·stemi·ous·ness** *noun* [Latin *abstemius* (as AB-, *temetum* strong drink)]

ab·sten·tion /əbˈstenʃən/ *noun* the act or an instance of abstaining, esp. from voting. [(as ABSTAIN)]

ab·stin·ence /ˈabstɪnəns/ *noun* the act of abstaining, esp. from food, drugs, or sexual activity.

ab·stin·ent /ˈabstɪnənt/ *adjective* practising abstinence. □ **ab·stin·ent·ly** *adverb* [(as ABSTAIN)]

ab·stract ● *adjective* **1 a** to do with or existing in thought rather than matter, or in theory rather than practice; not tangible or concrete (*abstract questions rarely concerned him*). **b** (of a word, esp. a noun) denoting a quality or condition or intangible thing rather than a concrete object. **2 a** (of art) achieving its effect by grouping shapes and colours in satisfying patterns rather than by the recognizable representation of physical reality. **b** (of a dance work) not telling a story. ● *verb* **1** *transitive* (often foll. by *from*) take out of; extract; remove. **2** *transitive* summarize (an article, book, etc.). **3** *transitive & reflexive* (often foll. by *from*) disengage (a person's attention etc.); distract. **4** *transitive* (foll. by *from*) consider abstractly or separately from something else. **5** *transitive euphemism* steal. ● *noun* **1** a summary or statement of the contents of a book etc. **2** an abstract work of art. **3** an abstraction or abstract term. □ **in the abstract** in theory rather than in practice. □ **ab·stract·ly** *adverb* **ab·stract·ness** *noun* **ab·stract·or** *noun* (in sense 2 of *verb*). [Latin *abstractus* past participle of *abstrahere* (as AB-, *trahere* draw)]

ab·stract·ed *adjective* inattentive to the matter in hand; preoccupied. □ **ab·stract·ed·ly** *adverb*

abstract expressionism *noun* a development of abstract art which aims at a subjective emotional expression of an ideal rather than a picture of a physical object.

ab·strac·tion *noun* **1** the act or an instance of abstracting or taking away. **2 a** an abstract or visionary idea. **b** the formation of abstract ideas. **3 a** abstract qualities (esp. in art). **b** an abstract work of art. **4** absent-mindedness.

ab·strac·tion·ism *noun* **1** the principles and practice of abstract art. **2** the pursuit or cult of abstract ideas. □ **ab·strac·tion·ist** *noun*

ab·struse /əbˈstruːs/ *adjective* hard to understand; obscure. □ **ab·struse·ly** *adverb* **ab·struse·ness** *noun* [Latin *abstrusus* (as AB-, *trusus* past participle of *trudere* push)]

ab·surd /əbˈsɜrd, -ˈzɜrd/ *adjective* **1** (of an idea, suggestion, etc.) wildly unreasonable, illogical, or inappropriate. **2** (of a person) unreasonable or ridiculous in manner. **3** (of a thing) ludicrous, incongruous (*an absurd hat*; *the situation was becoming absurd*). □ **ab·surd·ly** *adverb* [Latin *absurdus* (as AB-, *surdus* deaf, dull)]

ab·surd·ist ● *adjective* pertaining to or characteristic of the theatre of the absurd. ● *noun* a writer of absurdist drama. □ **ab·surd·ism** *noun*

ab·surd·ity *noun* (*pl.* **-ities**) **1** wild inappropriateness or incongruity. **2** extreme unreasonableness. **3** an absurd thing, esp. a statement or act.

Abu-Bakr /əˌbuːˈbakɜr/ (also **Abu-Bekr** /əˌbuːˈbekɜr/) (573–634), the first caliph of Islam 632–4, and a close companion of Muhammad.

Abu Dhabi /ˌabuː ˈdabi/ **1** the largest of the seven member states of the United Arab Emirates, lying between Oman and the Gulf coast; pop. (est. 2000) 1,186,000. **2** the capital of Abu Dhabi; pop. (est. 2002) 539,800. It is also the federal capital of the United Arab Emirates.

Abuja /əˈbuːdʒə/ a newly built city in central Nigeria, designated in 1982 to replace Lagos as the national capital; pop. (est. 2002) 565,100.

abu·lia /əˈbuːliə/ *noun* (also **abou·lia**) the loss of willpower as a mental disorder. □ **abu·lic** *adjective* [Greek *a-* not + *boulē* will]

Abu Musa /ˌabuː ˈmuːsə/ a small island in the Persian Gulf. Formerly held by the emirate of Sharjah, it has been occupied by Iran since 1971.

abun·dance *noun* **1** a very great quantity, usu. considered to be more than enough. **2** plentifulness of the good things in life; prosperity. **3** *Chem.*, *Ecology*, *etc.* the relative quantity or number (of a species, substance, etc.) present. □ **in abundance** in great quantities.

abun·dant *adjective* **1** existing or available in large quantities; plentiful. **2** (foll. by *in*) having an abundance of (*a sea abundant in fish*). □ **abun·dant·ly** *adverb* [(as ABOUND)]

abuse ● /əˈbjuːz/ *transitive verb* **1 a** use to bad effect or for a bad purpose; misuse (*abused his position of power*). **b** make excessive and habitual use of (alcohol or drugs, esp. illegal ones). **2 a** treat (a person or animal) with cruelty or violence, esp. regularly or repeatedly. **b** assault (esp. a woman or child) sexually. **c** use or treat in such a way as to cause harm or damage (*he had been abusing his body for years*). **3** insult verbally. ● *noun* /əˈbjuːs/ **1 a** incorrect or improper use (*drug abuse*). **b** an instance of this (*an abuse of power*). **2** unjust or corrupt practice (*political abuses*). **3** maltreatment of a person (*compare* CHILD ABUSE, SEXUAL ABUSE). **4** insulting language (*a torrent of abuse*). □ **abus·er** *noun* [Latin *abusus*, *abuti* (as AB-, *uti us-* USE)]

Abu Sim·bel /ˌabuː ˈsɪmbəl/ a former village in S Egypt, site of two rock-cut temples built by Rameses II (13th c. BC). The facade of the great temple (31 m, 102 ft. high) bears four colossal seated statues of the pharaoh.

abu·sive *adjective* **1** (of a situation) involving maltreatment. **2** (of a person) tending to abuse others; violent. **3** using or containing insulting language. **4** (of language) insulting. □ **abu·sive·ly** *adverb* **abu·sive·ness** *noun*

abut *verb* (**abut·ted**, **abut·ting**) **1** *transitive & intransitive* (of buildings, sites, etc.) be located next to. **2** *intransitive* (foll. by *on*, *against*) (of part of a building) touch or lean upon (another) with a projecting end or point (*the shed abutted on the side of the house*). [Old French *abouter* (BUTT[1]) and Anglo-Latin *abuttare* from Old French *but* end]

abu·tilon /əˈbjuːtɪlɒn/ *noun* a herbaceous plant or shrub of warm climates, typically bearing showy yellow, red, or mauve flowers and sometimes used for fibre. [modern Latin, from Arabic *ūbūṭīlūn* 'Indian mallow']

abut·ment *noun* **1** the lateral supporting structure of a bridge, arch, etc. **2** the point of junction between such a support and the thing supported.

abuzz *predicative adjective* **1** in a state of excitement or activity. **2** buzzing.

abysm /əˈbɪzm/ *noun archaic* or *literary* = ABYSS. [Old French *abi(s)me* from medieval Latin *abysmus*]

abys·mal /əˈbɪzməl/ *adjective* **1** extremely bad (*abysmal weather*; *the food is abysmal*). **2** profound, utter (*abysmal ignorance*). □ **abys·mal·ly** *adverb*

abyss /əˈbɪs/ *noun* **1** a deep or seemingly bottomless chasm. **2 a** an immeasurable depth (*abyss of despair*). **b** a catastrophic situation as contemplated or feared (*his loss brought him a step nearer the abyss*). **3** a vast difference (*unbridgeable cultural abyss*). **4** (prec. by *the*) primal chaos, hell. [Late Latin *abyssus* from Greek *abussos* bottomless (as A-[1], *bussos* depth)]

abys·sal /əˈbɪsəl/ *adjective* **1** at or of the ocean depths or floor. **2** *Geol.* plutonic.

Abys·sinia /ˌabəˈsɪniə/ a former name of Ethiopia.

stick·ing point *noun* the limit of progress, agreement, etc.

stick insect *noun* any usu. wingless female insect of the family Phasmidae with a twig-like body.

stick-in-the-mud *noun informal* an unprogressive or old-fashioned person.

stickle·back *noun* any small fish of the family Gasterosteidae, esp. *Gasterosteus aculeatus*, with sharp spines along the back. [Middle English from Old English *sticel* thorn, sting + *bæc* BACK]

stick·ler *noun* (usu. foll. by *for*) **1** a person who insists on something (*a stickler for detail*). **2** a difficult problem or puzzle. [obsolete *stickle* be umpire, Middle English *stightle* control, frequentative of *stight* from Old English *stihtʹ(i)an* set in order]

stick-on *adjective* that can be stuck on; adhesive (*stick-on address labels*).

stick pen *noun* a ballpoint pen with a narrow, usu. opaque barrel.

stick pin *noun* esp. *N Amer.* a straight pin with an ornamented head, worn on a tie, scarf, lapel, etc.

stick shift *noun N Amer.* **1** a manual transmission for a motor vehicle. **2** a motor vehicle having a manual transmission. **3** = GEARSHIFT.

stick-to-it-iveness *noun informal* dogged perseverance.

stick·um *noun N Amer.* a sticky or adhesive substance.

stick·up *noun informal* a robbery using a gun.

stick·weed *noun US* = RAGWEED 2.

stick·work *noun Hockey* interference with the stick, e.g. butt-ending, slashing, etc.

sticky (**stick·i·er**, **stick·i·est**) ● *adjective* **1** tending or intended to stick or adhere. **2** glutinous, viscous. **3 a** (of the weather) humid. **b** damp with sweat. **4** *informal* awkward or uncooperative; intransigent (*was very sticky about giving me a day off*). **5** *informal* difficult, awkward (*a sticky problem*). **6** (of a website) attracting long visits or repeat visits from users. ● *noun* (*pl.* **-ies**) (also **sticky note**) *informal* = POST-IT. □ **come to a sticky end** die or come to grief in an unpleasant or painful way. **have sticky fingers** be in the habit of stealing. □ **stick·i·ly** *adverb* **stick·i·ness** *noun*

sticky bun *noun* a sweet bread roll covered with a sticky glaze or icing or with a syrup-coated bottom.

sticky rice *noun* any type of rice which cooks to a glutinous consistency, used esp. in the cuisine of eastern and southeastern Asia.

sticky tape *noun* clear adhesive tape; Scotch tape.

sticky wicket *noun* **1** *Cricket* a field that is damp from rain, causing the ball to bounce awkwardly. **2** *informal* difficult or awkward circumstances.

Stieg·litz /ˈstiːglɪts/ **Al·fred** (1864–1946), US photographer, who established photography as a fine art in the US and, through his galleries and publications, introduced Americans to the modern art of Picasso, Matisse, and Georgia O'Keeffe, whom he married in 1924.

stiff ● *adjective* **1** rigid; not flexible. **2** hard to bend or move or turn etc.; not working freely. **3** thick, viscous; capable of retaining a definite shape (*beat the egg whites until stiff*). **4** hard to cope with; needing strength or effort (*a stiff climb*). **5** severe or strong (*a stiff breeze*; *a stiff penalty*; *stiff opposition*). **6** (of a person or manner) formal, constrained; lacking spontaneity. **7** (of a muscle or limb etc., or a person affected by these) aching when used, owing to previous exertion, injury, etc. **8** (of an alcoholic or medicinal drink) strong. **9** (of a price, demand, etc.) unusually high, severe, or excessive. **10** (foll. by *with*) *informal* abounding in (*a place stiff with tourists*). ● *adverb informal* to an extreme degree (*bored stiff*; *scared stiff*). ● *noun slang* **1** a corpse. **2 a** a foolish or useless person (*you big stiff*). **b** an ordinary person (*a working stiff*). **3** a commercial venture (esp. in the entertainment business) which merits or meets with public indifference; a flop. ● *verb* esp. *N Amer. slang* **1** *transitive* cheat; refuse to pay or tip. **2** *transitive* kill, murder. **3** *intransitive* fail to sell well or be popular (*his last album stiffed*). □ **stiff·ish** *adjective* **stiff·ly** *adverb* **stiff·ness** *noun* [Old English *stīf* from Germanic]

stiff-arm ● *transitive verb* tackle, fend off, or push with a rigid arm. ● *noun* the action or an act of stiff-arming someone.

stiff·en *transitive & intransitive verb* make or become stiff. □ **stiff·en·er** *noun* **stiff·en·ing** *noun*

stiff-necked *adjective* obstinate or haughty.

stiff upper lip *noun* fortitude; stoicism in adversity.

stiffy *noun* (also **stiff·ie**) (*pl.* **-ies**) *coarse slang* an erection.

stifle¹ /ˈstəifəl/ *verb* **1** *transitive* prevent or constrain (an activity or idea) (*high taxes were stifling small businesses*). **2** *transitive* smother, suppress (*stifled a yawn*). **3** *intransitive & transitive* suffocate; stop or cause to stop breathing. □ **stif·ler** *noun* [perhaps alteration of Middle English *stuffe*, *stuffle* from Old French *estouffer*]

stifle² /ˈstəifəl/ *noun* (in full **stifle joint**) a joint in the legs of horses, dogs, etc., equivalent to the knee in humans. [Middle English: origin unknown]

stif·ling *adjective* **1** unbearably hot. **2** oppressive. □ **stif·ling·ly** *adverb*

stig·ma *noun* (*pl.* **stig·mas** or esp. in sense 4 **stig·mata** /stɪgˈmatə/) **1 a** a mark or sign of disgrace or discredit. **b** an unfavourable reputation. **2** (foll. by *of*) a distinguishing mark or characteristic. **3** the part of a pistil that receives the pollen in pollination. **4** (in *pl.*) (in Christian belief) marks corresponding to those left on Christ's body by the Crucifixion, said to have been impressed by divine favour on the bodies of St. Francis of Assisi and others. **5** a mark or spot on the skin or on a butterfly's wing. **6** *Med.* a visible sign or characteristic of a disease. **7** an insect's spiracle. [Latin from Greek *stigma -atos* a mark made by a pointed instrument, a brand, a dot: related to STICK¹]

stig·mat·ic /stɪgˈmatɪk/ ● *adjective* **1** of or relating to a stigma or stigmas. **2** = ANASTIGMATIC. ● *noun Christianity* a person bearing stigmata.

stig·ma·tist /ˈstɪgmətɪst/ *noun Christianity* = STIGMATIC *noun*.

stig·ma·tize /ˈstɪgməˌtaiz/ *transitive verb* (also esp. *Brit.* **-tise**) **1** (often foll. by *as*) describe as discreditable or undesirable. **2** *Christianity* produce stigmata on. □ **stig·ma·tiz·a·tion** *noun*

Sti·kine River /stɪˈkiːn/ a river in northwestern BC, 539 km long, which rises in the north central part of the province and flows generally westward, then southwestward, crossing the Alaska border and emptying into an inlet of the Pacific Ocean northeast of Prince of Wales Island. [Tlingit, = the (big) river]

Sti·kine Territory /stɪˈkiːn/ (also **Stick·een Territory**) *hist.* a British territory (1862–63) of NW Canada, encompassing what is now the southern region of Yukon Territory. Established to ensure British authority in an area potentially rich in gold, it was administered by the colony of British Columbia. [see STIKINE RIVER]

stil·bene *noun Chem.* an aromatic hydrocarbon forming phosphorescent crystals. [French from Greek *stilbō* glitter + -ENE]

stil·bes·trol /stɪlˈbestrɒl/ *noun* (*Brit.* **stil·boes·trol**) a powerful synthetic estrogen derived from stilbene. [STILBENE + ESTRUS]

stile¹ *noun* an arrangement of steps allowing people but not cattle to climb over a fence or wall. [Old English *stigel* from a Germanic root *stig-* (unrecorded) climb]

stile² *noun* a vertical piece in the frame of a panelled door, wainscot, etc. (*compare* RAIL¹ *noun* 5). [prob. from Dutch *stijl* pillar, doorpost]

stil·etto /stɪˈletoː/ *noun* (*pl.* **-tos**) **1** a short dagger with a thick blade. **2** (in full **stiletto heel**) **a** a high tapering heel on a women's shoe. **b** a shoe with such a heel. **3** a small pointed instrument for making eyelets etc. [Italian, diminutive of *stilo* dagger (as STYLUS)]

still¹ ● *adjective* **1** not or hardly moving. **2** with little or no sound; calm and tranquil (*a still evening*). **3** (of sounds) hushed, stilled. **4** (of a drink) not effervescing. ● *noun* **1** deep silence (*in the still of the night*). **2** an ordinary static photograph (as opposed to a motion picture), esp. a single shot from a movie. ● *adverb* **1** without moving (*stand still*). **2** even now or at a particular time (*they still did not understand*; *why are you still here?*). **3** nevertheless; all the same. **4** (with *comparative* etc.) even, yet, increasingly (*still greater efforts*; *still another explanation*). ● *transitive & intransitive verb* make or become still; quieten. □ **still and all** *informal* nevertheless. **still waters run deep** a quiet manner conceals depths of feeling or knowledge or cunning. □ **still·ness** *noun* [Old English *stille* (adj. & adv.), *stillan* (v.), from West Germanic]

still² *noun* an apparatus for distilling alcoholic drinks etc. [obsolete *still* (v.), Middle English from DISTILL]

stil·lage /ˈstɪlɪdʒ/ *noun* a bench, frame, etc., for keeping articles off the floor while draining, drying, waiting to be packed, etc. [apparently from Dutch *stellagie* scaffold, from *stellen* to place + French *-age*]

still·birth *noun* the birth of a dead child.

still·born *adjective* **1** (of a child) born dead. **2** (of an idea, plan, etc.) abortive; not able to succeed.

still-hunt *intransitive verb N Amer.* hunt stealthily or covertly; stalk. □ **still-hunter** *noun* **still-hunting** *noun*

still life *noun* (*pl.* **still lifes**) **1** a painting, drawing, or photograph of inanimate objects such as fruit or flowers. **2** this genre of painting, drawing, or photography.

still·son *noun* (in full **stillson wrench**) a large wrench with jaws that tighten as pressure is increased. [D. C. *Stillson*, its inventor d.1899]

stilly ● *adverb* in a still manner. ● *adjective literary* still, quiet.

stilt *noun* **1** either of a pair of poles with supports for the feet enabling

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ab urbe condita *Latin.* (æb ˈɜːbɪ ˈkɒndɪtə) the full form of **AUC** (sense 1). [literally: from the founding of the city]

A bursary *n. N.Z.* the higher of two bursaries available for students entering university, polytechnic, etc. Compare **B bursary.**

abuse *vb.* (əˈbjuːz). (*tr.*) **1.** to use incorrectly or improperly; misuse. **2.** to maltreat, esp. physically or sexually. **3.** to speak insultingly or cruelly to; revile. **4.** (*reflexive*) to masturbate. ~*n.* (əˈbjuːs). **5.** improper, incorrect, or excessive use; misuse. **6.** maltreatment of a person; injury. **7.** insulting, contemptuous, or coarse speech. **8.** an evil, unjust, or corrupt practice. **9.** See **child abuse. 10.** *Archaic.* a deception. [C14 (vb.): via Old French from Latin *abūsus*, past participle of *abūtī* to misuse, from AB-[1] + *ūtī* to USE] —**aˈbuser** *n.*

Abu Simbel (ˌæbuː ˈsɪmbᵊl) *n.* a former village in S Egypt: site of two temples of Rameses II, which were moved to higher ground (1966–67) before the area behind the Aswan High Dam was flooded. Also called: **Ipsambul.**

abusive (əˈbjuːsɪv) *adj.* **1.** characterized by insulting or coarse language. **2.** characterized by maltreatment. **3.** incorrectly used; corrupt. —**aˈbusively** *adv.* —**aˈbusiveness** *n.*

abut (əˈbʌt) *vb.* **abuts, abutting, abutted.** (usually foll. by *on, upon,* or *against*) to adjoin, touch, or border on (something) at one end. [C15: from Old French *abouter* to join at the ends, border on; influenced by *abuter* to touch at an end, buttress]

abutilon (əˈbjuːtɪlən) *n.* any shrub or herbaceous plant of the malvaceous genus *Abutilon,* such as the flowering maple, that have showy white, yellow, or red flowers. [C18: New Latin from Arabic]

abutment (əˈbʌtmənt) *or* **abuttal** *n.* **1.** the state or process of abutting. **2. a.** something that abuts. **b.** the thing on which something abuts. **c.** the point of junction between them. **3.** *Architect., civil engineering.* a construction that takes the thrust of an arch or vault or supports the end of a bridge.

abuttals (əˈbʌtᵊlz) *pl. n. Property law.* the boundaries of a plot of land where it abuts against other property.

abutter (əˈbʌtə) *n. Property law.* the owner of adjoining property.

abuzz (əˈbʌz) *adj.* (*postpositive*) humming, as with conversation, activity, etc.; buzzing.

abvolt (ˈæbˌvəʊlt) *n.* the cgs unit of potential difference in the electromagnetic system; the potential difference between two points when work of 1 erg must be done to transfer 1 abcoulomb of charge from one point to the other: equivalent to 10^{-8} volt.

abwatt (ˈæbˌwɒt) *n.* the cgs unit of power in the electromagnetic system, equal to the power dissipated when a current of 1 abampere flows across a potential difference of 1 abvolt: equivalent to 10^{-7} watt.

aby *or* **abye** (əˈbaɪ) *vb.* **abys** *or* **abyes, abying, abought.** (*tr.*) *Archaic.* to pay the penalty for; redeem. [Old English *ābycgan* to pay for, atone for, from *bycgan* to buy]

Abydos (əˈbaɪdɒs) *n.* **1.** an ancient town in central Egypt: site of many temples and tombs. **2.** an ancient Greek colony on the Asiatic side of the Dardanelles (Hellespont): scene of the legend of Hero and Leander.

abysm (əˈbɪzəm) *n.* an archaic word for **abyss.** [C13: via Old French from Medieval Latin *abysmus* ABYSS]

abysmal (əˈbɪzməl) *adj.* **1.** immeasurable; very great: *abysmal stupidity.* **2.** *Informal.* extremely bad: *an abysmal film.* —**aˈbysmally** *adv.*

abyss (əˈbɪs) *n.* **1.** a very deep or unfathomable gorge or chasm. **2.** anything that appears to be endless or immeasurably deep, such as time, despair, or shame. **3.** hell or the infernal regions conceived of as a bottomless pit. [C16: via Late Latin from Greek *abussos* bottomless (as in the phrase *abussos limnē* bottomless lake), from A-[1] + *bussos* depth]

abyssal (əˈbɪsəl) *adj.* **1.** of or belonging to the ocean depths, esp. below 2000 metres (6500 feet): *abyssal zone.* **2.** *Geology.* another word for **plutonic.**

Abyssinia (ˌæbɪˈsɪnɪə) *n.* a former name for **Ethiopia.** —ˌ**Abysˈsinian** *adj., n.*

Abyssinian cat *n.* a variety of cat with a long body and a short brown coat with black or dark brown markings.

abyssopelagic (əˌbɪsəʊpɛˈlædʒɪk) *adj.* referring to or occurring in the region of deep water above the floor of the ocean.

Ac *the chemical symbol for* actinium.

AC *abbrev. for:* **1.** alternating current. Compare **DC. 2.** ante Christum. [Latin: before Christ] **3.** Air Corps. **4.** athletic club. **5.** Companion of the Order of Australia.

a.c. *abbrev. for* (in prescriptions) ante cibum. [Latin: before meals]

a/c *Book-keeping. abbrev. for:* **1.** account. **2.** account current.

ACA *abbrev. for* Associate of the Institute of Chartered Accountants.

acacia (əˈkeɪʃə) *n.* **1.** any shrub or tree of the tropical and subtropical mimosaceous genus *Acacia,* having compound or reduced leaves and small yellow or white flowers. See also **wattle** (sense 4). **2. false acacia.** another name for **locust** (senses 2, 3). **3. gum acacia.** another name for **gum arabic.** [C16: from Latin, from Greek *akakia,* perhaps related to *akē* point]

academe (ˈækəˌdiːm) *n. Literary.* **1.** any place of learning, such as a college or university. **2. the grove(s) of Academe.** the academic world. [C16: first used by Shakespeare in *Love's Labour's Lost* (1588); see ACADEMY]

academia (ˌækəˈdiːmɪə) *n.* the academic world.

academic (ˌækəˈdɛmɪk) *adj.* **1.** belonging or relating to a place of learning, esp. a college, university, or academy. **2.** of purely theoretical or speculative interest: *an academic argument.* **3.** excessively concerned with intellectual matters and lacking experience of practical affairs. **4.** (esp. of a schoolchild) having an aptitude for study. **5.** conforming to set rules and traditions; conventional: *an academic painter.* **6.** relating to studies such as languages, philosophy, and pure science, rather than applied, technical, or professional studies. ~*n.* **7.** a member of a college or university. —ˌ**acaˈdemically** *adv.*

academicals (ˌækəˈdɛmɪkᵊlz) *pl. n.* another term for **academic dress.**

academic dress *n.* formal dress, usually comprising cap, gown, and hood, worn by university staff and students.

academician (əˌkædəˈmɪʃən, ˌækədə-) *n.* a member of an academy (sense 1).

academicism (ˌækəˈdɛmɪˌsɪzəm) *or* **academism** (əˈkædəˌmɪzəm) *n.* adherence to rules and traditions in art, literature, etc.; conventionalism.

academy (əˈkædəmɪ) *n., pl.* **-mies.** **1.** an institution or society for the advancement of literature, art, or science. **2.** a school for training in a particular skill or profession: *a military academy.* **3.** a secondary school: now used only as part of a name, and often denoting a private school. [C16: via Latin from Greek *akadēmeia* name of the grove where Plato taught, named after the legendary hero *Akadēmos*]

Academy (əˈkædəmɪ) *n.* **the. 1. a.** the grove or garden near Athens where Plato taught in the late 4th century B.C. **b.** the school of philosophy founded by Plato. **c.** the members of this school and their successors. **2.** short for the **French Academy, Royal Academy,** etc.

Academy Award *n.* the official name for an **Oscar.**

Acadia (əˈkeɪdɪə) *n.* **1. a.** the Atlantic Provinces of Canada. **b.** the French-speaking areas of these provinces. **2.** (formerly) a French colony in the present-day Atlantic Provinces: ceded to Britain in 1713. ~French name: **Acadie** (akadi).

Acadian (əˈkeɪdɪən) *adj.* **1.** denoting or relating to Acadia or its inhabitants. ~*n.* **2.** any of the early French settlers in Nova Scotia, many of whom were deported to Louisiana in the 18th century. See also **Cajun.**

acajou (ˈækəˌʒuː) *n.* **1.** a type of mahogany used by cabinet-makers in France. **2.** a less common name for **cashew.** [C18: via French from Portuguese *acajú,* from Tupi]

acalculia (ˌækælˈkjuːlɪə) *n. Psychol.* an inability to make simple mathematical calculations. [C20: from A-[1] + Latin *calculare* to calculate]

acaleph (ˈækəˌlɛf) *n. Obsolete.* any of the coelenterates of the former taxonomic group *Acalephae,* which included the jellyfishes. [C18: from New Latin, from Greek *akalēphē* a sting]

acanthaceous (ˌækənˈθeɪʃəs) *adj.* **1.** of or relating to the *Acanthaceae,* a mainly tropical and subtropical family of flowering plants that includes the acanthus. **2.** having spiny or prickly outgrowths.

acanthine (əˈkænθaɪn, -θiːn) *adj.* **1.** of or resembling an acanthus. **2.** decorated with acanthus leaves.

acantho- *or before a vowel* **acanth-** *combining form.* indicating a spine or thorn: *acanthocephalan.* [New Latin from Greek *akanthos* thorn plant, from *akantha* thorn]

acanthocephalan (əˌkænθəʊˈsɛfələn) *n.* **1.** any of the parasitic wormlike invertebrates of the phylum *Acanthocephala,* the adults of which have a spiny proboscis and live in the intestines of vertebrates. ~*adj.* **2.** of, relating to, or belonging to the *Acanthocephala.*

acanthoid (əˈkænθɔɪd) *adj.* resembling a spine; spiny.

acanthopterygian (ˌækənˌθɒptəˈrɪdʒɪən) *adj.* **1.** of, relating to, or belonging to the *Acanthopterygii,* a large group of teleost fishes having spiny fin rays. The group includes most saltwater bony fishes. ~*n.* **2.** any fish belonging to the *Acanthopterygii.* ~Compare **malacopterygian.** [C19: from New Latin *Acanthopterygii,* from ACANTHO- + Greek *pterúgion* fin]

acanthous (əˈkænθəs) *adj.* another term for **spinous.**

acanthus (əˈkænθəs) *n., pl.* **-thuses** *or* **-thi** (-θaɪ). **1.** any shrub or herbaceous plant of the genus *Acanthus,* native to the Mediterranean region but widely cultivated as ornamental plants, having large spiny leaves and spikes of white or purplish flowers: family *Acanthaceae.* See also **bear's-breech. 2.** a carved ornament based on the leaves of the acanthus plant, esp. as used on the capital of a Corinthian column. [C17: New Latin, from Greek *akanthos,* from *akantha* thorn, spine]

a cappella (ɑː kəˈpɛlə) *adj., adv. Music.* without instrumental accompaniment. [Italian: literally, according to (the style of the) chapel]

Acapulco (ˌækəˈpʊlkəʊ; *Spanish* akaˈpulko) *n.* a port and resort in SW Mexico, in Guerrero state. Pop.: 638 000 (1985 est.). Official name: **Acapulco de Juárez** (*Spanish* de ˈxwares).

acariasis (ˌækəˈraɪəsɪs) *n.* infestation of the hair follicles and skin with acarids, esp. mites. [C19: New Latin. See ACARUS, -IASIS]

acaricide (əˈkærɪˌsaɪd) *n.* any preparation for killing acarids.

acarid (ˈækərɪd) *or* **acaridan** (əˈkærɪdᵊn) *n.* **1.** any of the small arachnids of the order *Acarina* (or *Acari*), which includes the ticks and mites. ~*adj.* **2.** of or relating to the order *Acarina.* [C19: from ACARUS]

acaroid (ˈækəˌrɔɪd) *adj.* resembling a mite or tick. [C19: see ACARUS, -OID]

acaroid gum *or* **resin** *n.* a red alcohol-soluble resin that exudes from various species of grass tree, esp. *Xanthorrhoea hastilis,* and is used in varnishes, for coating paper, etc. Also called: **gum accroides.** [C19 *acaroid,* of uncertain origin (apparently not related to ACARUS)]

acarology (ˌækəˈrɒlədʒɪ) *n.* the study of mites and ticks.

acarpellous *or U.S.* **acarpelous** (eɪˈkɑːpələs) *adj.* (of flowers) having no carpels.

acarpous (eɪˈkɑːpəs) *adj.* (of plants) producing no fruit. [from Greek *akarpos,* from A-[1] + *karpos* fruit]

acarus (ˈækərəs) *n., pl.* **-ri** (-ˌraɪ). any of the free-living mites of the widely distributed genus *Acarus,* several of which, esp. *A. siro,* are

Found at **Tab 13, Volume 1** of Google's BOA.

The Encyclopedic Dictionary of Canadian Law

Volume 3
P-Z

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STERILE TRANSIT AREA

An area in an airport where in-transit passengers, in-transit preclearance passengers or goods that are in transit or pre-controlled are physically separated from other passengers and goods.[2010]

STERNOCLEIDOMASTOID

a noun and adjective, an anatomical term first used in English around 1660, a compound of the Greek στέρνον (stérnon) = chest, breastbone or heart + mastoid from the Greek μάσταξ (mástax) = jaws, what chews. **As a noun**: 1. Each of a pair of long muscles that connect the sternum, clavicle, and mastoid process of the temporal bone and serve to turn and nod the head. 2. A thick superficial muscle on each side of the neck that arises by one head from the first segment of the sternum and by a second from the inner part of the clavicle, that inserts into the mastoid process and occipital bone, and that acts especially to bend, rotate, flex, and extend the head. It is one of the largest muscles of the neck. 3. The primary actions of the muscle are rotation of the head to the opposite side and flexion of the neck. The sternocleidomastoid is innervated by the accessory nerve. **As an adjective**: 4. Of, relating to, or involving the sternum, the clavicle, and the mastoid process.

STERNUM

a noun denoting an anatomical feature, first used in English during the mid-17th Century from the Greek στέρνον (stérnon) = chest, breastbone, heart, itself from the Proto-Indo-European **stern-* = chest or forehead. Given its ancient roots, it is also related to the Old English *steorn* =forehead and the German *Stirn* = forehead, but the modern English form derives from the Greek. 1. The breastbone of a vertebrate (other than fish). It is a long flat bone located in the centre of the chest. It connects to the ribs via cartilage and forms the front of the rib cage, thus helping to protect the heart, lungs, and major blood vessels from injury. The sternum has three distinct parts: the manubrium, the body of the sternum (sometimes called the gladiolus), and the xiphoid process. 2. The thickened ventral plate on each segment of the body of an arthropod (invertebrate animals such as insects, arachnids, and crustaceans).

STIGMA

a noun first used in English around 1580, from the Latin noun *stigma*, itself from the Greek στίγμα (stigma) = brand. 1. Originally, a mark made by pricking or branding. 2. A mark of disgrace associated with a particular circumstance, quality, or person. 3. A dishonor or blot on one's reputation. 4. More broadly, a set of negative and often unfair beliefs that a society or group of people have about something.[2011] 5. A phenomenon by reason of which an individual with an attribute by reason of which is rejected or deeply discounted by the society in which or she lives. 6. **In medicine**, a visible sign or characteristic of a disease. 7. **In botany**: the part of the pistil in a flower that receives the pollen during pollination. 8. **In Christian tradition**: marks corresponding to those left on Jesus' body by the Crucifixion, said to have been impressed by divine favour on the bodies of St. Francis of Assisi and others.

STILL

1. A device used to manufacture liquor, especially by a bootlegger. 2. Any distilling apparatus whatever adapted or adaptable to the distillation of spirits.[2012]

STILL GAS

A gas suitable for use in an oil refinery that is produced as a result of distillation, cracking, reforming or other oil refining processes.[2013]

STILL-BIRTH and STILL-BORN

medical terms. 1. The complete expulsion or extraction from a person of a product of conception either after the twentieth week of pregnancy or after the product of conception has attained the weight of 500 grams or more, and where after such expulsion or extraction there is no breathing, beating of the heart, pulsation of the umbilical cord or movement of voluntary muscle.[2014] 2. The death or loss of a baby before or during delivery. Both miscarriage and stillbirth describe pregnancy loss, but they differ according to when the loss occurs. In North American medical practice, a miscarriage is usually defined as loss of a baby before the 20th week of pregnancy, and a stillbirth is loss of a baby after 20 weeks of pregnancy.[2015] 3. Stillbirth is further classified as either early, late, or term. An early stillbirth is a fetal death occurring between 20 and 27 completed weeks of pregnancy. A late stillbirth occurs between 28 and 36 completed pregnancy weeks. A term stillbirth occurs between 37 or more completed pregnancy weeks. Stillbirth affects about 1 in 100 pregnancies, meaning that each year about 26,000 babies are stillborn across North America. 4. The complete expulsion or extraction from a person of a product of conception either after the twentieth week of pregnancy or after the product of conception has attained the weight of 500 grams or more, and where after such expulsion or extraction there is no breathing, beating of the heart, pulsation of

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[2010] *Preclearance Act, 2016,* S.C. 2017, c. 27, s. 2(1).

[2011] Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity,* (New York: Touchstone, 1963).

[2012] *Excise Act,* R.S.C., 1985, c. E-14, s. 3(1).

[2013] *Greenhouse Gas Pollution Pricing Act,* S.C. 2018, c. 12, s. 186, s. 3.

Found at **Tab 30, Volume 9** of Google's Reply BOA.

1992 CarswellOnt 99
Ontario Court of Appeal

R. v. Durham

1992 CarswellOnt 99, 10 O.R. (3d) 596, 11 C.R.R. (2d) 258, 15 C.R. (4th) 45, 17 W.C.B. (2d) 218, 58 O.A.C. 126, 76 C.C.C. (3d) 219

R. v. CAMERON EDWARD DURHAM; R. v. PETER STRATIGEAS

Brooke, Arbour and Doherty JJ.A.

Heard: April 13-14, 1992
Judgment: September 22, 1992
Docket: Docs. CA 670/91, 791/91

Counsel: *David Finley* and *Ian Smith*, for the Crown.
B. Clive Bynoe, for respondent Durham.
Marc Rosenberg, for respondent Stratigeas.

Subject: Criminal
Headnote
Criminal Law --- Firearms and other offensive weapons — Careless use of firearm — Nature and elements of offence
Criminal Law --- Firearms and other offensive weapons — Careless use of firearm
Criminal Law --- Firearms and other offensive weapons — Carrying firearm in careless manner
Criminal Law --- Firearms and other offensive weapons — Careless handling of firearm
Criminal Law --- Firearms and other offensive weapons — Storing firearms in careless manner
Charter of Rights and Freedoms — Life, liberty and security — Principles of fundamental justice — Civil standard of inadvertent negligence for Criminal Code offence in s. 86(2) of careless storage or use of firearm not violating s. 7 — Offence having significant regulatory component and not carrying special stigma requiring subjective awareness.
In separate trials, charges under s. 86(2) of the *Criminal Code* of careless storage of a firearm and careless use of a firearm were stayed on the basis that that section of the *Criminal Code* violated s. 7 of the *Charter* and could not be saved under s. 1. The Crown appealed.
Held:
The appeals were allowed; the stays were set aside and matters remitted.
The imposition of criminal liability under s. 86(2) of the *Criminal Code* on the basis of a civil standard of inadvertent negligence does not violate s. 7 of the *Charter*. It was not clear whether

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the Supreme Court of Canada had decided that the minimum fault requirement of civil negligence satisfies the requirement of s. 7 for every criminal and regulatory offence, except for offences carrying a special stigma analogous to murder, attempted murder and theft, or whether there is still a distinction for constitutional purposes between criminal and regulatory offences, with only the defence of due diligence being constitutionally required in the case of regulatory offences. In any event, s. 86(2) could be safely affirmed as constitutional as the offence had a significant regulatory component and did not carry the special stigma associated with the highest form of deviance. The desirability of requiring that guilt be dependent on a subjective state of mind was a matter of legislative choice not constitutional imperative. There was no violation of s. 7 and it was unnecessary to engage in a s. 1 analysis.

It seems more likely that regulatory offences would find themselves in federal statutes other than the *Criminal Code*, where the federal activity is not solely based on the criminal law power contained in s. 91(27) of the *Constitution Act, 1867*. Offences contained in the *Criminal Code* would be presumed to have been enacted solely on the basis of the federal criminal law power and would more likely be true crimes than offences enacted for the purpose of enforcing a federal head of power. However, the distinction is not determinative. Not all true crimes are contained in the *Criminal Code*, and some *Criminal Code* offences may have been enacted under the "public welfare" branch of the criminal law power. Section 86(2) is part of an overall regulatory scheme whereby a duty is imposed on all persons in possession of firearms not to obtain a licence to continue their lawful possession, but to handle, store and use their weapons carefully. It is directed to the regulated, although not necessarily the licensed, defendant. Consequently, it should be classified as a regulatory offence for which nothing more than a defence of due diligence is con stitutionally required. Although enacted solely on the strength of the federal criminal law power, gun control legislation has undeniably a strong regulatory base. Part III of the *Criminal Code* is a largely administrative scheme, which regulates an often legitimate activity which happens to have a strong historical link with crime.

Even though a person convicted of an offence under s. 86(2) of the *Criminal Code* will carry the stigma of having a criminal conviction, that is not sufficient to dictate that the offence must contain a subjective mental element. There is likely to be more stigma attached to a criminal conviction than to the violation of a non-criminally related statute. Yet not all criminal offences carry the same amount of stigma. The stigma is proportional not only to the gravity of the conduct and its consequences, but to the level of fault, represented by the mental element, with which the act or omission was performed. A conviction for careless storage of a firearm, known to comport no subjective awareness of the risk created by the conduct, and otherwise not associated with any other form of social deviance, would not carry the same stigma as a conviction for careless use of a firearm by a person shown to have deliberately created or undertaken a substantial and unjustifiable risk, with full awareness of the danger created.

Table of Authorities

Cases considered:

Beaver v. R., [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129 — *referred to*

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[The wording of section 86(2) of the *Criminal Code*, R.S.C. 1985, c. C-46 demonstrates] Parliament's obvious choice of a standard of fault at the negligence level by the use of the word "careless", which has a clear jurisprudential pedigree.

USE

. . . none of the modes of commission of the offence in s. 86(2) [of the *Criminal Code*, R.S.C. 1985, c. C-46] requires proof of any consequence. The section prohibits an act or ommission which constitutes the careless storage or the careless use of a firearm. The "use" of a firearm does not extend the definition to import proof of consequence.

Appeals from orders staying charges of careless storage of a firearm.

The judgment of the court was delivered by *ArbourJ.A.*:

1 These two appeals by the Crown involve the constitutionality of s. 86(2) of the *Criminal Code*, R.S.C. 1985, c. C-46. In *R. v. Stratigeas*, Clarke J. dismissed an appeal by the Crown from a decision of Provincial Judge Main, ordering the stay of a charge of careless storage of a firearm on the basis that s. 86(2) of the Code infringed s. 7 of the *Canadian Charter of Rights and Freedoms* and could not be saved by s. 1 of the *Charter* (these decisions are now reported at (1991), 66 C.C.C. (3d) 94, affirming (1990), 61 C.C.C. (3d) 146). In his decision, Clarke J. adopted the more extensivereasons given by Moldaver J. in *R. v. Durham*, for staying a charge of careless use of a firearm, contrary to s. 86(2) of the Code, which are reported at (1991), 6 C.R. (4th) 178, 66 C.C.C. (3d) 66 (Ont. Gen. Div.).

I The Applicable Legislation

2 Section 86(2) of the *Criminal Code* states:

> Every one who, without lawful excuse, uses, carries, handles, ships or stores any firearm or ammunition in a careless manner or without reasonable precautions for the safety of other persons
>
> (*a*) is guilty of an indictable offence and liable to imprisonment
>
> (i) in the case of a first offence, for a term not exceedingtwo years, and
>
> (ii) in the case of a second or subsequent offence, for a term not exceeding five years; or
>
> (*b*) is guilty of an offence punishable on summary conviction.

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37 There is obviously enough of a criminal underpinning to the gun control legislation to have it validly enacted by Parliament under its criminal law power, and for the entire legislation to have found its place in the *Criminal Code*. On the other hand, along with the gaming provisions, Part III of the Code stands out as a largely administrative scheme, which regulates an often legitimate activity which happens to have a strong historical link with crime. In that context, had it been the sole criterion applicable, I would have concluded that it was open to Parliament, without infringing s. 7 of the *Charter*, to impose liability on the civil standard of negligence for careless use or storage of firearms, as part of its effort to regulate and control the possession and handling of firearms. As stated above, in light of the various opinions expressed in *Wholesale Travel*, supra, I believe that I should conduct an alternative analysis and examine whether the stigma attached to a conviction for that offence is such as to dictate a higher constitutionally mandated standard.

(e) The Stigma Attached to Conviction

38 Generally speaking, there is likely to be more stigma attached to a criminal conviction than to the violation of a non-criminally related statute. Yet not all criminal offences carry the same amount of stigma. The stigma is proportional not only to the gravity of the conduct and of its consequences, but to the level of fault, represented by the mental element, with which the act or omission was performed. This can be no better illustrated than by comparing the difference between a conviction for murder and a conviction for manslaughter. In the same way, the social stigma attached to a conviction for careless use or storage of a firearm will adjust over time to reflect an understanding of the gravity of the conduct, which in turn will be determined by the degree of fault, the moral blameworthiness of the offender. The social stigma comes not only from the fact of a criminal conviction, with its attendant criminal record, fingerprinting etc., but from the likelihood of imprisonment, the possibility of a penitentiary term, rather than a mere reformatory one, being imposed, and the association of the crime with other forms of social deviance. Therefore, in determining the degree of stigma likely to attach to a conviction for careless use of a firearm, it is important to take into account the mental element of the offence. A conviction for careless storage of a firearm, known to comport no subjective awareness of the risk created by the conduct, and otherwise not associated with any other form of social deviance, would not carry the same stigma as a conviction for careless use of a firearm by a person shown to have deliberately created or undertaken a substantial and unjustifiable risk, with full awareness of the danger created. Aside from the basic assertion that every criminal conviction generates a significant social stigma, which is true as far as it goes, the more precise appreciation of what distinguishes the stigma attached to a conviction for fraud, from the stigma of a conviction for sexual assault, possession of counterfeit money or careless storage of a firearm, depends on a multitude of factors, including not only the social repugnance of the conduct, but the degree of fault with which it is committed.

39 It is constitutionally impermissible for Parliament to treat as murder a conduct devoid of the essential characteristic upon which the stigmatization of murderers came to be based, the moral

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Her Majesty The Queen *Appellant*

v.

Orval Stuart Finlay *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General of British Columbia and the Attorney General for Alberta *Interveners*

INDEXED AS: R. *v.* FINLAY

File No.: 22596.

1992: October 15; 1993: September 9.

Present: Lamer C.J. and L'Heureux-Dubé, Sopinka, Cory and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Charter of Rights — Fundamental justice — Mens rea — Criminal Code prohibiting storing of firearms or ammunition "in a careless manner" — Whether offence satisfies minimum fault requirements under s. 7 of Canadian Charter of Rights and Freedoms — Criminal Code, R.S.C., 1985, c. C-46, s. 86(2).

Criminal law — Mens rea — Criminal Code prohibiting storing of firearms or ammunition "in a careless manner" — Whether offence satisfies minimum fault requirements under s. 7 of Canadian Charter of Rights and Freedoms — Criminal Code, R.S.C., 1985, c. C-46, s. 86(2).

The accused was charged with storing firearms and ammunition in a careless manner, contrary to s. 86(2) of the *Criminal Code*. He was granted a stay of proceedings in Provincial Court, on the basis that s. 86(2) violated s. 7 of the *Canadian Charter of Rights and Freedoms* in a manner that could not be justified under s. 1 of the *Charter*. The Court of Queen's Bench reversed this judgment and ordered that the matter proceed to trial. It found that since the defence of due diligence was

Sa Majesté la Reine *Appelante*

c.

Orval Stuart Finlay *Intimé*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général du Manitoba, le procureur général de la Colombie-Britannique et le procureur général de l'Alberta *Intervenants*

RÉPERTORIÉ: R. *c.* FINLAY

Nº du greffe: 22596.

1992: 15 octobre; 1993: 9 septembre.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Sopinka, Cory et McLachlin.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Droit constitutionnel — Charte des droits — Justice fondamentale — Mens rea — Le Code criminel interdit l'entreposage d'armes à feu ou de munitions «d'une manière négligente» — L'infraction satisfait-elle à l'exigence minimale en matière de faute aux termes de l'art. 7 de la Charte canadienne des droits et libertés? — Code criminel, L.R.C. (1985), ch. C-46, art. 86(2).

Droit criminel — Mens rea — Le Code criminel interdit l'entreposage d'armes à feu ou de munitions «d'une manière négligente» — L'infraction satisfait-elle à l'exigence minimale en matière de faute aux termes de l'art. 7 de la Charte canadienne des droits et libertés? — Code criminel, L.R.C. (1985), ch. C-46, art. 86(2).

L'inculpé a été accusé d'avoir entreposé des armes à feu et des munitions d'une manière négligente, en contravention du par. 86(2) du *Code criminel*. Il a obtenu un arrêt des procédures en cour provinciale, pour le motif que le par. 86(2) du *Code* viole l'art. 7 de la *Charte canadienne des droits et libertés* d'une manière dont la justification ne peut pas se démontrer en vertu de l'article premier de la *Charte*. La Cour du Banc de la Reine a infirmé ce jugement et a ordonné la tenue du procès.

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Graeme G. Mitchell and *Thomson Irvine*, for the appellant.

Mark Brayford, for the respondent.

William H. Corbett, *Q.C.*, and *Peter J. Lamont*, for the intervener the Attorney General of Canada.

Ian R. Smith, for the intervener the Attorney General for Ontario.

François Huot, *Mario Tremblay* and *Gilles Laporte*, for the intervener the Attorney General of Quebec.

Brian G. Wilford, for the intervener the Attorney General of Manitoba.

George H. Copley, for the intervener the Attorney General of British Columbia.

Ken Tjosvold, for the intervener the Attorney General for Alberta.

The reasons of Lamer C.J. and Sopinka J. were delivered by

LAMER C.J.—This case concerns a challenge to the constitutionality of s. 86(2) of the *Criminal Code*, R.S.C., 1985, c. C-46, under s. 7 of the *Canadian Charter of Rights and Freedoms*.

I. Facts

The respondent was charged that on or about February 27, 1989, he did without lawful excuse store firearms and ammunition in a careless manner, contrary to s. 86(2) of the *Code*. Prior to trial, the respondent made an application for a stay of proceedings, on the basis that s. 86(2) of the *Code* violated s. 7 of the *Charter* in a manner that could not be justified under s. 1 of the *Charter*.

Finley Prov. Ct. J. allowed the respondent's application and ordered a stay of proceedings: (1989), 53 C.C.C. (3d) 417. The appellant appealed to the Court of Queen's Bench for Sas-

Graeme G. Mitchell et *Thomson Irvine*, pour l'appelante.

Mark Brayford, pour l'intimé.

William H. Corbett, *c.r.*, et *Peter J. Lamont*, pour l'intervenant le procureur général du Canada.

Ian R. Smith, pour l'intervenant le procureur général de l'Ontario.

François Huot, *Mario Tremblay* et *Gilles Laporte*, pour l'intervenant le procureur général du Québec.

Brian G. Wilford, pour l'intervenant le procureur général du Manitoba.

George H. Copley, pour l'intervenant le procureur général de la Colombie-Britannique.

Ken Tjosvold, pour l'intervenant le procureur général de l'Alberta.

Version française des motifs du juge en chef Lamer et du juge Sopinka rendus par

LE JUGE EN CHEF LAMER—Le présent pourvoi porte sur une contestation de la constitutionnalité du par. 86(2) du *Code criminel*, L.R.C. (1985), ch. C-46, en vertu de l'art. 7 de la *Charte canadienne des droits et libertés*.

I. Les faits

L'intimé a été accusé d'avoir, aux environs du 27 février 1989, sans excuse légitime, entreposé des armes à feu et des munitions d'une manière négligente, en contravention du par. 86(2) du *Code*. Avant la tenue du procès, l'intimé a demandé un arrêt des procédures, pour le motif que le par. 86(2) du *Code* viole l'art. 7 de la *Charte* d'une manière dont la justification ne peut pas se démontrer en vertu de l'article premier de la *Charte*.

Le juge Finley de la Cour provinciale a accueilli la demande de l'intimé et a ordonné l'arrêt des procédures: (1989), 53 C.C.C. (3d) 417. L'appelante a interjeté appel auprès de la Cour du Banc

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person in the circumstances to result in an acquittal. Based on the interpretation of this section in *R. v. Gosset* set out above, I find s. 86(2) satisfies the minimum fault requirement under s. 7.

(2) Stigma Analysis

The only remaining question, therefore, is to determine whether the social stigma which attaches to a conviction under this provision is sufficiently grave to warrant imposing a subjective fault requirement for s. 86(2) of the *Code*. This analysis must consider both the gravity of the offence and the moral blameworthiness of a person who engages in such conduct. As a supplemental factor, the penalties to which the offence gives rise should also be considered.

Section 86(2) renders a person convicted liable to imprisonment for up to two years for a first offence, and up to five years for a second offence. In *Wholesale Travel Group Inc.*, *supra*, where the Court was considering a statute which also provided for up to five years' imprisonment, I concluded the following (at p. 185):

> A conviction for false/misleading advertising will rest on a variety of facts, many of which will not reveal any dishonesty but, rather, carelessness and the conviction of same does not brand the accused as being dishonest. [Emphasis added.]

In my view, applying this same reasoning to s. 86(2) of the *Code*, given the nature of the offence, the absence of any proof of advertence in the imposition of a conviction, and the range of punishment upon conviction, there is not sufficient stigma arising from a conviction under s. 86(2) to require a subjective *mens rea*.

The stigma attaching to a conviction under s. 86(2) has been recently examined by Arbour J.A.

gence qu'observerait une personne raisonnablement prudente dans les circonstances donne lieu à un acquittement. En me fondant sur l'interprétation que j'en ai donnée dans l'arrêt *R. c. Gosset*, je conclus que le par. 86(2) satisfait à l'exigence minimale en matière de faute que prévoit l'art. 7.

(2) L'analyse relative aux stigmates

Il ne reste donc qu'à déterminer si les stigmates sociaux qui se rattachent à une déclaration de culpabilité prononcée en vertu de cette disposition sont suffisamment graves pour justifier l'imposition d'une exigence subjective en matière de faute dans le cas du par. 86(2) du *Code*. Cette analyse doit prendre en considération à la fois la gravité de l'infraction et le caractère moralement blâmable qui se rattache à une personne qui a adopté une telle conduite. À titre de facteur supplémentaire, il faudrait également tenir compte des peines auxquelles l'infraction peut donner lieu.

Le paragraphe 86(2) rend la personne reconnue coupable passible d'un emprisonnement maximal de deux ans dans le cas d'une première infraction et de cinq ans dans le cas d'une deuxième infraction. Dans l'arrêt *Wholesale Travel Group Inc.*, précité, où la Cour examinait une loi qui prévoyait également un emprisonnement maximal de cinq ans, j'ai conclu (à la p. 185):

> Dans le cas de la publicité fausse ou trompeuse, la déclaration de culpabilité repose sur divers faits, dont un bon nombre ne participent pas de la malhonnêteté, mais plutôt de l'insouciance, et la déclaration de culpabilité à cet égard ne donne pas à l'accusé l'étiquette de la malhonnêteté. [Je souligne.]

À mon avis, si l'on applique le même raisonnement au par. 86(2) du *Code*, étant donné la nature de l'infraction, l'absence de toute preuve que l'accusé a agi consciemment lorsqu'une déclaration de culpabilité est prononcée et l'étendue de la peine en cas de déclaration de culpabilité, il n'y a pas suffisamment de stigmates qui découleraient d'une déclaration de culpabilité prononcée en vertu de ce paragraphe pour exiger une *mens rea* subjective.

Les stigmates qui se rattachent à une déclaration de culpabilité prononcée en vertu du par. 86(2) ont

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in *R. v. Durham*, *supra*, at pp. 611-12. Arbour J.A. offered the following observations regarding the importance of the standard of fault in the analysis of social stigma, at p. 612:

A conviction for careless storage of a firearm, known to comport no subjective awareness of the risk created by the conduct, and otherwise not associated with any other form of social deviance, would not carry the same stigma as a conviction for careless use of a firearm by a person shown to have deliberately created or undertaken a substantial and unjustifiable risk, with full awareness of the danger created. Aside from the basic assertion that every criminal conviction generates a significant social stigma, which is true as far as it goes, the more precise appreciation of what distinguishes the stigma attached to a conviction for fraud, from the stigma of a conviction for sexual assault, possession of counterfeit money or careless storage of a firearm, depends on a multitude of factors, including not only the social repugnance of the conduct, but the degree of fault with which it is committed.

After taking into account these factors, Arbour J.A. concluded that s. 86(2) of the *Code* does not give rise to sufficient social stigma to require a subjective *mens rea* under s. 7 of the *Charter*. I agree with this conclusion.

VI. Disposition

Based on the above analysis, I would answer the constitutional questions as follows:

1. Does s. 86(2) of the *Criminal Code*, R.S.C., 1985, c. C-46, infringe or deny the right to life, liberty and security of the person, and the right not to be deprived of that right, except in accordance with the principles of fundamental justice, as guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

été examinés récemment par le juge Arbour dans l'arrêt *R. c. Durham*, précité, aux pp. 611 et 612. Celle-ci a fait les remarques suivantes en ce qui concerne l'importance de la norme de faute dans l'analyse des stigmates sociaux, à la p. 612:

[TRADUCTION] Une déclaration de culpabilité pour entreposage d'une arme à feu d'une manière négligente, qui est reconnue comme ne comportant pas une conscience subjective des risques que cette conduite entraînait et qui n'est par ailleurs associée à aucune autre forme de déviation sociale, n'engendrerait pas les mêmes stigmates qu'une déclaration de culpabilité pour utilisation d'une arme à feu d'une manière négligente par une personne dont il serait prouvé qu'elle a délibérément créé ou pris un risque grave et injustifiable, tout en étant tout à fait consciente du danger créé. À part l'affirmation de base selon laquelle toute déclaration de culpabilité en matière criminelle engendre des stigmates sociaux importants, ce qui est vrai en soi, l'évaluation plus précise de ce qui distingue les stigmates qui se rattachent à la déclaration de culpabilité pour fraude de la déclaration de culpabilité pour agression sexuelle, possession de monnaie contrefaite ou entreposage d'une arme à feu d'une manière négligente, dépend d'une multitude de facteurs, y compris non seulement la répugnance de la société pour la conduite en question, mais le degré de faute avec lequel celle-ci est adoptée.

Après avoir pris ces facteurs en considération, le juge Arbour a conclu que le par. 86(2) du *Code* n'entraîne pas suffisamment de stigmates sociaux pour exiger une *mens rea* subjective en conformité avec l'art. 7 de la *Charte*. Je souscris à cette conclusion.

VI. Dispositif

Compte tenu de l'analyse ci-dessus, je suis d'avis de répondre aux questions constitutionnelles de la façon suivante:

1. Le paragraphe 86(2) du *Code criminel*, L.R.C. (1985), ch. C-46, porte-t-il atteinte au droit à la vie, à la liberté et à la sécurité de sa personne et à celui de ne se voir porter atteinte à ce droit qu'en conformité avec les principes de justice fondamentale, que garantit l'art. 7 de la *Charte canadienne des droits et libertés*?

Réponse: Non.

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Found at **Tab 7, Volume 2** of Google's Reply BOA.

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The British Columbia Human Rights Commission, the Commissioner of Investigation and Mediation, the British Columbia Human Rights Tribunal and Andrea Willis *Appellants*

v.

Robin Blencoe *Respondent*

and

Irene Schell *Intervener*

and

The Attorney General for Ontario, the Attorney General of British Columbia, the Saskatchewan Human Rights Commission, the Ontario Human Rights Commission, the Nova Scotia Human Rights Commission, the Manitoba Human Rights Commission, the Canadian Human Rights Commission, the Commission des droits de la personne et des droits de la jeunesse, the British Columbia Human Rights Coalition and the Women's Legal Education and Action Fund *Interveners*

La British Columbia Human Rights Commission, le Commissioner of Investigation and Mediation, le British Columbia Human Rights Tribunal et Andrea Willis *Appelants*

c.

Robin Blencoe *Intimé*

et

Irene Schell *Intervenante*

et

Le procureur général de l'Ontario, le procureur général de la Colombie-Britannique, la Saskatchewan Human Rights Commission, la Commission ontarienne des droits de la personne, la Nova Scotia Human Rights Commission, la Commission des droits de la personne du Manitoba, la Commission canadienne des droits de la personne, la Commission des droits de la personne et des droits de la jeunesse, la British Columbia Human Rights Coalition et le Fonds d'action et d'éducation juridiques pour les femmes *Intervenants*

INDEXED AS: BLENCOE *v.* BRITISH COLUMBIA (HUMAN RIGHTS COMMISSION)

RÉPERTORIÉ: BLENCOE *c.* COLOMBIE-BRITANNIQUE (HUMAN RIGHTS COMMISSION)

Neutral citation: 2000 SCC 44.

Référence neutre: 2000 CSC 44.

File No.: 26789.

Nº du greffe: 26789.

2000: January 24; 2000: October 5.

2000: 24 janvier; 2000: 5 octobre.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

Présents: Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL

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

Constitutional law — Charter of Rights — Application — Human Rights Commission — Commission implementing specific governmental program and exercising statutory authority — Commission independent

Droit constitutionnel — Charte des droits — Application — Commission des droits de la personne — Commission mettant en œuvre un programme gouvernemental particulier et exerçant un pouvoir conféré par la loi

The judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. was delivered by

BASTARACHE J. —

I. Introduction

1 This case raises the issue of whether the respondent's rights to "liberty and security of the person" under s. 7 of the *Canadian Charter of Rights and Freedoms* were violated by state-caused delay in the human rights proceedings against him. In the alternative, should this Court find that s. 7 of the *Charter* was not engaged, it must be determined whether the respondent was entitled to a remedy pursuant to principles of administrative law, notwithstanding that he had not been prejudiced in his ability to respond to the complaints against him.

2 I have concluded that the respondent's rights to liberty and security of the person were not implicated in the circumstances of this case. There is therefore no need to determine whether the alleged violation was in accordance with the principles of fundamental justice. While I accept that, under administrative law principles, a denial of natural justice may occur for reasons other than procedural unfairness to the respondent, I find that there has been no denial of natural justice or abuse of process in the circumstances of this case.

II. Factual Background

3 In 1995, the respondent, Robin Blencoe, had been a member of the British Columbia legislature for 12 years. In March of that year the respondent's assistant, Fran Yanor, went public with allegations that the respondent had sexually harassed her. Following this allegation, the respondent stepped down as Minister, but remained in Cabinet pending the results of an inquiry. On April 4, 1995, Premier Harcourt removed the respondent from Cabinet and dismissed him from the New Democratic Party caucus. Subsequently, in July and August of 1995, two sexual harassment complaints were filed with the British Columbia Coun-

Version française du jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Gonthier, Major et Bastarache rendu par

LE JUGE BASTARACHE —

I. Introduction

Le présent pourvoi porte sur la question de savoir si le délai imputable à l'État dans les procédures en matière de droits de la personne engagées contre l'intimé a porté atteinte aux droits de ce dernier «à la liberté et à la sécurité de sa personne», que lui garantit l'art. 7 de la *Charte canadienne des droits et libertés*. Subsidiairement, si jamais notre Cour ne conclut pas à l'application de l'art. 7 de la *Charte* en l'espèce, il faudra déterminer si l'intimé a droit à une réparation fondée sur les principes du droit administratif, même s'il n'a pas été porté atteinte à sa capacité de répondre aux plaintes portées contre lui.

J'arrive à la conclusion que les droits de l'intimé à la liberté et à la sécurité de sa personne ne sont pas en cause dans la présente affaire. Il est donc inutile de déterminer si l'atteinte alléguée est conforme aux principes de justice fondamentale. Bien que je convienne que, selon les principes du droit administratif, il peut y avoir déni de justice naturelle pour des raisons autres que l'iniquité procédurale, je juge qu'il n'y a eu ni déni de justice naturelle ni abus de procédure dans les circonstances de la présente affaire.

II. Les faits

En 1995, l'intimé, Robin Blencoe, était député à l'assemblée législative de la Colombie-Britannique depuis 12 ans. En mars de la même année, son adjointe, Fran Yanor, l'a accusé publiquement de harcèlement sexuel. L'intimé a alors abandonné son poste de ministre, mais a continué de faire partie du Cabinet jusqu'à ce que les résultats d'une enquête soient connus. Le 4 avril suivant, le premier ministre Harcourt a exclu l'intimé du Cabinet et du caucus du Nouveau Parti Démocratique. En juillet et en août 1995, l'appelante Andrea Willis et l'intervenante Irene Schell ont déposé devant le British Columbia Council of Human Rights (le

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cil of Human Rights ("Council" or "Commission") against the respondent and the provincial Crown under the *Human Rights Act*, S.B.C. 1984, c. 22 (now the *Human Rights Code*, R.S.B.C. 1996, c. 210, since January 1, 1997) (also referred to as the "Act" or the "Code") by the appellant Andrea Willis and the intervener, Irene Schell ("Complaints" or "Complaint").

The Complaints centered around various incidents of sexual harassment alleged to have occurred between March 1993 and March 1995. It is not necessary, for the purposes of this appeal, that I comment on the particulars of the Complaints in any detail. In brief, Ms. Willis worked as a senior clerk in the respondent's ministerial office and alleged that the respondent discriminated against her because of her sex with respect to terms and conditions of her employment, causing her to resign. The alleged incidents occurred in August 1994 and March 1995. Ms. Schell represented a government-funded sports association with which the respondent had contact in his ministerial capacity. She alleged that the respondent had discriminated against her because of her sex with respect to a service or facility customarily available to the public. The alleged incidents occurred in March 1993 and on several occasions in July 1993 and July 1994.

While the events that followed in the human rights proceedings are lengthy, they nevertheless merit recitation in some detail in order to adequately address the alleged delay in the process. The following are what I consider to be the most relevant facts regarding each of the Complaints.

A. *The Schell Complaint*

The Schell Complaint dealt with conduct which allegedly occurred more than six months before the Complaint was filed. For this reason, a threshold issue of timeliness arose pursuant to s. 13(1)(d) of the Act. By letter dated July 20, 1995, the respondent's counsel was informed that the Commission was considering whether to proceed with the investigation of the Schell Complaint and that timeliness submissions should be made. Letters were sent by the respondent on July 21 and July

«Conseil» ou la «Commission») deux plaintes de harcèlement sexuel contre l'intimé et Sa Majesté du chef de la province en application de la *Human Rights Act*, S.B.C. 1984, ch. 22 (désormais le *Human Rights Code*, R.S.B.C. 1996, ch. 210, depuis le 1er janvier 1997) (également désigné sous le nom de «Loi» ou de «Code») (les «plaintes» ou la «plainte»).

4 Les plaintes concernaient divers épisodes de harcèlement sexuel qui seraient survenus entre mars 1993 et mars 1995. Il n'est pas nécessaire, aux fins du présent pourvoi, que je m'attarde aux détails des plaintes. En résumé, Mme Willis occupait le poste de commis principal au bureau du ministre Blencoe et elle a allégué que ce dernier avait fait preuve de discrimination sexuelle à son égard relativement à ses conditions de travail, ce qui l'aurait amenée à démissionner. Les épisodes en cause se seraient produits en août 1994 et en mars 1995. Pour sa part, Mme Schell représentait une association sportive financée par l'État, avec laquelle l'intimé était en rapport en sa qualité de ministre. Elle a prétendu que l'intimé avait fait preuve de discrimination sexuelle à son égard relativement à des services ou à des installations habituellement accessibles au public. Les épisodes en question se seraient produits en mars 1993 et à maintes reprises en juillet 1993 et en juillet 1994.

5 Malgré la longueur des procédures en matière de droits de la personne qui ont suivi, il y a lieu néanmoins de les relater de façon assez détaillée pour bien examiner l'allégation de délai. Les faits qui suivent sont, à mon avis, les plus pertinents en ce qui concerne chacune des plaintes.

A. *La plainte de Mme Schell*

6 La plainte de Mme Schell porte sur une conduite qui aurait été adoptée plus de six mois avant le dépôt de ladite plainte, ce qui soulève la question préliminaire du respect du délai imparti à l'al. 13(1)d) de la Loi. Dans une lettre datée du 20 juillet 1995, la Commission a informé l'avocat de l'intimé qu'elle se demandait si elle devait enquêter sur la plainte de Mme Schell, et que des observations devraient être formulées concernant la question du respect du délai imparti. Les 21 et 28

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certain information obtained during the investigation. Such response was given on December 23, 1996. On March 3, 1997, the respondent was provided with a completed investigation report and asked for written responses which were provided by the respondent on March 27, 1997. In April 1997, the respondent was sent the submissions of Ms. Willis. He replied to them on May 14, 1997.

Le 8 novembre 1996, on a demandé à M. Blencoe de réagir à certains renseignements obtenus pendant l'enquête, ce qu'il a fait le 23 décembre suivant. Le 3 mars 1997, on a remis à l'intimé une copie du rapport d'enquête et on lui a demandé d'y répondre par écrit, ce qu'il a fait le 27 mars suivant. En avril 1997, l'intimé a obtenu copie des observations de M^me^ Willis, et il y a répondu le 14 mai suivant.

On July 3, 1997, the respondent was informed that the Willis Complaint would be referred to the Tribunal for hearing. That ended the involvement of the Commission in the Complaint. On September 10, 1997, the respondent was notified that the hearing was set for March 18, 19 and 20, 1998 and a pre-hearing conference in November 1997. The hearing was thus scheduled to take place approximately 32 months after the initial Complaint was filed.

16 Le 3 juillet 1997, l'intimé a appris que la plainte de M^me^ Willis serait renvoyée au Tribunal pour qu'il tienne une audience. La Commission était dès lors dessaisie de la plainte. Le 10 septembre 1997, l'intimé a été avisé que l'audience se déroulerait les 18, 19 et 20 mars 1998 et qu'une conférence préparatoire aurait lieu en novembre 1997. L'audience devait donc débuter environ 32 mois après le dépôt de la plainte initiale.

Subsequent to the allegations of sex discrimination, the respondent and his family have been hounded by the media. Mr. Blencoe has suffered from severe depression and both he and his wife have sought psychological counselling. The respondent did not stand for re-election when his province went to the polls in 1996. Mr. Blencoe and his wife decided to move their family to Ontario in August 1996, in order to escape the media attention and seek employment. In May 1997, the family returned to Victoria, allegedly because they could not escape the harassment of the media which followed them to Ontario and because the respondent's wife received an excellent job offer in British Columbia. The respondent continues to be clinically depressed and has been prescribed medication. He was prevented from coaching his youngest son's soccer team on the grounds that the soccer association did not want him working with children. The respondent considers himself "unemployable" in British Columbia, due to the outstanding human rights Complaints against him.

17 À la suite des allégations de discrimination sexuelle, l'intimé et les membres de sa famille ont été traqués par les médias. Monsieur Blencoe a fait une grave dépression, et son épouse et lui ont tous les deux eu recours aux services d'un psychologue. L'intimé n'a pas sollicité un nouveau mandat lors du scrutin provincial de 1996. En août 1996, M. Blencoe et son épouse ont décidé d'aller s'établir en Ontario afin d'échapper à l'attention des médias et de trouver du travail. En mai 1997, la famille est revenue à Victoria, apparemment parce qu'elle ne pouvait pas échapper au harcèlement des médias qui les avaient suivis jusqu'en Ontario et que l'épouse de l'intimé s'était vu offrir un emploi très intéressant en Colombie-Britannique. L'intimé souffre toujours de dépression clinique et consomme des médicaments sur ordonnance. Il n'a pas pu entraîner l'équipe de soccer de son fils cadet parce que l'association responsable ne voulait pas qu'il côtoie des enfants. L'intimé se dit «inapte au travail» en Colombie-Britannique en raison des plaintes fondées sur les droits de la personne qui pèsent toujours contre lui.

On November 27, 1997, the respondent commenced proceedings for judicial review, claiming that the Commission had lost jurisdiction due to unreasonable delay in processing the human rights

18 Le 27 novembre 1997, l'intimé a présenté une demande de contrôle judiciaire en faisant valoir que la Commission avait perdu compétence en raison d'un délai déraisonnable dans le traitement des

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Complaints. The respondent alleged that the unreasonable delay caused serious prejudice to him and his family which amounted to an abuse of process and a denial of natural justice.

plaintes fondées sur les droits de la personne. Il a allégué que ce délai déraisonnable avait causé à sa famille et à lui-même un préjudice grave équivalant à un abus de procédure et à un déni de justice naturelle.

III. Judicial History

A. *British Columbia Supreme Court* (1998), 49 B.C.L.R. (3d) 201

19 The respondent's application for judicial review was dismissed by Lowry J. on February 11, 1998. The question before the court was whether, given the time that had elapsed since the Complaints were first made to the Commission, personal hardship attributable to the stigma attached to the allegations justified the supervisory intervention of the court. The respondent also alleged that, because two prospective witnesses had died and the memories of other witnesses had faded, he would be unable to obtain a fair hearing. The respondent did not make an express s. 7 argument before the lower court, but relied instead on principles of natural justice, pursuant to administrative law jurisprudence and common law protections against undue delay. The respondent did however cite s. 7 jurisprudence to support his claim that the prejudice he suffered was analogous to the prejudice that justifies a stay of proceedings in the s. 7 context.

20 Lowry J. recognized that the allegations of sexual harassment had significantly affected the respondent's life and that his political career appeared to be finished. However, he added that it was difficult to determine to what extent such prejudice could be fairly attributed to any delay in the proceedings.

21 Lowry J. rejected the contention that, absent any application of the *Charter*, personal hardship attributable to unacceptable delay in an administrative process could, standing alone, constitute prejudice that entitled a respondent to prerogative relief. He held that delay will only constitute a denial of natural justice if the result of the delay is to directly prejudice the ability of an affected party

III. Historique des procédures judiciaires

A. *Cour suprême de la Colombie-Britannique* (1998), 49 B.C.L.R. (3d) 201

Le 11 février 1998, le juge Lowry a rejeté la demande de contrôle judiciaire de l'intimé. La cour était appelée à décider si, en raison du délai écoulé depuis le dépôt initial des plaintes à la Commission, les difficultés personnelles imputables à la stigmatisation liée aux allégations justifiaient un contrôle judiciaire. L'intimé prétendait également que, du fait que deux témoins éventuels étaient décédés et que la mémoire d'autres témoins avait décliné, il ne pourrait pas obtenir une audience équitable. Il n'a avancé aucun argument explicitement fondé sur l'art. 7 devant le tribunal inférieur, préférant invoquer les principes de justice naturelle, conformément à la jurisprudence en matière de droit administratif et aux protections que la common law offre contre les délais injustifiés. Il a cependant invoqué la jurisprudence relative à l'art. 7 à l'appui de son allégation que le préjudice qu'il subissait s'apparentait à celui qui justifie un arrêt des procédures dans le contexte de l'art. 7.

Le juge Lowry a reconnu que les allégations de harcèlement sexuel avaient sensiblement perturbé l'existence de l'intimé et semblaient avoir mis un terme à sa carrière politique. Il a toutefois ajouté qu'il était difficile de déterminer dans quelle mesure le préjudice subi pouvait être attribué, à juste titre, à un délai dans le déroulement des procédures.

Le juge Lowry a rejeté la prétention que, en l'absence de toute application de la *Charte*, les difficultés personnelles imputables à un délai inacceptable dans le déroulement d'un processus administratif pouvaient, à elles seules, conférer à l'intimé le droit à un bref de prérogative. Il a conclu qu'un délai ne constitue un déni de justice naturelle pour une partie que s'il porte atteinte

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"overlong subjection to the vexations and vicissitudes of a pending criminal accusation" (*Kodellas*, at p. 152). The unreasonable delay in *Kodellas* was found to result in two forms of prejudice to Mr. Kodellas. First, it extended his psychological trauma. Second, it reduced Mr. Kodellas's chances of a fair hearing (*Kodellas*, at p. 161).

sécurité de la personne, dans le contexte de l'al. 11*b*) de la *Charte*, englobe la protection contre [TRADUCTION] «un assujettissement trop long aux vexations et aux vicissitudes d'une accusation criminelle pendante» (*Kodellas*, à la p. 152). Il a été jugé, dans *Kodellas*, que le délai déraisonnable avait causé deux formes de préjudice à M. Kodellas: premièrement, il avait prolongé son traumatisme psychologique et, deuxièmement, il avait réduit les chances de M. Kodellas d'obtenir une audience équitable (*Kodellas*, à la p. 161).

In *Nisbett*, the Manitoba Court of Appeal denied relief sought by a medical doctor to prohibit the hearing of his employee's complaint of sexual harassment that had been outstanding for over three years. This decision was reached despite the stigma attached to the allegations which was described as "anxiety, the strain on family life, the disruption of his professional practice, the quest for evidence of similar conduct from former employees, the damage to his personal dignity and professional standing, the loss of self-esteem, and the continuing uncertainty as to the final outcome of the proceedings" (*Nisbett*, at p. 749) (quoting from the trial judgment (1992), 90 D.L.R. (4th) 672, at p. 679). The Manitoba Court of Appeal refused to follow *Kodellas*, questioning whether the impact of a criminal proceeding for sexual assault can be equated with a human rights proceeding on allegations of sex discrimination for the purposes of s. 7. The Court of Appeal concluded that s. 7 had no application to non-penal proceedings under human rights legislation and that s. 11 of the *Charter* was restricted to criminal cases.

43 Dans l'arrêt *Nisbett*, la Cour d'appel du Manitoba a refusé d'interdire, à la demande d'un médecin, l'audition de la plainte de harcèlement sexuel que l'employée de ce dernier avait déposée plus de trois ans auparavant. Elle a rendu cette décision malgré les stigmates liés aux allégations, qui avait été décrits comme étant [TRADUCTION] «l'angoisse, la perturbation de la vie familiale et de la vie professionnelle, la recherche d'une preuve de comportement similaire auprès d'anciennes employées, l'atteinte à la dignité personnelle et à la réputation professionnelle, la perte d'estime de soi et l'incertitude continuelle quant à l'issue finale des procédures» (*Nisbett*, à la p. 749 (citation provenant du jugement de première instance (1992), 90 D.L.R. (4th) 672, à la p. 679)). Doutant que l'incidence de procédures criminelles en matière d'agression sexuelle puisse être assimilée, aux fins de l'application de l'art. 7, à celle de procédures en matière de droits de la personne relatives à des allégations de discrimination sexuelle, la Cour d'appel du Manitoba a refusé de suivre l'arrêt *Kodellas*. Elle a statué que l'art. 7 ne s'appliquait pas à des procédures non pénales fondées sur une loi relative aux droits de la personne et que l'art. 11 de la *Charte* ne s'appliquait qu'en matière criminelle.

In *Canadian Airlines*, there was a 50-month delay between the filing of the complaint and the appointment of a tribunal to investigate. The Federal Court of Appeal also refused to follow *Kodellas*, and concluded that s. 7 did not apply to administrative proceedings of a non-criminal nature.

44 Dans *Lignes aériennes Canadien*, un délai de 50 mois s'était écoulé entre le dépôt de la plainte et la désignation des membres du tribunal chargé de faire enquête. La Cour d'appel fédérale y a également refusé de suivre l'arrêt *Kodellas* et a conclu que l'art. 7 ne s'appliquait pas à des procédures administratives de nature non criminelle.

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which interferes with the parent-child relationship would have triggered s. 7.



Stress, anxiety and stigma may arise from any criminal trial, human rights allegation, or even a civil action, regardless of whether the trial or process occurs within a reasonable time. We are therefore not concerned in this case with all such prejudice but only that impairment which can be said to flow from the delay in the human rights process. It would be inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state.

While it is incontrovertible that the respondent has suffered serious prejudice in connection with the allegations of sexual harassment against him, there must be a sufficient causal connection between the state-caused delay and the prejudice suffered by the respondent for s. 7 to be triggered. In *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 447, Dickson J. (as he then was) concluded that the causal link between the actions of government and the alleged *Charter* violation was too "uncertain, speculative and hypothetical to sustain a cause of action". In separate concurring reasons, Wilson J. also conveyed the need to have some type of direct causation between the actions of the state and the resulting deprivation. She stated, at p. 490:

> It is not necessary to accept the restrictive interpretation advanced by Pratte J., which would limit s. 7 to protection against arbitrary arrest or detention, in order to agree that the central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. At the very least, it seems to me, there must be a strong presumption that governmental action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face. [Emphasis added.]

(je souligne). Il a souligné que les actes de l'État qui constituent une ingérence dans le lien parent-enfant ne déclenchent pas tous l'application de l'art. 7.

59 Un procès criminel, une allégation en matière de droits de la personne ou même une action au civil peut être une cause de stress, d'angoisse et de stigmatisation même lorsque le procès ou les procédures se déroulent dans un délai raisonnable. Ce qui nous intéresse en l'espèce n'est pas tout préjudice de cette nature, mais seulement l'atteinte qui, peut-on dire, résulte du délai écoulé dans le déroulement du processus en matière de droits de la personne. Il serait inopportun de tenir le gouvernement responsable du préjudice causé par un tiers qui n'est aucunement un mandataire de l'État.

60 Bien que les allégations de harcèlement sexuel dont l'intimé a fait l'objet lui aient indéniablement causé un préjudice grave, il doit y avoir un lien de causalité suffisant entre le délai imputable à l'État et le préjudice subi par l'intimé pour que l'art. 7 s'applique. Dans *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, à la p. 447, le juge Dickson (plus tard Juge en chef) a conclu que le lien de causalité entre les actes du gouvernement et la violation alléguée de la *Charte* était «trop incertain, trop conjectural et trop hypothétique pour étayer une cause d'action». Dans des motifs concordants distincts, le juge Wilson a également fait état de la nécessité d'un lien direct quelconque entre les actes de l'État et l'atteinte qui en a résulté. Voici ce qu'elle a dit, à la p. 490:

> Il n'est pas nécessaire de souscrire à l'interprétation restrictive avancée par le juge Pratte, qui limiterait l'art. 7 à une protection contre les arrestations ou les détentions arbitraires, pour convenir que l'article a pour objet central l'ingérence directe du gouvernement dans la vie, la liberté et la sécurité personnelle des citoyens. À tout le moins, me semble-t-il, il doit y avoir une forte présomption qu'on n'a jamais voulu qu'une action gouvernementale relative aux relations de l'État avec d'autres États, et qui donc n'est dirigée contre aucun membre de la collectivité politique immédiate, tombe sous le coup de l'art. 7 même si cette action peut avoir l'effet incident d'accroître le risque de mort ou de préjudice auquel les gens doivent faire face en général. [Je souligne.]

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61 The appellants submit that the nexus between the harm to the respondent and the alleged delay in processing the Complaints is remote. They assert that the largest measure of prejudice to Mr. Blencoe resulted not from any delay but from the publicity surrounding the events, especially his dismissal from Cabinet and later from the NDP caucus. They add that the respondent himself fought the allegations against him in the public domain. For the reasons I set out below, I also have doubts whether, on the facts, the psychological harm suffered by the respondent can be seen as the result of state-caused delay in the human rights process.

Les appelants soutiennent que le lien entre le préjudice subi par l'intimé et le délai qui se serait écoulé dans le traitement des plaintes est ténu. Selon eux, la majeure partie du préjudice causé à M. Blencoe résultait non pas d'un délai mais de la publicité qui a entouré, plus particulièrement, son exclusion du Cabinet et, par la suite, du caucus du NPD. Ils ajoutent que l'intimé a lui-même réfuté publiquement les allégations dont il faisait l'objet. Pour les motifs indiqués ci-après, je doute également qu'il soit possible, d'après les faits, de considérer que le préjudice psychologique subi par l'intimé a résulté d'un délai imputable à l'État dans le déroulement du processus en matière de droits de la personne.

62 On March 1, 1995, the respondent was informed by Premier Harcourt that his former assistant, Fran Yanor, made sexual harassment allegations against him. This allegation was made public one week later. On March 9, 1995, Mr. Blencoe stepped down as Minister but remained in Cabinet, pending the results of an inquiry. He issued a press release, "vehemently denying the harassment allegations". On March 10, 1995, the national and provincial press began running stories about the respondent's resignation and allegations against him by Ms. Yanor and two other women. On April 4, 1995, Premier Harcourt removed the respondent from Cabinet and dismissed him from the NDP caucus.

Le 1er mars 1995, l'intimé a été informé par le premier ministre Harcourt que son ancienne adjointe, Fran Yanor, avait formulé des allégations de harcèlement sexuel contre lui. Ces allégations ont été rendues publiques une semaine plus tard. Le 9 mars 1995, M. Blencoe a démissionné de son poste de ministre, tout en continuant de faire partie du Cabinet, jusqu'à ce que les résultats de l'enquête soient connus. Il a diffusé un communiqué de presse dans lequel il [TRADUCTION] «niait catégoriquement les allégations de harcèlement». Le 10 mars 1995, la presse nationale et la presse provinciale ont commencé à faire état de la démission de l'intimé et des allégations formulées contre lui par Mme Yanor et deux autres femmes. Le 4 avril de la même année, le premier ministre Harcourt a exclu l'intimé du Cabinet et, ensuite, du caucus du NPD.

63 While the respondent was only notified of the Schell and Willis Complaints in July and September of 1995, the record demonstrates that Mr. Blencoe had suffered the following prejudice or "stigmatization" prior to that time: Mr. Blencoe and his family were hounded by the media from the time that the Yanor harassment allegations were made public; the respondent and his wife feared press leaks and stopped speaking to persons outside their close circle of family and friends; Mr. Blencoe's children were subjected to insults and name-calling at school; and Mr. Blencoe was under the care of a physician and was prescribed

Quoique l'intimé Blencoe n'ait été avisé des plaintes de Mmes Schell et Willis qu'en juillet et en septembre 1995, il ressort du dossier qu'il avait déjà été victime d'un préjudice ou d'une «stigmatisation»: M. Blencoe et les membres de sa famille ont été traqués par les médias dès que les allégations de harcèlement de Mme Yanor eurent été rendues publiques; craignant les indiscrétions de la presse, l'intimé et son épouse n'ont plus parlé qu'à leurs proches; les enfants de M. Blencoe ont fait l'objet d'insultes et de railleries à l'école; M. Blencoe a été suivi par un médecin qui lui a prescrit des antidépresseurs dès avril 1995.

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antidepressants by April of 1995. The respondent himself admits that from mid-March 1995 until August 1995, he was "extremely unwell". From April 11, 1995, to September 7, 1995, the respondent was on medical leave from the legislature. In the Fall of 1995, Mr. Blencoe considered whether to run in the upcoming election. Since he suspected that Premier Harcourt would refuse to sign his nomination papers, he decided not to seek the NDP nomination in his riding and resigned from the party on December 29, 1995. All of these events had occurred prior to any delays in the proceedings.

L'intimé lui-même reconnaît que, à partir de la mi-mars jusqu'au mois d'août 1995, il allait [TRADUCTION] «très mal». Du 11 avril au 7 septembre 1995, il s'est absenté de l'assemblée législative pour cause de maladie. À l'automne de 1995, M. Blencoe s'est demandé s'il solliciterait un nouveau mandat lors du prochain scrutin. Comme il s'attendait à ce que le premier ministre Harcourt refuse de signer sa mise en candidature, il a décidé de ne pas se porter candidat du NPD dans sa circonscription et a démissionné du parti le 29 décembre 1995. Tous ces événements ont précédé quelque délai que ce soit dans les procédures.

There is no question that the respondent's life and that of his family have been terribly affected by the allegations of sexual harassment against him. His political career appears to be finished and, as professed by Lowry J., "[t]he impact on his family of what has seemed at times an unrelenting media coverage has been traumatic" (para. 12). The respondent attributes this prejudice to the delay in the human rights proceedings. McEachern C.J.B.C. agreed, stating (at para. 53) that:

64 Il ne fait aucun doute que les allégations de harcèlement sexuel ont terriblement nui à la vie personnelle de l'intimé et à celle des membres de sa famille. Sa carrière politique semble terminée et, comme l'a affirmé le juge Lowry, [TRADUCTION] «ce qui s'apparentait par moments à un acharnement médiatique a été traumatisant pour les membres de sa famille» (par. 12). L'intimé attribue ce préjudice au délai écoulé dans le déroulement des procédures en matière de droits de la personne. Le juge en chef McEachern lui a donné raison (au par. 53):

> There can be no doubt that [Blencoe] was severely wounded by the publicity surrounding his dismissal from the Cabinet. Such is the price of public life. But for these proceedings, however, it might reasonably be expected that the overwhelming attention would have died away and [Blencoe] and his family could have attempted to reconstruct their lives. [Emphasis added.]

> [TRADUCTION] On ne saurait douter que [Blencoe] a profondément souffert de la publicité qui a entouré son exclusion du Cabinet. Tels sont les aléas de la vie publique. Or, n'eût été des procédures, on aurait pu raisonnablement s'attendre à ce que l'attention considérable s'estompe et à ce que [Blencoe] et les membres de sa famille puissent tenter de retrouver une vie normale. [Je souligne.]

With respect, I cannot agree with McEachern C.J.B.C.'s speculation that the respondent would have been able to reconstruct his life but for the proceedings (or I should say, delay in the proceedings). A higher level of certainty is required than "might reasonably be expected" in order to find that government has caused a deprivation of an individual's *Charter* rights.

En toute déférence, je ne puis souscrire à la supposition du juge en chef McEachern que l'intimé aurait pu retrouver une vie normale n'eût été des procédures (ou, devrais-je dire, du délai écoulé dans les procédures). Pour conclure que le gouvernement a porté atteinte aux droits d'une personne garantis par la *Charte*, il faut plus de certitude que ce à quoi [TRADUCTION] «on aurait pu raisonnablement s'attendre».

65 Based on the above facts, the Willis and Schell allegations were clearly not the first events in the sexual harassment claims against the respondent. Lambert J.A. asserted that "[t]he human rights pro-

D'après les faits susmentionnés, les allégations de M^mes^ Willis et Schell ne constituaient manifestement pas les premiers maillons de la chaîne des événements relatifs aux plaintes de harcèlement

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cess started with the complaints in *April, 1995*" (para. 5 (emphasis in original)). Based on the record, however, it is clear that the Willis and Schell Complaints were only filed with the Commission in July and August of that year. The respondent himself asserts that the complaints to the Premier's office are what resulted in his removal from Cabinet and caucus. He makes this assertion to support his contention that the date from which the delay should be computed should pre-date the official Complaints to the Commission. This argument rather undermines the respondent's assertion that the state caused his prejudice. The central event leading to the intense media scrutiny was the dismissal of the respondent from Cabinet and caucus in April 1995, following the allegations of Fran Yanor. At that time, there had been no complaints to the Commission. The Yanor allegations are thus more closely tied to the dismissal from Cabinet, and consequently the stigma. I therefore find that the most prejudicial impact on Mr. Blencoe was caused not by the actions of the Commission but rather by the events prior to the Complaints which caused the respondent to be ousted from Cabinet and caucus as well as the result of actions by non-governmental actors such as the press, employers and a soccer association. The harm to the respondent resulted from the publicity surrounding the allegations themselves coupled with the political fall-out which ensued rather than any delay in the human rights proceedings which had yet to commence at the time that the respondent began to experience stigma.

sexuel contre l'intimé. Le juge Lambert a dit que [TRADUCTION] «[l]e processus en matière de droits de la personne a été enclenché par le dépôt des plaintes en *avril 1995*» (par. 5 (en italique dans l'original)). Toutefois, selon le dossier, il est clair que la Commission n'a été saisie des plaintes de M^mes^ Willis et Schell qu'en juillet et en août de la même année. L'intimé lui-même affirme que ce sont les plaintes reçues au bureau du premier ministre qui ont entraîné son exclusion du Cabinet et du caucus. Cette affirmation vise à étayer sa prétention que la date à partir de laquelle le délai devrait être calculé est antérieure au dépôt officiel des plaintes à la Commission. Cet argument mine plutôt sa prétention que l'État est à l'origine du préjudice qu'il a subi. L'événement central à l'origine de la grande couverture médiatique a été l'exclusion de l'intimé du Cabinet et du caucus en avril 1995, à la suite des allégations de Fran Yanor. À l'époque, la Commission n'avait encore été saisie d'aucune plainte. Les allégations de M^me^ Yanor sont donc plus étroitement liées à l'exclusion du Cabinet et, par conséquent, à la stigmatisation. Je conclus donc que l'effet le plus préjudiciable sur M. Blencoe résulte non pas des actes de la Commission, mais plutôt d'événements antérieurs au dépôt des plaintes qui ont entraîné son expulsion du Cabinet et du caucus, ainsi que du comportement d'acteurs non gouvernementaux comme les journalistes, les employeurs et une association de soccer. Le préjudice subi par l'intimé est imputable à la publicité ayant entouré les allégations elles-mêmes et aux retombées politiques qui ont suivi, et non pas à un délai dans les procédures en matière de droit de la personne qui n'avait pas encore commencé à s'écouler lorsque l'intimé a commencé à être victime d'une stigmatisation.

66 Lambert J.A. rejected the connection between the delay and the prejudice. Although recognizing that the respondent and his family had suffered dreadfully, Lambert J.A. found that "[n]one of that stigma was brought about by the processes under the *Human Rights Act* or the *Human Rights Code*. Nor, in my opinion, was it much exacerbated by those processes" (para. 29). Lambert J.A. was also of the opinion that the stigma would not come to

Le juge Lambert a écarté tout lien entre le délai écoulé et le préjudice subi. Tout en reconnaissant que l'intimé et les membres de sa famille avaient souffert terriblement, il a conclu que [TRADUCTION] «[c]ette stigmatisation n'était aucunement imputable aux procédures fondées sur la *Human Rights Act* ou le *Human Rights Code*. À mon sens, ces procédures ne l'ont pas beaucoup aggravée non plus» (par. 29). Le juge Lambert était aussi d'avis

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an end after the Tribunal had made its decision, "no matter the content of that decision" (para. 29).

I am in agreement with Lowry J. and Lambert J.A. on this issue. My understanding is that there remains a civil suit pending against Mr. Blencoe for sexual harassment and that Ms. Willis's Complaint against the Government on these very same issues has not been stayed. The prolongation of stigma from this ongoing publicity was therefore likely regardless of the delay in the human rights proceedings. At best, the respondent was deprived of a speedy opportunity to clear his name.

While I conclude that the delay in the human rights process was not the direct cause of the respondent's prejudice, another question which arises is whether it exacerbated his prejudice. According to McEachern C.J.B.C., the excessive delay in the human rights proceedings both created a stigma against Mr. Blencoe and exacerbated an existing prejudice, which, according to the majority of the Court of Appeal, is tantamount to the creation of the prejudice itself. McEachern C.J.B.C. relied on the decision of this Court in *Rodriguez*, *supra*, to find that the Commission's exacerbation of the deprivation of security of the person that Mr. Blencoe suffered at the hands of the media, triggered s. 7 (at para. 56). The respondent similarly argues that the delay exacerbated the stigmatization, claiming that additional media stories surfaced each time there was a new development in the processing of the Complaints. He relies on this Court's decision in *Morgentaler*, *supra*, to support the position that it is sufficient if the delay is "a contributing cause" of the prejudice.

First, with respect to this "contributing cause" argument, I find it very difficult to equate the situations in *Rodriguez* and *Morgentaler* with that in the case at bar. In *Rodriguez*, the Crown had erroneously characterized Mrs. Rodriguez's deprivation of security of the person as caused not by government but by her physical disabilities. In rejecting that argument, Sopinka J. held that the *Criminal Code* prohibition at s. 241(*b*) would con-

que la stigmatisation ne prendrait pas fin dès que le Tribunal aurait rendu sa décision [TRADUCTION] «quelle qu'elle soit» (par. 29).

67 Je partage l'avis des juges Lowry et Lambert à cet égard. Si je comprends bien, M. Blencoe fait toujours l'objet de poursuites civiles pour harcèlement sexuel, et la plainte que M^me^ Willis a déposée contre le gouvernement pour les mêmes motifs n'a pas été suspendue. Il était donc probable que la stigmatisation résultant de cette publicité incessante se poursuivrait peu importe le délai écoulé dans les procédures en matière de droits de la personne. Au mieux, l'intimé a été privé de la possibilité de se disculper rapidement.

68 Même si je conclus que le délai écoulé dans le déroulement du processus en matière de droits de la personne n'a pas été la cause directe du préjudice subi par l'intimé, une autre question qui se pose est de savoir s'il a aggravé ce préjudice. Selon le juge en chef McEachern, le délai excessif dans les procédures en matière de droits de la personne a à la fois stigmatisé M. Blencoe et aggravé un préjudice existant, ce qui, selon la Cour d'appel à la majorité, équivaut au fait même de causer le préjudice. Le juge en chef McEachern s'est fondé sur l'arrêt *Rodriguez*, précité, de notre Cour pour conclure que l'aggravation, par la Commission, de l'atteinte que les médias portaient à la sécurité de la personne de M. Blencoe déclenchait l'application de l'art. 7 (au par. 56). De même, l'intimé fait valoir que le délai a aggravé la stigmatisation du fait que l'affaire refaisait surface dans les médias chaque fois qu'il y avait du nouveau dans le traitement des plaintes. Il s'appuie sur l'arrêt *Morgentaler*, précité, de notre Cour pour affirmer qu'il suffit que le délai écoulé soit un «facteur qui a contribué» au préjudice.

69 Premièrement, en ce qui concerne l'argument du «facteur qui a contribué», il me semble très difficile d'assimiler les situations dans les affaires *Rodriguez* et *Morgentaler* à celle qui existe en l'espèce. Dans l'affaire *Rodriguez*, le ministère public avait imputé à tort l'atteinte à la sécurité de la personne de M^me^ Rodriguez non pas au gouvernement, mais à ses déficiences physiques. En rejetant cet argument, le juge Sopinka a conclu que l'inter-

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S.C.R. 411, at para. 119, with respect to privacy, "once invaded, it can seldom be regained". Much the same is true of reputation; it is quickly ruined and difficult to re-establish. It is thus difficult to see how procedural delay could have seriously increased the damage to the respondent's reputation that had already been done. The true prejudice to the respondent in this case may only be the lost opportunity to clear his name rapidly.

Comme le juge L'Heureux-Dubé l'a affirmé, au sujet de la vie privée, dans *R. c. O'Connor*, [1995] 4 R.C.S. 411, au par. 119, «dès qu'on y a porté atteinte, on peut rarement la regagner dans son intégralité». Il en va généralement de même de la réputation; elle peut être ternie rapidement, mais elle est difficile à rétablir. On voit mal comment un délai de procédure pourrait avoir sérieusement accru le préjudice déjà causé à la réputation de l'intimé. Il se peut que le véritable préjudice qui a été causé à l'intimé en l'espèce ait seulement été la perte de la possibilité de se disculper rapidement.

At trial, Lowry J. made the following finding concerning the cause of Mr. Blencoe's suffering (at para. 13):

> The stigma attached to the outstanding complaints has certainly contributed in large measure to the very real hardship Mr. Blencoe has experienced. His public profile as a Minister of the Crown rendered him particularly vulnerable to the media attention that has been focused on him and his family, and the hardship has, in the result, been protracted and severe.

72 En première instance, le juge Lowry a conclu ce qui suit au sujet de la cause des souffrances de M. Blencoe (au par. 13):

> [TRADUCTION] La stigmatisation liée aux plaintes dont M. Blencoe faisait l'objet a sûrement contribué dans une large mesure aux difficultés très réelles qu'il a éprouvées. Du fait de sa visibilité en tant que ministre du gouvernement, il était davantage exposé à l'attention que les médias lui ont portée à lui-même et à sa famille, ce qui explique la longueur et la gravité des difficultés qui ont résulté.

Perhaps this statement supports the view that the outstanding Complaints did contribute to the stigma to some degree and that it was therefore a cause of the respondent's suffering. Because I find in the next section that the state has not directly intruded into a private and intimate sphere of the respondent's life, I assume without deciding that there is a sufficient nexus between the state-caused delay and the prejudice to Mr. Blencoe. I now turn to the question of whether this interference amounts to a violation of the respondent's security of the person.

73 Cet énoncé confirme peut-être que les plaintes dont M. Blencoe faisait l'objet ont jusqu'à un certain point contribué à la stigmatisation et qu'elles ont donc été l'une des causes de ses souffrances. Étant donné que je conclus ci-après que l'État ne s'est pas directement immiscé dans la vie privée et intime de l'intimé, je présume, sans pour autant le décider, qu'il existe un lien suffisant entre le délai imputable à l'État et le préjudice subi par M. Blencoe. Je vais maintenant passer à la question de savoir si cette immixtion constitue une atteinte à la sécurité de la personne de l'intimé.

(ii) *Quality of the Interference*

(ii) *Qualité de l'immixtion*

McEachern C.J.B.C. concluded that liberty and security of the person under s. 7 protect both the privacy and dignity of individuals against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by Mr. Blencoe (at para. 101). He therefore conflated s. 7 into a general right to dignity and protection against the stigma of undue, prolonged humiliation and public degradation suffered as a result of an administra-

74 Le juge en chef McEachern a conclu que le droit à la liberté et à la sécurité de la personne garanti par l'art. 7 protège à la fois la vie privée et la dignité de l'individu contre la stigmatisation découlant d'un opprobre prolongé et injustifié comme celui dont M. Blencoe a été victime (au par. 101). Il a donc considéré que l'art. 7 confère un droit général à la dignité et à la protection contre l'opprobre prolongé et injustifié qui résulte de

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COURT FILE NO.: CV-10-8993-00 CL
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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
THE COMMISSIONER OF COMPETITION Applicant	*J. Thomas Curry, Jaan Lilles, Paul Erik Veel,* for the Applicant
– and –	
CHATR WIRELESS INC. AND ROGERS COMMUNICATIONS INC. Respondents	*Kent Thomson, Anita Banicevic, James Bunting, Sean Campbell,* for the Respondents
	HEARD: January 14, 2014

2014 ONSC 1146 (CanLII)

REASONS FOR PENALTY

MARROCCO A.C.J.S.C.

[1] This court found that the respondents had failed to conduct adequate and proper tests prior to claiming that Chatr Wireless Inc. ("Chatr Wireless") dropped fewer calls than Wind Mobile in Calgary and Edmonton and Public Mobile in Toronto and Montréal.

[2] The "fewer dropped calls" claim appeared on Chatr Wireless' website, in press releases, in media statements, in social media and in the fine print on Chatr handset packaging.

[3] Failure to conduct an adequate and proper test prior to making a performance claim to the public is defined as reviewable conduct in section 74.01(1)(b) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"). Section 74.01 is located in Part VII.1 which is entitled Deceptive Marketing Practices.

[49] I am not persuaded by the evidence, including the evidence to which I have made specific reference, that the respondents were duly diligent.

Should the court impose an administrative monetary penalty?

[50] The applicant seeks an order that the respondents pay an administrative monetary penalty in the range of $5-7 million. I did not find this submission helpful because it failed to take into account two key aspects that distinguish this case from others – that the false or misleading advertising portion of the application was not established and that subsequent testing substantiated the fewer dropped calls claim.

[51] As with any order under s. 74.1(4), an administrative monetary penalty must be imposed for the purpose of promoting compliance with the *Competition Act*. An administrative monetary penalty cannot be imposed with a view to punishment or deterring others who might contemplate making unsubstantiated performance claims.

[52] A monetary penalty in the range of $5-7 million might have been justified on the facts of this case if the fewer dropped calls claim had been false or misleading.

[53] Section 74.1(5) of the Competition Act provides a number of factors to be taken into account in determining the amount of any administrative monetary penalty, many of which are relevant to this case:

(a) the reach of the conduct within the relevant geographic market;

(b) the frequency and duration of the conduct;

(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;

(d) the materiality of any representation;

(e) the likelihood of self-correction in the relevant geographic market;

(f) the effect on competition in the relevant market;

(g) the gross revenue from sales affected by the conduct;

(h) the financial position of the person against whom the order is made;

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

…

(j) any other relevant factor.

These criteria are analyzed below.

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The effect on competition

[61] The fewer dropped calls claim may have been harmful to the new wireless carriers but, if that was the case, the harm was not inflicted in a manner which caused harm to consumers because the claim was substantiated. Equally, because the claim was substantiated, any harm inflicted on Wind Mobile and Public Mobile was appropriate. The evidence suggests that Public Mobile probably had the worst performing network of any wireless carrier in Canada during the period with which we are concerned.

[62] However competition was adversely affected because, contrary to Parliament's expressed intention, the market was exposed to the risk that the untested performance claim might be false. This aggravates the amount of the administrative monetary penalty.

Gross revenue from sales affected by the reviewable conduct

[63] This factor has only a marginal effect on the amount of the administrative monetary penalty. Any increase in gross revenue as a result of the fewer dropped calls claim was an increase in gross revenue that occurred as a result of a performance claim which was ultimately substantiated. Members of the public who relied upon the claim and became Chatr Wireless customers ultimately joined a network which dropped fewer calls than Wind Mobile and Public Mobile.

The financial position of the respondents

[64] This is a significant relevant consideration when setting the administrative monetary penalty. There is a need for regulatory sanctions to create economic incentives to foster compliance. An administrative monetary penalty will not foster compliance if the financial position of the noncompliant person is ignored: see *Rowan (Re)* (2010), 33 O.S.C.B. 91, at para. 74. According to Rogers' 2010 Annual Report, the Wireless Division generated operating revenue of $6.968 billion. Its adjusted wireless operating profit margin as a percentage of network revenue was 48.2%.

[65] I do not accept the submission that the respondents simply determined the benefit of making an unsubstantiated claim outweighed the cost of violating the *Competition Act*. I reject this submission because the reputational risk to a genuine business, such as Rogers', in an application such as this is so significant that a properly conducted cost-benefit analysis will lead to the conclusion that it is better to comply with the *Competition Act*.

The respondent's history of compliance

[66] There are no previous findings that the respondents have engaged in reviewable conduct. The applicant referred to an injunction application in the case of the *TELUS Communications Co. v. Rogers Communications Inc.*, 2009 BCCA 1610, 99 B.C.L.R. (4th) 229. This was a case in which the Court of Appeal of British Columbia upheld a motion judge's decision to grant an injunction against Rogers restraining it from publicly representing that it had "Canada's Most

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[76] The harm caused to the respondents by the conduct of the complainants in this matter mitigates the amount of the administrative monetary penalty.

Conclusions on an administrative monetary penalty

[77] When I consider all of the evidence, including the evidence to which I referred, I am satisfied that an administrative monetary penalty ought to be imposed in this case and that an appropriate administrative monetary penalty is $500,000.

Should the court impose a prohibition order that Rogers not engage in substantially similar reviewable conduct?

[78] Section 74.1(2) of the *Competition Act* states that a prohibition order lasts for 10 years unless otherwise ordered. The applicant seeks an order that the respondents not engage in substantially similar reviewable conduct for a period of 10 years.

[79] The applicant submitted that a prohibition order is directed at ensuring compliance because it draws the significance of compliance with the *Competition Act* to the firm's attention. In the applicant's view the prohibition order is a reprimand and a reminder not to engage in the reviewable conduct again. The applicant pointed to decisions such as *Commissioner of Competition v. Sears Canada Inc.* (2005), 37 C.P.R. (4th) 65, as authority for the proposition that prohibition orders are routinely made even where the reviewable conduct persisted only for a limited duration. The applicant submitted that there was no reason to depart from the normal practice of making such orders following a finding of reviewable conduct.

[80] The respondents maintained that a prohibition order was a mandatory injunction rather than a reprimand. The respondents pointed out that no precedent exists for making such an order where the claim was true but untested prior to publication. The respondents also point out that the Competition Bureau has never previously asked for such a remedy where the representation was truthful. The respondents' view is that a prohibition order is an unfair punishment, in part because it exposes the respondents to a $15 million administrative monetary penalty for subsequent reviewable conduct, as well as damages or fines pursuant to sections 36(1)(b) and 66 of the *Competition Act*. The respondents argue that such consequences are excessive given the extensive drive testing conducted by Rogers and the fact that the fewer dropped calls claim was ultimately substantiated.

[81] The respondents also point out that they have suffered reputational harm as a result of these proceedings and that a prohibition order would unfairly compound that harm.

[82] The commencement of proceedings harmed the respondents because it contained an allegation of false or misleading advertising. Commencement of these proceedings was covered by at least 63 different broadcast media outlets. A national newspaper erroneously reported that the respondents had been ordered to pay $10 million because they had made misleading wireless claims.

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