COMPETITION TRIBUNAL
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CT- 2024-010

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OTTAWA, ONT. | # 186

PUBLIC

CT-2024-010

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

ORAL COMPENDIUM OF GOOGLE CANADA CORPORATION AND GOOGLE LLC

VOL 4 of 4

PUBLIC

September 22, 2025

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H. Violations of Google's Rights and Section 1

Section 8

to advance its goals, notably those of law enforcement.

Appeal from judgment of Alberta Court of Appeal, *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.* (1983), 147 D.L.R. (3d) 420, [1983] 3 W.W.R. 385, 42 A.R. 93, 3 C.C.C. (3d) 497, 32 C.R. (3d) 141, 4 C.R.R. 368, 24 Alta. L.R. (2d) 307, 1983 CarswellAlta 27, 72 C.P.R. (2d) 145 (Alta. C.A.), allowing appeal from judgment of Cavanagh J., *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.* (1982), 20 Alta. L.R. (2d) 144, 42 A.R. 109, 68 C.C.C. (2d) 356, 65 C.P.R. (2d) 80, 2 C.R.R. 264, 136 D.L.R. (3d) 133, [1982] 4 W.W.R. 673, 1982 CarswellAlta 94 (Alta. Q.B.), dismissing application for interim injunction pending trial.

***Dickson J.*:**

1 The Constitution of Canada, which includes the *Canadian Charter of Rights and Freedoms*, is the supreme law of Canada. Any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Section 52(1) of the *Constitution Act, 1982* so mandates. The constitutional question posed in this appeal is whether s. 10 (3), and by implication s. 10 (1), of the *Combines Investigation Act*, R.S.C. 1970, c.C-23 (the "Act") are inconsistent with s. 8 of the *Charter* by reason of authorizing unreasonable searches and seizures and are therefore of no force and effect.

I Background

2 Subsections 10(1) and 10(3) of the *Combines Investigation Act* provide:

> 10(1) Subject to subsection (3) in any inquiry under this Act the Director [of Investigation and Research of the Combines Investigation Branch] or any representative authorized by him may enter any premises on which the Director believes there may be evidence relevant to the matters being inquired into and may examine any thing on the premises and may copy or take away for further examination or copying any book, paper, record or other document that in the opinion of the Director or his authorized representative, as the case may be, may afford such evidence.
>
> 10.(3) Before exercising the power conferred by subsection (1), the Director or his representative shall produce a certificate from a member of the [Restrictive Trade Practices] Commission, which may be granted on the *ex parte* application of the Director, authorizing the exercise of such power.

3 On April 13, 1982, in the course of an inquiry under the *Act*, the appellant Lawson A.W. Hunter, Director of Investigation and Research of the Combines Investigation Branch, authorized the other appellants, Messrs. Milton, Murphy, McAlpine and Marroco, all Combines Investigation officers, to exercise his authority under s. 10 of the *Act* to enter and examine documents and other

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things at the business premises of the Edmonton Journal, a division of the respondent corporation, Southam Inc.

4 On April 16, 1982, in fulfilment of the requirement in s. 10(3) of the *Act*, Dr. Frank Roseman, a member of the Restrictive Trade Practices Commission, (the "R.T.P.C.") certified his authorization of this exercise of the Director's powers.

5 On April 17, 1982, the *Constitution Act, 1982*, incorporating the *Canadian Charter of Rights and Freedoms* was proclaimed. Section 8 of the *Charter* provides:

> Everyone has the right to be secure against unreasonable search and seizure.

6 On April 19, 1982 the officers presented their certified authorization at the premises of the Edmonton Journal. The English version of this certificate reads as follows:

> In the matter of the Combines Investigation Act and section 33 and section 34(1)(c) thereof and in the matter of an Inquiry relating to the Production, Distribution and Supply of Newspapers and Related Products in Edmonton
>
> TO:
>
> M.J. Milton
>
> M.L. Murphy
>
> J.A. McAlpine
>
> A.P. Marrocco
>
> being my representatives under section 10 of the Combines Investigation Act
>
> You are hereby authorized to enter upon the premises hereinafter mentioned, on which I believe there may be evidence relevant to this inquiry, and examine anything thereon and copy or take away for copying any book, paper, record or other document that in your opinion may afford such evidence.
>
> The premises referred to herein are those occupied by or on behalf of
>
> Southam Inc,
>
> 10006-101 Street
>
> Edmonton, Alberta
>
> and elsewhere in Canada
>
> This authorization is not valid after May 31, 1982.

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authorize "unreasonable" search or seizure. Further, the appellants argue, the wording of s. 10 does not prevent the R.T.P.C. member in appropriate cases from requiring, for instance, evidence under oath before he approves the Director's authorization. In any event, they maintain, it cannot be said that s. 10 is incapable of being applied in a manner which does not offend the Constitution, and it ought not, therefore, to be struck down. At most it ought to be read down so as to include any necessary procedural safeguards. In support, they cite the decision of Van Camp J. in *The Queen v. Metropolitan Toronto Pharmacists' Association* (unreported, Ont. H.C., May 4, 1983).

III "Unreasonable" Search or Seizure

14 At the outset it is important to note that the issue in this appeal concerns the constitutional validity of a statute authorizing a search and seizure. It does not concern the reasonableness or otherwise of the manner in which the appellants carried out their statutory authority. It is not the conduct of the appellants, but rather the legislation under which they acted, to which attention must be directed.

15 As is clear from the arguments of the parties as well as from the judgment of Prowse J.A., the crux of this case is the meaning to be given to the term "unreasonable" in the s.8 guarantee of freedom from unreasonable search or seizure. The guarantee is vague and open. The American courts have had the advantage of a number of specific prerequisites articulated in the Fourth Amendment to the United States Constitution, as well as a history of colonial opposition to certain Crown investigatory practices from which to draw out the nature of the interests protected by that Amendment and the kinds of conduct it proscribes. There is none of this in s. 8. There is no specificity in the section beyond the bare guarantee of freedom from "unreasonable" search and seizure; nor is there any particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.

16 It is clear that the the meaning of "unreasonable" cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction. The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".

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of a search or of a statute authorizing a search, it is first necessary to specify the purpose underlying s. 8: in other words, to delineate the nature of the interests it is meant to protect.

21 Historically, the common law protections with regard to governmental searches and seizures were based on the right to enjoy property and were linked to the law of trespass. It was on this basis that in the great case of *Entick v. Carrington* (1765), 19 State Tr. 1029the Court refused to countenance a search purportedly authorized by the executive, to discover evidence that might link the plaintiff to certain seditious libels. Lord Camden prefaced his discussion of the rights in question by saying, at p. 1066:

> The great end, for which men entered into society, was to preserve their property. That right is preserved sacred and incommunicable all instances where it has not been taken away or abridged by some public law for the good of the whole.

The defendants argued that their oaths as Kings' messengers required them to conduct the search in question and ought to prevail over the plaintiff's property rights. Lord Camden rejected this contention, at p. 1067:

> Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave: if he does he is a trespasser though he does no damage at all; if he will tread upon his neighbour's ground he must justify it by law.

Lord Camden could find no exception from this principle for the benefit of Kings' messengers. He held that neither the intrusions nor the purported authorizations were supportable on the basis of the existing law. That law would only have countenanced such an entry if the search were for stolen goods and if authorized by a justice on the basis of evidence upon oath that there was "strong cause" to believe the goods were concealed in the place sought to be searched. In view of the lack of proper legal authorization for the governmental intrusion, the plaintiff was protected from the intended search and seizure by the ordinary law of trespass.

22 In my view the interests protected by s. 8 are of a wider ambit than those enunciated in *Entick v. Carrington*. Section 8 is an entrenched constitutional provision. It is not therefore vulnerable to encroachment by legislative enactments in the same way as common law protections. There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass. It guarantees a broad and general right to be secure from unreasonable search and seizure.

23 The Fourth Amendment of the United States Constitution, also guarantees a broad right. It provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon

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41 To read ss.10(1) and 10(3) as simply *allowing* the authorizing party to satisfy himself on these questions, without requiring him to do so, would in my view be clearly inadequate. Such an amorphous standard cannot provide a meaningful criterion for securing the right guaranteed by s.8. The location of the constitutional balance between a justifiable expectation of privacy and the legitimate needs of the state cannot depend on the subjective appreciation of individual adjudicators. Some objective standard must be established.

42 Requiring the authorizing party to satisfy himself as to the legality of the inquiry and the reasonableness of the Director's belief in the possible existence of relevant evidence, would have the advantage of substituting an objective standard for an amorphous one, but would, in my view, still be inadequate. The problem is with the stipulation of a reasonable belief that evidence *may* be uncovered in the search. Here again it is useful, in my view, to adopt a purposive approach. The purpose of an objective criterion for granting prior authorization to conduct a search or seizure is to provide a consistent standard for identifying the point at which the interests of the state in such intrusions come to prevail over the interests of the individual in resisting them. To associate it with an applicant's reasonable belief that relevant evidence *may* be uncovered by the search, would be to define the proper standard as the *possibility* of finding evidence. This is a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude. It would tip the balance strongly in favour of the state and limit the right of the individual to resist, to only the most egregious intrusions. I do not believe that this is a proper standard for securing the right to be free from unreasonable search and seizure.

43 Anglo-Canadian legal and political traditions point to a higher standard. The common law required evidence on oath which gave "strong reason to believe" that stolen goods were concealed in the place to be searched before a warrant would issue. Section 443 of the *Criminal Code* authorizes a warrant only where there has been information upon oath that there is "reasonable ground to believe" that there is evidence of an offence in the place to be searched. The American *Bill of Rights* provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation..." The phrasing is slightly different but the standard in each of these formulations is identical. The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshhold for subordinating the expectation of privacy to the needs of law enforcement. Where the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one. That is not the situation in the present case. In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s.8 of the *Charter*, for

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authorizing search and seizure. Insofar as ss. 10(1) and 10(3) of the *Combines Investigation Act* do not embody such a requirement, I would hold them to be further inconsistent with s.8.

Reading In and Reading Down

44 The appellants submit that even if ss.10(1) and 10(3) do not specify a standard consistent with s.8 for authorizing entry, search and seizure, they should not be struck down as inconsistent with the *Charter*, but rather that the appropriate standard should be read into these provisions. An analogy is drawn to the case of *MacKay v. The Queen*, [1965] S.C.R. 798 in which this Court held that a local ordinance regulating the use of property by prohibiting the erection of unauthorized signs, though apparently without limits, could not have been intended unconstitutionally to encroach on federal competence over elections, and should therefore be "read down" so as not to apply to election signs. In the present case, the overt inconsistency with s.8 manifested by the lack of a neutral and detached arbiter renders the appellants' submissions on reading in appropriate standards for issuing a warrant purely academic. Even if this were not the case, however, I would be disinclined to give effect to these submissions. While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. Without appropriate safeguards legislation authorizing search and seizure is inconsistent with s.8 of the *Charter*. As I have said, any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. I would hold ss.10(1) and 10(3) of the *Combines Investigation Act* to be inconsistent with the *Charter* and of no force and effect, as much for their failure to specify an appropriate standard for the issuance of warrants as for their designation of an improper arbiter to issue them.

Section 1

45 Section 1 of the *Charter* provides:

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

46 The phrase "demonstrably justified" puts the onus of justifying a limitation on a right or freedom set out in the *Charter* on the party seeking to limit. In the present case the appellants have made no submissions capable of supporting a claim that even if searches under ss.10(1) and 10(3) are "unreasonable" within the meaning of s.8, they are nevertheless a reasonable limit, demonstrably justified in a free and democratic society, on the right set out in s.8. It is, therefore, not necessary in this case to consider the relationship between s. 8 and s. 1. I leave to another day the difficult question of the relationship between those two sections and, more particularly, what further balancing of interests, if any, may be contemplated by s.1, beyond that envisaged by s.8.

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Found at **Tab 79, Volume 15** of Google's BOA.

1993 CarswellBC 1168
Supreme Court of Canada

R. v. Grant

1993 CarswellBC 1168, 1993 CarswellBC 1265, [1993] 3 S.C.R. 223, [1993] 8 W.W.R. 257, [1993] S.C.J. No. 98, 159 N.R. 161, 17 C.R.R. (2d) 269, 20 W.C.B. (2d) 590, 24 C.R. (4th) 1, 35 B.C.A.C. 1, 57 W.A.C. 1, 84 C.C.C. (3d) 173, J.E. 93-1669, EYB 1993-67107

R. v. DAVID ANGELO GRANT and ROBERT WALLACE WILEY (Intervenor)

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: April 2, 1993
Judgment: September 30, 1993
Docket: Doc. 23075

Counsel: *S. David Frankel, Q.C.*, for the Crown.
David M. Rosenberg and *Paul Rosenberg*, for respondent.
Greg Cranston, for intervenor.

Subject: Constitutional; Criminal; Human Rights

Headnote

Criminal law --- Charter of Rights and Freedoms — Unreasonable search and seizure [s. 8] — Warrant requirements

Cultivation of marihuana — Perimeter search of accused's property without warrant — Constitutionality of section of Narcotic Control Act authorizing warrantless search of places other than dwelling houses — Canadian Charter of Rights and Freedoms, ss. 8, 24(2) — Criminal Code, R.S.C. 1985, c. C-46, s. 487 — Narcotic Control Act, R.S.C. 1985, c. N-1, ss. 4(2), 6(1), 10, 12 Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, s 8; Criminal Code, R.S.C. 1985, c. C-46, s 487(1).

The police stopped the accused in a routine roadblock. His truck contained items consistent with growing marijuana. Later they received a tip from a reliable informant that the accused had been on his way to set up a marijuana growing operation. The police conducted two warrantless daylight perimeter searches of the accused's residence. They observed several indications of a marijuana operation which could not have been observed from off the property. On other occasions they saw the accused remain at the residence for some hours. Once they saw him take a garden sprayer there. Further, they found that the electrical consumption at the residence was unusually high. Based on all that information, although they mentioned only one perimeter search, the police obtained search warrants under s. 487 of the *Criminal Code* to search the accused's residences. They found

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finally resolved in an appeal in which it is fully argued. Moreover, we have been advised that s. 10, along with other parts of the NCA, are being amended by Parliament and therefore this issue may be specifically addressed in the revised legislation.

(2) Constitutional Limitations of s. 10

34 This issue is whether s. 10 authorizes unreasonable searches and seizures contrary to s. 8 of the *Charter* if it permits a warrantless search of private property absent exigent circumstances which would render it impracticable to obtain a warrant. As I have stated, the Attorney General of Canada conceded that, to the extent that the section authorizes such a search in circumstances in which it is practicable to obtain a warrant, it should be read down. In my opinion, this was a proper concession on the part of the Crown. In this regard, I am in agreement with the conclusion reached by Martin J.A. in *R. v. Rao* (1984), 12 C.C.C. (3d) 97(Ont. C.A.). Martin J.A.'s review of the history of searches and seizures, the legislation and jurisprudence is so complete that my reasons can be confined to an attempt at defining with as much precision as possible the constitutional limitations of the section and how they relate to the facts of this case.

35 In *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, *(*sub nom. *Hunter v. Southam Inc.)* [1984] 2 S.C.R. 145 [[1984] 6 W.W.R. 577, 33 Alta. L.R. 193], this Court indicated that prior authorization was necessary to insure the broadest protection of s. 8 rights. In this regard, Dickson J. (as he then was) stated that s. 8:

> ... requires a means of *preventing* unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of *prior authorization*, not one of subsequent validation.
>
> A requirement of prior authorization, usually in the form of a valid warrant, has been a consistent prerequisite for a valid search and seizure both at common law and under most statutes. [At p. 160.] [Emphasis in original.]
>
> I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure. [At p. 161.]
>
> In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s. 8 of the *Charter*, for authorizing search and seizure. [At p. 168.]

36 Some exceptions have been developed with respect to the strict application of the requirement for prior authorization in *Hunter*, supra. In situations where an individual can be said to have

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a lower expectation of privacy, such as in passing through customs at border crossings (*R. v. Simmons*, [1988] 2 S.C.R. 495) or where a search is conducted in connection with a known and ongoing regulatory scheme (*Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research)*, [1990] 1 S.C.R. 425, and *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627), this Court has indicated that a less rigorous application of the pre-authorization criterion is appropriate. Nevertheless, this Court remains vigilant with respect to searches conducted in relation to criminal investigations, given that the liberty of individuals is ultimately at stake: *Baron v. R.*, [1993] 1 S.C.R. 416. Furthermore, it was indicated in *Simmons* supra, that exceptions to the general rule ought to remain "exceedingly rare" in the face of a strong common law rule against warrantless intrusions onto private property: *Eccles v. Bourque*[1975] 2 S.C.R. 739 [[1975] 1 W.W.R. 609], *Colet v. R.*[1981] 1 S.C.R. 2 [[1981] 2 W.W.R. 472].

37 The present searches arose in the context of criminal investigations and must be assessed in strict accordance with the approach set out in *Hunter* supra, especially given the serious penal consequences which may flow from conviction for these offences pursuant to the NCA. Cautious protection of the right against unreasonable search and seizure is also warranted in wake of the formidable search powers available to police pursuant to the NCA. Not only may police intrude into places where individuals may have very high expectations of privacy, officers may break down walls and doors, seize a wide variety of evidence and search the person of individuals found in the place searched. (See ss. 10, 11 and 14 of the NCA.)

38 As such, the three criteria identified by this Court in *Hunter*, supra, must be met in order to find that s. 10 of the NCA is reasonable within the meaning of s. 8 of the *Charter*. It is clear from the express wording of the statute that reasonable grounds to believe a narcotic is contained in contravention of the NCA in the place to be searched are necessary before a warrantless search of a place other than a dwelling-house will be permissible pursuant to s. 10 of the Act. This statutory requirement satisfies the first criterion for constitutionality pursuant to *Hunter*.

39 The second and third criteria identified in *Hunter*, namely, prior authorization by an independent and neutral arbiter and evidence on oath of the grounds for issuance of the warrant, are not a requirement under s. 10 and were clearly absent in the case at bar in relation to the perimeter searches.

40 This Court has stated that in criminal proceedings, deviations from the *Hunter* standards will rarely be permitted. Nevertheless, warrantless searches of private property have on occasion been upheld by Canadian courts, including this Court. In determining the extent of the constitutional validity of s. 10, it is necessary to balance two interests: the reasonable expectation of privacy of individuals with respect to the free enjoyment of property against the societal interest in effective law enforcement.

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Found at **Tab 86, Volume 17** of Google's BOA.

1990 CarswellOnt 802
Supreme Court of Canada

R. v. McKinlay Transport Ltd.

1990 CarswellOnt 992, 1990 CarswellOnt 802, [1990] 1 S.C.R. 627, [1990] 2 C.T.C. 103, [1990] S.C.J. No. 25, 106 N.R. 385, 10 W.C.B. (2d) 16, 39 O.A.C. 385, 47 C.R.R. 151, 55 C.C.C. (3d) 530, 68 D.L.R. (4th) 568, 72 O.R. (2d) 798 (note), 76 C.R. (3d) 283, 90 D.T.C. 6243, J.E. 90-576, EYB 1990-67530

McKinlay Transport Ltd. and C.T. Transport Inc. v. Her Majesty The Queen and The Attorney General for Ontario, The Attorney General of Quebec, The Attorney General for Alberta (Interveners)

Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka JJ.

Judgment: March 29, 1990
Docket: Court No. 20761

Proceedings: on appeal from a judgment of the Court of Appeal of Ontario reported at [1988] 1 C.T.C. 426

Counsel: *Alan Shanoff* and *Ted Saskin* for the appellants.
S.R. Fainstein and *James W. Leising* for the respondents.
Leah Price and *Timothy Macklem* for the Attorney General for Ontario.
Jean Bouchard and *Gilles Laporte* for the Attorney General of Quebec.
Robert C. Maybank for the Attorney General for Alberta.

Subject: Criminal; Income Tax (Federal)
Headnote
Income tax --- Administration and enforcement — Investigations — General
Income tax --- General principles — Constitutional issues — General
Income tax --- Administration and enforcement of Act — Investigations
Income tax --- Administration and enforcement of Act — Search and seizure — Charter of Rights and Freedoms
Income tax — Federal — Income Tax Act, R.S.C. 1952, c. 148 (am. S.C. 1970-71-72, c. 63) — 231(3), 238(2) (as they stood at the relevant time) — Constitution Act, 1982 — 1, 8, Charter of Rights and Freedoms — Whether a demand for information or documents under subsection 231(3) of the Income Tax Act constituted a seizure and, if so, whether it violated the Charter.
In October 1983, Revenue Canada, pursuant to subsection 231(3) of the *Income Tax Act*, served the appellants with letters demanding a wide array of information and documents in respect of the

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415n (reasons delivered concurrently herewith), I concluded that a seizure was "the taking hold by a public authority of a thing belonging to a person against that person's will". *Thomson*, however, involved a seizure in a criminal or quasi-criminal law context and I confined my remarks to that situation. Subsection 231(3) is not criminal or quasi-criminal legislation. The *Income Tax Act* is essentially a regulatory statute since it controls the manner in which income tax is calculated and collected. This Court pointed out in *R. v. Grimwood*, [1987] 2 S.C.R. 755, [1988] 1 C.T.C. 44, 88 D.T.C. 6001 at page 44 (D.T.C. 6001; S.C.R. 756), that "the purpose of ss. 231(3) and 238(2), when read together, is not to penalize criminal conduct but to enforce compliance with the Act".

24 Since subsection 231(3) is not legislation in relation to a criminal or quasi-criminal proceeding, the question arises whether a "seizure" within the meaning of section 8 takes place when the state compels the production of documents in a regulatory context. To answer this question one must, I think, return to the general discussion of Dickson, J. in *Hunter* on the purposes underlying the section 8 right. One of those purposes, he found, is the protection of the individual's reasonable expectation of privacy. He stated at pages 159-60 (D.T.C. 6473-74):

> The guarantee of security from unreasonable search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by section 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.
> [Emphasis in original.]

25 It is apparent from the above that Dickson, J. considered that the underlying value to be protected by section 8 of the Charter was the individual's interest in privacy. However, it was his view that the section 8 protection was confined to "a reasonable expectation" because of the fact that the words "search or seizure" were qualified by the word "unreasonable": see also *R. v. Simmons*, [1988] 2 S.C.R. 495, 55 D.L.R. (4th) 673. Undoubtedly there will be instances in which an individual will have no privacy interest or expectation in a particular document or article required by the state to be disclosed. Under such circumstances, the state authorized inspection or the state demand for production of documents will not amount to a search or seizure within section 8: see *R. v. Hufsky*, [1988] 1 S.C.R. 621 at page 638; 4 M.V.R. (2d) 170. However, I do not think that is so here. I reach that conclusion for two reasons. First, subsection 231(3), even construed narrowly in accordance with prior authority, envisages the compelled production of a wide array of documents and not simply those which the state requires the taxpayer to prepare and maintain under the legislation. Second, the legislation contemplates that parties who are not the subject of an investigation or audit can be compelled to produce documents relating to another taxpayer who

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is the subject of such investigation or audit. Thus, compelled production reaches beyond the strict filing and maintenance requirements of the Act and may well extend to information and documents in which the taxpayer has a privacy interest in need of protection under section 8 of the Charter although it may not be as vital an interest as that obtaining in a criminal or quasi-criminal context. I would therefore conclude that the application of subsection 231(3) of the *Income Tax Act* to the appellants constitutes a "seizure" since it infringes on their expectations of privacy. It remains to be determined, however, whether the state's intrusion on that privacy interest is unreasonable or, to put it another way, whether it violates the taxpayers' reasonable expectation of privacy.

26 In *Hunter*, Dickson, J. set forth several criteria which had to be met in order that a search be reasonable. I summarized these criteria in Thomson (D.L.R. 177):

> (a) a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;
>
> (b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established under oath, to believe that an offence has been committed;
>
> (c) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered; and
>
> (d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation.

27 It is important to note that these criteria were enunciated in the context of an appeal concerning the validity of a section which was, in essence, criminal or quasi-criminal in nature. As I stated in *Thomson* at pages 211-12:

> Not all seizures violate s. 8 of the *Charter*; only unreasonable ones. Put another way, an individual is accorded only a reasonable expectation of privacy. At some point the individual's interest in privacy must give way to the broader state interest in having the information or document disclosed. However, the state interest only becomes paramount when care is taken to infringe the privacy interest of the individual as little as possible. It is because of this need for delicate balancing that Dickson J. in *Hunter* identified several criteria which must be met if a search in a criminal investigation is to meet the test of reasonableness. I think that these criteria were accurately summarized by J. Holland J. at trial as set out earlier in these reasons. I would agree, however, that these criteria are not hard and fast rules which must be adhered to in all cases under all forms of legislation. What may be reasonable in the regulatory or civil context may not be reasonable in a criminal or *quasi*-criminal context. What is important is not so much that the strict criteria be mechanically applied in every case but that the legislation

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Found at **Tab 103, Volume 19** of Google's BOA.

A-292-20
2022 FCA 63

Lucien Rémillard (*Appellant*)

v.

Minister of National Revenue (*Respondent*)

Indexed as: Rémillard v. Canada (National Revenue)

Federal Court of Appeal, de Montigny, Gleason and Locke JJ.A.—By videoconference, December 13, 2021; Ottawa, April 8, 2022.

Practice — Applications — Material in possession of tribunal — Appeal from Federal Court decision concluding certified records becoming accessible to public upon transmission to Federal Court Registry, transmission of such record not constituting seizure within meaning of Canadian Charter of Rights and Freedoms, s. 8 — Appellant retired businessman living in Barbados — Appellant claims to have become non-resident of Canada for purposes of Income Tax Act (Act) — Since 2015, respondent auditing appellant's non-resident status; during audit, Canada Revenue Agency (CRA) made requests for administrative assistance from certain countries — Appellant challenged requests by filing application for judicial review — As part of application for judicial review, appellant relied on Federal Courts Rules, r. 317 to request disclosure of documents, information (Information) concerning appellant obtained or created by CRA — In response to request for disclosure, appellant learned Information accessible to public — Appellant then filed ex parte motion for interim order of confidentiality, publication ban for specific period — Federal Court quickly issued interim order, ordering to treat Information as confidential under r. 151, not to publish contents of Information — In accordance with interim order, appellant filed motion for order of confidentiality, subject of dispute before Court — Whether Federal Court correct in concluding certified records become public when transmitted to Court Registry under r. 318 — Rules 317, 318 governing transmission to Court Registry of record compiled by administrative decision maker — Rules 2, 23, 26 specifying certain procedures for compiling, consulting Court's files — Paragraph 23(2)(c) providing Administrator shall keep annex to each Court file — Certified record from tribunal transmitted to Registry under r. 318 clearly falling into subcategory of annex — Appellant's submission stating annexes (thus certified record) not formally part of Court file erroneous — Definition of "Court file" in r. 2 making no such distinction; therefore, annex must be considered part of Court file — Rules 151,

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2022 CAF 63

Lucien Rémillard (*appelant*)

c.

Ministre du revenu national (*intimé*)

Répertorié : Rémillard c. Canada (Revenu national)

Cour d'appel fédérale, juges de Montigny, Gleason et Locke, J.C.A.—Par vidéoconférence, 13 décembre 2021; Ottawa, 8 avril 2022.

Pratique — Demandes — Obtention de documents en la possession d'un office fédéral — Appel à l'encontre d'une décision rendue par la Cour fédérale ayant conclu que les dossiers certifiés devenaient accessibles au public dès leur transmission au greffe de la Cour fédérale, et que la transmission d'un tel dossier ne constituait pas une saisie au sens de l'article 8 de la Charte canadienne des droits et libertés — L'appelant est un homme d'affaires retraité vivant à la Barbade — Il dit être ainsi devenu un non-résident du Canada aux fins de la Loi de l'impôt sur le revenu (Loi) — L'intimé vérifie depuis 2015 le statut de non-résident de l'appelant, et dans le cadre de cette vérification, l'Agence du revenu du Canada (l'ARC) a fait des demandes d'assistance administrative auprès de certains pays — L'appelant a contesté ces demandes en déposant une demande de contrôle judiciaire — Dans le cadre de sa demande de contrôle judiciaire, l'appelant s'est prévalu de la règle 317 des Règles des Cours fédérales pour demander la divulgation des documents et informations (les Renseignements) le concernant, obtenus ou créés par l'ARC — Suite à cette demande, il a appris que les Renseignements étaient accessibles au public — Il a par la suite présenté une requête ex parte visant à obtenir une ordonnance provisoire de confidentialité et de non-publication pour une certaine période — La Cour fédérale a rapidement émis l'ordonnance provisoire et ordonné que les Renseignements soient traités comme confidentiels suivant la règle 151 et que leur contenu ne puisse faire l'objet d'une publication — Conformément à cette ordonnance provisoire, l'appelant a déposé la requête en confidentialité qui faisait l'objet du présent litige — Il s'agissait de savoir si la Cour fédérale a eu raison de conclure que les dossiers certifiés deviennent publics suite à leur transmission au greffe de la Cour en application de la règle 318 — Les règles 317 et 318 encadrent la transmission au greffe de la Cour du dossier constitué par le décideur administratif — Les règles 2, 23 et 26 viennent préciser certaines modalités entourant la constitution et la consultation des dossiers de la Cour — L'alinéa 23(2)c) prévoit que l'administrateur doit tenir une

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reasonable in the circumstances. Anyone who brings a case before the courts, whether in family, commercial, administrative, tax or other matters, must expect that large parts of his or her private life will become accessible to the public. This is what is provided for in rule 26, as well as in paragraph 241(3)(b) of the ITA, which states that the confidentiality of information transmitted to the Minister does not apply in respect of legal proceedings relating to the administration or enforcement of the ITA.

[71] I would add that the concept of seizure involves the taking of a thing from a person by a public authority without that person's consent (*Dyment*, at paragraph 26). In *McKinlay* (at page 642), this concept was extended to all situations where a person is required to produce information under compulsion of the state. This is not the situation in which Mr. Rémillard found himself. He asked the Minister of his own initiative to provide him (and the Registry) with the documents that concerned him. He controlled not only the scope of the documents transmitted, but also the timing of his request. He was also informed of the documents that had been provided to the Registry since he also obtained a copy of them.

[72] This situation therefore has nothing to do with the situation in which Ms. Gernhart found herself. The documents were not transmitted by the Minister automatically, but at the request of Mr. Rémillard, and the information was not broadcast "indiscriminately" (the French version of *Gernhart* uses the word "*inconsidérément*"), but only according to the criteria determined by Mr. Rémillard himself. This situation is therefore far from one in which the state is interfering in the private affairs of the appellant, as was the case in *Gernhart* and *Dyment*. Far from transmitting confidential information without his consent and without informing him, it was rather at Mr. Rémillard's own request that the Minister transmitted the relevant documents to the Court Registry.

[73] In his memorandum and at the hearing, Mr. Rémillard argued that he had no real choice in proceeding as he did and that he had to use the procedure set out in rules 317 and 318 in order to make a valid application for judicial review. The Federal Court was correct in rejecting this argument.

circonstances. Quiconque saisit les tribunaux d'un litige, que ce soit en matière familiale, commerciale, administrative, fiscale ou autre, doit s'attendre à ce que de larges pans de sa vie privée deviennent accessibles au public. C'est d'ailleurs ce que prévoient la règle 26, ainsi que l'alinéa 241(3)b) de la LIR, en vertu duquel la confidentialité des renseignements transmis au ministre ne s'applique pas dans les procédures judiciaires ayant trait à l'application ou à l'exécution de cette loi.

[71] J'ajouterais que le concept de saisie suppose que les autorités prennent quelque chose appartenant à une personne sans son consentement (*Dyment*, au paragraphe 26). Dans l'arrêt *McKinlay* (à la page 642), on a étendu ce concept à toutes les situations où une personne est tenue de produire de l'information sous la contrainte de l'État. Telle n'est pas la situation dans laquelle se trouvait M. Rémillard. C'est de son propre chef qu'il a demandé au ministre de lui transmettre (ainsi qu'au greffe) les documents qui le concernaient. Non seulement contrôlait-il l'étendue des documents transmis, mais également le moment où il a fait cette demande. Et il était également informé des documents qui ont été communiqués au greffe puisqu'il en a aussi obtenu copie.

[72] Cette situation n'a donc rien à voir avec celle dans laquelle se trouvait Mme Gernhart. Les documents n'ont pas été transmis par le ministre de façon automatique mais à la requête de M. Rémillard, et l'information n'a pas été diffusé « inconsidérément » (« indiscriminately » dans la version anglaise de *Gernhart*), mais uniquement en fonction des critères déterminés par M. Rémillard lui-même. On est donc loin d'une ingérence de l'État dans les affaires privées de l'appelant, comme c'était le cas dans les affaires *Gernhart* et *Dyment*. Loin de transmettre des informations confidentielles sans son consentement et sans l'en informer, c'est plutôt à la demande même de M. Rémillard que le ministre a transmis les documents pertinents au greffe de la Cour.

[73] Dans son mémoire et lors de l'audition, M. Rémillard a fait valoir qu'il n'avait pas vraiment le choix de procéder comme il l'a fait, et qu'il devait se servir de la procédure prévue par les règles 317 et 318 pour pouvoir exercer valablement sa demande de contrôle judiciaire. C'est à bon droit que la Cour fédérale a rejeté cette prétention.

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Found at Tab 81, Volume 15 of Google's BOA.

Warren James Jarvis *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General for Ontario, the Attorney General of Quebec and the Criminal Lawyers' Association (Ontario) *Interveners*

INDEXED AS: R. *v.* JARVIS

Neutral citation: 2002 SCC 73.

File No.: 28378.

2002: June 13; 2002: November 21.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Income tax — Administration and enforcement — Audits and investigations — Whether distinction can be drawn between audit and investigation under Income Tax Act — If so, circumstances in which tax official's inquiry constitutes penal investigation — Whether evidence obtained during audit pursuant to ss. 231.1(1) and 231.2(1) of Income Tax Act can be used to further investigation or prosecution of offences under s. 239(1) of the Act without violating taxpayer's Charter rights — Canadian Charter of Rights and Freedoms, ss. 7, 8 — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 231.1, 231.2.

Income tax — Administration and enforcement — Audits and investigations — Sections 231.1(1) and 231.2(1) of Income Tax Act available "for any purpose related to administration or enforcement" of Income Tax Act — Whether "enforcement" of Income Tax Act includes investigation and prosecution of offences under s. 239 of Act — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 231.1(1), 231.2(1), 239.

Warren James Jarvis *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Le procureur général de l'Ontario, le procureur général du Québec et la Criminal Lawyers' Association (Ontario) *Intervenants*

RÉPERTORIÉ : R. *c.* JARVIS

Référence neutre : 2002 CSC 73.

N° du greffe : 28378.

2002 : 13 juin; 2002 : 21 novembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

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

Impôt sur le revenu — Application et exécution — Vérifications et enquêtes — Peut-on faire une distinction entre une vérification et une enquête sous le régime de la Loi de l'impôt sur le revenu? — Le cas échéant, dans quelles circonstances l'examen effectué par un agent du fisc constitue-t-il une enquête pénale? — La preuve obtenue dans le cadre d'une vérification conformément aux art. 231.1(1) et 231.2(1) de la Loi de l'impôt sur le revenu peut-elle être utilisée pour les besoins d'une enquête ou d'une poursuite relative à des infractions prévues par l'art. 239(1) de la Loi, sans qu'il soit porté atteinte aux droits que la Charte garantit au contribuable? — Charte canadienne des droits et libertés, art. 7, 8 — Loi de l'impôt sur le revenu, L.R.C. 1985, ch. 1 (5e suppl.), art. 231.1, 231.2.

Impôt sur le revenu — Application et exécution — Vérifications et enquêtes — Les articles 231.1(1) et 231.2(1) de la Loi de l'impôt sur le revenu sont destinés à être utilisés « pour l'application et l'exécution » de la Loi de l'impôt sur le revenu — Le terme « exécution » figurant dans la Loi de l'impôt sur le revenu inclut-il les enquêtes et les poursuites relatives aux infractions prévues par l'art. 239 de la Loi? — Loi de l'impôt sur le revenu, L.R.C. 1985, ch. 1 (5e suppl.), art. 231.1(1), 231.2(1), 239.

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pp. 349-50: "Those who do evade the payment of income tax not only cheat the State of what is owing to it, but inevitably increase the burden placed upon the honest taxpayers." As a consequence, the s. 239(1) offences carry rather significant penalties. They may be proceeded on by way of summary conviction or by way of indictment at the election of the Attorney General (s. 239(2)).

57 As with the s. 238 offence, this Court has recognized the centrality of s. 239 to the income tax *régime*: see Strayer J.A.'s reasons, endorsed on appeal to this Court, in *Del Zotto*, *supra*, at para. 23, where he described s. 239 as being "designed to ensure compliance with the self-reporting requirements of the *Income Tax Act*". Moreover, the presence in the ITA of s. 239 does nothing to alter the regulatory or administrative nature of the inspection and requirement powers, even though s. 239 "relate[s] to conduct that might well be discovered by the[ir] exercise" (*Thomson Newspapers*, *supra*, at p. 516, *per* La Forest J. See also *Comité paritaire*, *supra*, at p. 421). As already mentioned, it is under ss. 239(1)(*a*) and (*d*) that the appellant in the present case was ultimately charged.

58 Having discussed the general statutory context, we will now deal specifically with the important distinction between regulatory and criminal statutory provisions.

(2) The Regulatory vs. Criminal Distinction

59 The parties have engaged in a spirited debate over the proper contextualization of the ITA offences for the purposes of *Charter* analysis. The respondent defines the ITA as comprising an "integrated regulatory scheme", the implication being that a person accused of offences thereunder attracts little *Charter* protection. Meanwhile, the appellants in both the present case and its companion, *R. v. Ling*, [2002] 3 S.C.R. 814, 2002 SCC 74, as well as the intervener,

actes interdits. Selon le juge Cory dans l'arrêt *Knox Contracting*, précité, p. 349-350 : « Ceux qui éludent le paiement de l'impôt sur le revenu frustrent non seulement l'État de ce qu'ils lui doivent, mais ils augmentent inévitablement le fardeau des contribuables honnêtes ». C'est pourquoi les infractions prévues au par. 239(1) sont assorties de peines assez lourdes. Tout contrevenant peut, au choix du procureur général, être poursuivi par voie de procédure sommaire ou de mise en accusation (par. 239(2)).

Comme elle l'a fait dans le cas de l'infraction prévue à l'art. 238, notre Cour a reconnu l'importance de l'art. 239 dans le régime fiscal : voir les motifs du juge Strayer, adoptés par notre Cour, dans *Del Zotto*, précité, par. 23, dans lesquels il affirme que la règle énoncée à l'art. 239 est « conçue pour garantir le respect des exigences d'auto-déclaration de la *Loi de l'impôt sur le revenu* ». De plus, la présence de l'art. 239 dans la LIR ne modifie en rien le caractère réglementaire ou administratif des pouvoirs d'inspection et de demande péremptoire même si l'art. 239 « se rapport[e] à une conduite qui pourrait fort bien être découverte par [leur] exercice » (*Thomson Newspapers*, précité, p. 516, le juge La Forest. Voir aussi l'arrêt *Comité paritaire*, précité, p. 421). Comme je l'ai déjà mentionné, l'appelant a finalement été inculpé des infractions prévues aux al. 239(1)*a*) et *d*).

Ayant abordé l'ensemble du contexte législatif, nous examinerons maintenant plus particulièrement l'importante distinction qui existe entre les dispositions de nature réglementaire et les dispositions de nature criminelle.

(2) La distinction entre les dispositions de nature réglementaire et les dispositions de nature criminelle

Les parties ont eu un débat animé sur la contextualisation appropriée des infractions à la LIR pour fins d'analyse fondée sur la *Charte*. L'intimée définit la LIR comme une loi comportant [TRADUCTION] « un régime de réglementation intégré », ce qui implique qu'une personne accusée d'infractions sous le régime de la Loi bénéficie d'une protection bien ténue en vertu de la *Charte*. Par ailleurs, les appelants, tant en l'espèce que dans l'affaire

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the Criminal Lawyers' Association (Ontario), submit that the Act is essentially a "dual-purpose statute" and that the s. 239 offences constitute "quintessential criminal law". It follows in the appellant Jarvis's submission that, where tax avoidance or evasion is being investigated, "the taxpayer must be afforded the Charter protection that is the right of any Canadian suspected or accused of a crime" (appellant's factum, at para. 33). It is plain that the s. 239 offences are no trifling matter as this provision bears at least the formal hallmarks of criminal legislation, namely, prohibitions coupled with penalties (see *Hydro-Québec*, *supra*, at para. 35). They may be prosecuted upon indictment, and conviction can carry up to five years' incarceration. It is because of these factors that the penal sanctions in s. 239 are, in certain contexts, referred to as "criminal".

That is not to say, however, that they are "purely" or "quintessentially" criminal for *Charter* purposes. The cases cited in support of the appellant's favoured characterization are of limited relevance. The present case does not consider a number of issues such as: whether the ITA offences are constitutionally supportable under the federal criminal law power (*Hydro-Québec*, *supra*); the characterization of s. 239 offences for the purpose of determining the appeal procedure from the issuance of a s. 231.3 search warrant (*Knox Contracting*, *supra*); or whether making false statements on an income tax return constitutes a "criminal offence" under provincial legislation, so as to render revocable a person's licence to practice as a public accountant (*Re Ramm*, [1958] O.R. 98 (C.A.)). In any case, the contextual approach to *Charter* application is not a mere exercise in taxonomy.

connexe *R. c. Ling*, [2002] 3 R.C.S. 814, 2002 CSC 74, et la Criminal Lawyers' Association (Ontario), intervenante, font valoir que la Loi est essentiellement une [TRADUCTION] « loi à double objet » et que les infractions prévues à l'art. 239 constituent [TRADUCTION] « du droit criminel sous sa forme la plus pure ». Suivant la thèse de l'appelant, M. Jarvis, il s'ensuit que dans le cas où il y a enquête sur une question d'évitement ou de fraude en matière fiscale, [TRADUCTION] « le contribuable doit bénéficier de la protection accordée par la Charte à tout Canadien soupçonné ou accusé d'un crime » (mémoire de l'appelant, par. 33). De toute évidence, les infractions prévues à l'art. 239 ne sont pas sans importance puisque cette disposition présente au moins les caractéristiques formelles de la législation criminelle, savoir des interdictions assorties de peines (voir *Hydro-Québec*, précité, par. 35). Ces infractions peuvent faire l'objet de poursuites par voie de mise en accusation et entraîner un emprisonnement maximal de cinq ans advenant une déclaration de culpabilité. C'est à cause de ces facteurs que les sanctions pénales prévues à l'art. 239 sont, dans certains contextes, qualifiées de sanctions « criminelles ».

60 Toutefois, cela ne signifie pas que pour l'application de la *Charte* ces infractions sont « purement » de nature criminelle ou qu'elles constituent du droit criminel dans « sa forme la plus pure ». Les arrêts cités à l'appui de la qualification que privilégie l'appelant présentent un pertinence limitée. Le présent pourvoi ne touche pas certaines questions, dont celles de savoir si les infractions créées par la LIR sont constitutionnellement justifiables en vertu de la compétence fédérale en matière de droit criminel (*Hydro-Québec*, précité), comment il faut qualifier les infractions prévues à l'art. 239 afin de déterminer la procédure d'appel applicable contre la délivrance d'un mandat de perquisition en application de l'art. 231.3 (*Knox Contracting*, précité) ou, enfin, si de fausses déclarations dans une déclaration de revenu constituent une « infraction criminelle » au sens de la loi provinciale, emportant la révocabilité du permis d'exercice de la profession d'expert-comptable de la personne qui en est l'auteur. (*Re Ramm*, [1958] O.R. 98 (C.A.)). Quoi qu'il en soit, l'approche contextuelle à l'égard de l'application de la *Charte* ne se résume pas à un simple exercice de taxinomie.

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61 As La Forest J. stated in *Wholesale Travel*, *supra*, at p. 209, "what is ultimately important are not labels (though these are undoubtedly useful), but the values at stake in the particular context". In this connection, differing levels of *Charter* protection may obtain under the same statute, depending on the circumstances. Compare *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, and *Thomson Newspapers*, *supra*: each dealt with the former *Combines Investigation Act*, R.S.C. 1970, c. C-23, which, although it created penal offences, was recognized on the whole to embody "a complex scheme of economic regulation" (see *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 676, *per* Dickson C.J.; *Thomson Newspapers*, *supra*; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 648-49). The provisions impugned in *Hunter v. Southam* authorized entry onto private premises and hence attracted a much greater expectation of privacy than the provision ordering the production of documents in *Thomson Newspapers*.

Comme le juge La Forest l'a mentionné dans l'arrêt *Wholesale Travel*, précité, p. 209, « ce qui importe en fin de compte, ce ne sont pas les étiquettes (bien qu'elles soient sans doute utiles), mais les valeurs en jeu dans le contexte particulier ». À cet égard, la même loi peut, selon les circonstances, emporter des niveaux différents de protection sous le régime de la *Charte*. Comparer *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, avec *Thomson Newspapers*, précité : chacun de ces arrêts portait sur l'application de l'ancienne *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, ch. C-23, qui, même si elle créait des infractions pénales, était reconnue dans l'ensemble comme comportant « un système de réglementation économique complexe » (voir *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641, p. 676, le juge en chef Dickson; *Thomson Newspapers*, précité; *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, p. 648-649). Dans l'arrêt *Hunter c. Southam*, les dispositions attaquées autorisaient l'entrée dans des lieux privés, de sorte que l'attente en matière de respect de la vie privée était plus grande que dans le cas de la disposition ordonnant la production de documents en cause dans l'arrêt *Thomson Newspapers*.

62 In this measure, the ITA presents no different consideration. Wilson J. acknowledged as much in *McKinlay Transport*, *supra*, at p. 649, where she suggested that greater s. 8 protection would obtain under the ITA if tax officials were to enter onto private property in order to conduct a search or seizure for the purposes of the Act, rather than to compel the same documentation by way of requirement letters (see para. 53 of these reasons re: s. 231.1(2); see also *Baron v. Canada*, [1993] 1 S.C.R. 416, at pp. 443-44; *Del Zotto*, *supra*, at paras. 12-13, *per* Strayer J.A. (dissenting)). In sum, the ITA is a regulatory statute, but non-compliance with its mandatory provisions can in some cases lead to criminal charges being laid. In prosecution thereof, the state is pitted against the individual in an attempt to establish culpability. Stiff jail terms can result from a conviction. To conduct an appropriately contextual *Charter* analysis in these cases, the various regulatory and

À ce point de vue, la LIR ne présente pas de considération différente. C'est ce qu'a reconnu le juge Wilson dans *McKinlay Transport*, précité, p. 649, où elle a laissé entendre que la LIR ferait entrer en jeu une plus grande protection en vertu de l'art. 8 si les agents du fisc devaient pénétrer dans la propriété d'un particulier pour y faire une fouille, une perquisition ou une saisie pour l'application de la Loi, plutôt que forcer la production de ces mêmes documents au moyen de demandes péremptoires (voir le par. 53 des présents motifs concernant le par. 231.1(2); voir aussi *Baron c. Canada*, [1993] 1 R.C.S. 416, p. 443-444; *Del Zotto*, précité, par. 12-13, le juge Strayer, dissident). Bref, la LIR est une loi de nature réglementaire, mais le non-respect de ses dispositions impératives peut dans certains cas donner lieu à des accusations criminelles. Au cours de la poursuite, le ministère public a comme adversaire le particulier dont il tente de prouver la culpabilité. Une déclaration de culpabilité peut donner

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individual's interest in privacy must give way to the broader state interest in having the information or document disclosed". Naturally, if a person has but a minimal expectation with respect to informational privacy, this may tip the balance in the favour of the state interest: *Plant*, *supra*; *Smith v. Canada (Attorney General)*, [2001] 3 S.C.R. 902, 2001 SCC 88.

Generally, an individual has a diminished expectation of privacy in respect of records and documents that he or she produces during the ordinary course of regulated activities: see, e.g., *Thomson Newspapers*, *supra*, at p. 507, *per* La Forest J.; *143471 Canada*, *supra*, at p. 378, *per* Cory J.; *Comité paritaire*, *supra*, at pp. 420-21; *Fitzpatrick*, *supra*, at para. 49. In the particular context of the self-assessment and self-reporting income tax regime, a taxpayer's privacy interest in records that may be relevant to the filing of his or her tax return is relatively low: *McKinlay Transport*, *supra*, at pp. 649-50.

C. *Audit vs. Investigation*

As mentioned above, the *Charter* issues in this appeal touch upon the admission into evidence in a s. 239 prosecution of documents and utterances compelled by ss. 231.1(1) and 231.2(1). This problem did not arise in *McKinlay Transport*, where the appellants were charged under s. 238 for failing to comply with requirement letters, but there was no allegation that the requirements were themselves being used to further the investigation of an offence. In brief, this Court has yet to consider the extent to which the use of ss. 231.1(1) and 231.2(1) to build a prosecutorial case infringes a taxpayer's constitutional rights.

(1) Submissions of the Parties

The submissions of the parties in this regard stand in stark opposition. The parties seeking to

précité, p. 495, que « vient [. . .] un moment où le droit de l'individu au respect de sa vie privée doit céder le pas à l'intérêt plus grand qu'a l'État à ce que soient communiqués des renseignements ou un document ». De toute évidence, si une personne n'a qu'une attente minimale pour ce qui est des aspects informationnels de sa vie privée, cela pourrait faire pencher la balance en faveur de l'intérêt de l'État : *Plant*, précité; *Smith c. Canada (Procureur général)*, [2001] 3 R.C.S. 902, 2001 CSC 88.

72 Généralement, un particulier possède une attente réduite quant au respect de sa vie privée dans le cas de registres et documents qu'il produit dans le cours normal d'activités réglementées : voir par ex. *Thomson Newspapers*, précité, p. 507, le juge La Forest; *143471 Canada*, précité, p. 378, le juge Cory; *Comité paritaire*, précité, p. 420-421; *Fitzpatrick*, précité, par. 49. Dans le contexte particulier du régime fiscal d'autocotisation et d'autodéclaration, le droit d'un contribuable à la protection de sa vie privée à l'égard des registres qui peuvent être utiles au dépôt de sa déclaration de revenu est relativement faible : *McKinlay Transport*, précité, p. 649-650.

C. *Vérification et enquête*

73 Comme je l'ai mentionné, les questions relatives à la *Charte* en l'espèce se rapportent à l'admission en preuve, dans une poursuite relative à l'art. 239, de documents et déclarations obtenus par la contrainte sous le régime des par. 231.1(1) et 231.2(1). Ce problème ne s'est pas présenté dans l'affaire *McKinlay Transport*, où les appelants avaient été inculpés sous le régime de l'art. 238 de ne pas avoir obtempéré à des demandes péremptoires, mais où il n'était pas allégué que ces demandes mêmes avaient été utilisées pour les besoins de l'enquête relative à une infraction. En résumé, notre Cour n'a pas encore eu à déterminer dans quelle mesure l'utilisation des par. 231.1(1) et 231.2(1) pour fins de constitution d'un dossier de poursuite porte atteinte aux droits constitutionnels du contribuable.

(1) Les prétentions des parties

74 Les prétentions des parties sur ce point sont diamétralement opposées. Les parties qui s'appuient

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[1996] 1 S.C.R. ix (*sub nom. Samson v. Addy*); *R. v. Yip* (2000), 278 A.R. 124, 2000 ABQB 873, at para. 34; *R. v. Anderson* (2001), 209 Sask. R. 117, 2001 SKQB 334, at para. 36; *R. v. Seaside Chevrolet Oldsmobile Ltd.* (2002), 248 N.B.R. (2d) 132, 2002 NBPC 5, at para. 51. Another has purported to have applied the same test, only to find that the predominant purpose will always be investigatory when "matters are placed in the hands of" Special Investigations Section: see *R. v. Warawa* (1997), 208 A.R. 81 (Q.B.), at paras. 11-12 and 134.

In *Norway Insulation*, *supra*, LaForme J. held, at p. 437, that the regulatory nature of an inquiry "changed after Special Investigations became involved and directed the subsequent work". He also agreed with the trial judge (reasons at [1995] 2 C.T.C. 451 (Ont. Ct. (Prov. Div.)) that it was when the first auditor developed the opinion, ultimately erroneous, that there was "sufficient evidence" of an offence, that the inquiry changed hue. Finally, in *R. v. Coghlan*, [1994] 1 C.T.C. 164 (Ont. Ct. (Prov. Div.)), at p. 172, Judge Ratushny opined that it was only when "Revenue Canada decides to lay criminal charges" that the criminal investigation begins. Otherwise, "the searches or seizures are for the bona fide purpose of determining compliance with the *Income Tax Act*, whether or not Revenue Canada suspects a criminal offence during that time" (*ibid.*). *Coghlan* was followed in *Gorenko v. La Reine*, [1997] R.J.Q. 2482 (Sup. Ct.), at p. 2500 (aff'd [1999] Q.J. No. 6268 (QL) (C.A.), leave to appeal to S.C.C. granted and appeal discontinued, [2000] 2 S.C.R. ix).

In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the

voir les décisions des tribunaux d'instance inférieure en l'espèce; *Samson c. Canada*, [1995] 3 C.F. 306 (C.A.), autorisation de pourvoi refusée, [1996] 1 R.C.S. ix (*sub nom. Samson c. Addy*); *R. c. Yip* (2000), 278 A.R. 124, 2000 ABQB 873, par. 34; *R. c. Anderson* (2001), 209 Sask. R. 117, 2001 SKQB 334, par. 36; *R. c. Seaside Chevrolet Oldsmobile Ltd.* (2002), 248 R.N.-B. (2e) 132, 2002 NBPC 5, par. 51. Un autre tribunal a expressément voulu appliquer le même critère pour enfin conclure que l'objet prédominant consiste toujours à mener une enquête lorsque [TRADUCTION] « l'examen des questions » sera confié à la Section des enquêtes spéciales : voir l'arrêt *R. c. Warawa* (1997), 208 A.R. 81 (B.R.), par. 11-12 et 134.

87 Dans l'affaire *Norway Insulation*, précitée, le juge LaForme a conclu à la p. 437, que le caractère réglementaire d'un examen [TRADUCTION] « avait changé au moment où les Enquêtes spéciales étaient intervenues et avaient dirigé le travail accompli par la suite ». Il a également souscrit à l'opinion du juge de première instance (motifs publiés à [1995] 2 C.T.C. 451 (C. Ont. (Div. prov.)) selon laquelle c'était au moment où le premier vérificateur avait formé l'opinion, erronée en dernière analyse, qu'il existait une [TRADUCTION] « preuve suffisante » de la perpétration d'une infraction que l'examen avait changé d'orientation. Enfin, dans l'affaire *R. c. Coghlan*, [1994] 1 C.T.C. 164 (C. Ont. (Div. prov.)), p. 172, le juge Ratushny a exprimé l'avis que c'est seulement lorsque [TRADUCTION] « Revenu Canada décide de porter des accusations criminelles » que commence l'enquête criminelle. Sinon, [TRADUCTION] « l'objet véritable des fouilles, perquisitions ou saisies est de vérifier la conformité avec la *Loi de l'impôt sur le revenu*, que Revenu Canada ait ou non alors des soupçons relativement à la perpétration d'une infraction criminelle » (*ibid.*). La décision *Coghlan* a été suivie dans *Gorenko c. La Reine*, [1997] R.J.Q. 2482 (C.S.), p. 2500 (conf. par [1999] J.Q. nº 6268 (QL) (C.A.), autorisation de pourvoi à la C.S.C. accordée, suivie d'un désistement : [2000] 2 R.C.S. ix).

88 À notre avis, lorsqu'un examen dans un cas particulier a pour objet prédominant d'établir la responsabilité pénale du contribuable, les fonctionnaires

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authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.

89 To begin with, the mere existence of reasonable grounds that an offence may have occurred is by itself insufficient to support the conclusion that the predominant purpose of an inquiry is the determination of penal liability. Even where reasonable grounds to suspect an offence exist, it will not always be true that the predominant purpose of an inquiry is the determination of penal liability. In this regard, courts must guard against creating procedural shackles on regulatory officials; it would be undesirable to "force the regulatory hand" by removing the possibility of seeking the lesser administrative penalties on every occasion in which reasonable grounds existed of more culpable conduct. This point was clearly stated in *McKinlay Transport*, *supra*, at p. 648, where Wilson J. wrote: "The Minister must be capable of exercising these [broad supervisory] powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act." While reasonable grounds indeed constitute a necessary condition for the issuance of a search warrant to further a criminal investigation (s. 231.3 of the ITA; *Criminal Code*, s. 487), and might in certain cases serve to indicate that the audit powers were misused, their existence is not a sufficient indicator that the CCRA is conducting a *de facto* investigation. In most cases, if all ingredients of an offence are reasonably thought to have occurred, it is likely that the investigation function is triggered.

de l'ADRC doivent renoncer à leur faculté d'utiliser les pouvoirs d'inspection et de demande péremptoire que leur confèrent les par. 231.1(1) et 231.2(1). Essentiellement, les fonctionnaires [TRADUCTION] « franchissent le Rubicon » lorsque l'examen crée la relation contradictoire entre le contribuable et l'État. Il n'existe pas de méthode claire pour décider si tel est le cas. Pour déterminer si l'objet prédominant d'un examen consiste à établir la responsabilité pénale du contribuable, il faut plutôt examiner l'ensemble des facteurs qui ont une incidence sur la nature de cet examen.

D'abord, la simple existence de motifs raisonnables de croire qu'il peut y avoir eu perpétration d'une infraction est insuffisante en soi pour conclure que l'objet prédominant d'un examen consiste à établir la responsabilité pénale du contribuable. Même lorsqu'il existe des motifs raisonnables de soupçonner la perpétration d'une infraction, il ne sera pas toujours exact de dire que l'objet prédominant de l'examen est d'établir la responsabilité pénale du contribuable. À cet égard, les tribunaux doivent se garder d'imposer des entraves de nature procédurale aux fonctionnaires; il ne serait pas souhaitable de [TRADUCTION] « forcer la main des autorités réglementaires » en les privant de la possibilité de recourir à des peines administratives moindres chaque fois qu'il existe des motifs raisonnables de croire à l'existence d'une conduite plus coupable. Ce point a été exprimé clairement dans l'arrêt *McKinlay Transport*, précité, p. 648, où le juge Wilson affirme : « Le Ministre doit être capable d'exercer ces [larges] pouvoirs [de surveillance], qu'il ait ou non des motifs raisonnables de croire qu'un certain contribuable a violé la Loi ». Bien que l'existence de motifs raisonnables constitue en fait une condition nécessaire à la délivrance d'un mandat de perquisition pour mener une enquête criminelle (art. 231.3 de la LIR et 487 du *Code criminel*) et pourrait, dans certains cas, indiquer que les pouvoirs de vérification ont été utilisés à mauvais escient, cet élément ne suffit pas pour établir que l'ADRC mène une enquête *de facto*. Dans la plupart des cas, si l'on croit raisonnablement à la présence de tous les éléments d'une infraction, il est probable que le processus d'enquête sera enclenché.

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All the more, the test cannot be set at the level of mere suspicion that an offence has occurred. Auditors may, during the course of their inspections, suspect all manner of taxpayer wrongdoing, but it certainly cannot be the case that, from the moment such suspicion is formed, an investigation has begun. On what evidence could investigators ever obtain a search warrant if the whiff of suspicion were enough to freeze auditorial fact-finding? The state interest in prosecuting those who wilfully evade their taxes is of great importance, and we should be careful to avoid rendering nugatory the state's ability to investigate and obtain evidence of these offences.

The other pole of the continuum is no more attractive. It would be a fiction to say that the adversarial relationship only comes into being when charges are laid. Logically, this will only happen once the investigators believe that they have obtained evidence that indicates wrongdoing. Because the s. 239 offences contain an element of mental culpability, the state will, one must presume, usually have some evidence that the accused satisfied the *mens rea* requirements before laying an information or preferring an indictment. The active collection of such evidence indicates that the adversarial relationship has been engaged, since it is irrelevant to the determination of tax liability. Moreover, although there are judicial controls on the unauthorized exercise of power (*Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, 2002 SCC 57, at para. 25), we believe that allowing CCRA officials to employ ss. 231.1(1) and 231.2(1) until the point where charges are laid, might promote bad faith on the part of the prosecutors. Quite conceivably, situations may arise in which charges are delayed in order to compel the taxpayer to provide evidence against himself or herself for the purposes of a s. 239 prosecution. Although the respondent argued that such situations could be remedied by the courts, we view it as preferable that such situations be avoided rather than

90 On peut encore moins retenir comme critère le simple soupçon qu'une infraction a été commise. Au cours de sa vérification, le vérificateur peut soupçonner toutes sortes de conduites répréhensibles, mais on ne peut certainement pas affirmer qu'une enquête est enclenchée dès l'apparition d'un soupçon. Sur le fondement de quels éléments de preuve un enquêteur pourrait-il obtenir un mandat de perquisition si un vague soupçon était suffisant pour bloquer le processus de vérification qui permet d'établir les faits? L'intérêt qu'a l'État à poursuivre ceux qui éludent volontairement le paiement d'un impôt revêt une grande importance, et nous devons nous garder de neutraliser la capacité de l'État d'enquêter et de recueillir des éléments de preuve de la perpétration de ces infractions.

91 L'autre extrême ne semble pas mieux convenir. Ce serait une fiction de dire que la relation de nature contradictoire ne prend naissance qu'au moment du dépôt des accusations. En toute logique, cela ne se produira qu'une fois que les enquêteurs croiront avoir obtenu la preuve de l'existence d'une conduite répréhensible. Puisque les infractions visées à l'art. 239 comportent un élément de culpabilité morale, il faut présumer que l'État disposera habituellement d'une preuve que l'accusé avait la *mens rea* requise avant de déposer une dénonciation ou de présenter un acte d'accusation. La collecte active de ces éléments de preuve indique que la relation de nature contradictoire a pris naissance puisqu'il s'agit là d'un aspect non pertinent pour l'évaluation de l'obligation fiscale. Par ailleurs, bien qu'il existe des mécanismes de contrôle judiciaire de l'exercice non autorisé d'un pouvoir (*Roncarelli c. Duplessis*, [1959] R.C.S. 121; *Babcock c. Canada (Procureur général)*, [2002] 3 R.C.S. 3, 2002 CSC 57, par. 25), nous sommes d'avis que permettre aux fonctionnaires de l'ADRC d'avoir recours à l'application des par. 231.1(1) et 231.2(1) jusqu'au dépôt des accusations pourrait favoriser la mauvaise foi chez les poursuivants. Il est tout à fait concevable qu'il puisse survenir des situations où le dépôt des accusations sera retardé afin de contraindre le contribuable à fournir des éléments de preuve contre lui-même pour les besoins d'une poursuite sous le régime de l'art. 239. Bien que l'intimée ait soutenu

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remedied. It is for this reason that the test is as set out above.

92 Whether a matter has been sent to the investigations section is another factor in determining whether the adversarial relationship exists. Again, though, this, by itself, is not determinative. An auditor's recommendation that investigators look at a file might result in nothing in the way of a criminal investigation since there is always the possibility that the file will be sent back. Still, if, in an auditor's judgment, a matter should be sent to the investigators, a court must examine the following behaviour very closely. If the file is sent back, does it appear that the investigators have actually declined to take up the case and have returned the matter so that the audit can be completed? Or, does it appear, rather, that they have sent the file back as a matter of expediency, so that the auditor may use ss. 231.1(1) and 231.2(1) to obtain evidence for a prosecution (as was found to be the case in *Norway Insulation*, *supra*)?

93 To reiterate, the determination of when the relationship between the state and the individual has reached the point where it is effectively adversarial is a contextual one, which takes account of all relevant factors. In our opinion, the following list of factors will assist in ascertaining whether the predominant purpose of an inquiry is the determination of penal liability. Apart from a clear decision to pursue a criminal investigation, no one factor is necessarily determinative in and of itself, but courts must assess the totality of the circumstances, and make a determination as to whether the inquiry or question in issue engages the adversarial relationship between the state and the individual.

94 In this connection, the trial judge will look at all factors, including but not limited to such questions as:

(a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that

que les tribunaux pourraient remédier à de telles situations, nous estimons préférable de les éviter plutôt que d'y remédier. C'est pourquoi le critère applicable est celui exposé précédemment.

Le fait que le dossier a été ou non transmis à la section des enquêtes constitue un autre facteur à prendre en compte pour déterminer s'il existe une relation de nature contradictoire. Encore une fois, ce facteur n'est pas déterminant en soi. Même lorsqu'un vérificateur recommande que les enquêteurs examinent un dossier, il se peut qu'aucune enquête criminelle ne soit engagée, car il est toujours possible que le dossier soit retourné à la vérification. Cependant, si un vérificateur est d'avis qu'un dossier devrait être envoyé aux enquêteurs, le tribunal doit examiner très attentivement ce qui se passe ensuite. Si le dossier est retourné à la vérification, les enquêteurs ont-ils réellement décidé de ne pas examiner le dossier et l'ont-ils retourné aux vérificateurs pour que ceux-ci terminent la vérification? L'ont-ils plutôt retourné pour des raisons de commodité afin que le vérificateur puisse utiliser les par. 231.1(1) et 231.2(1) pour obtenir des éléments de preuve pour les besoins d'une poursuite (comme le tribunal l'a constaté dans l'affaire *Norway Insulation*, précitée)?

Rappelons que, pour déterminer à quel moment la relation entre l'État et le particulier est effectivement devenue une relation de nature contradictoire, il faut tenir compte du contexte, en examinant tous les facteurs pertinents. À notre avis, la liste suivante de facteurs sera utile pour déterminer si un examen a pour objet prédominant d'établir la responsabilité pénale du contribuable. À l'exception de la décision claire de procéder à une enquête criminelle, aucun facteur n'est nécessairement déterminant en soi. Les tribunaux doivent plutôt apprécier l'ensemble des circonstances et déterminer si l'examen ou la question en cause crée une relation de nature contradictoire entre l'État et le particulier.

À cet égard, le juge de première instance examinera tous les facteurs, y compris les suivants :

a) Les autorités avaient-elles des motifs raisonnables de porter des accusations? Semble-t-il,

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a decision to proceed with a criminal investigation could have been made?

(b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?

(c) Had the auditor transferred his or her files and materials to the investigators?

(d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?

(e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?

(f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?

(g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?

It should also be noted that in this case we are dealing with the CCRA. However, there may well be other provincial or federal governmental departments or agencies that have different organizational settings which in turn may mean that the above factors, as well as others, will have to be applied in those particular contexts.

E. *Charter Consequences*

With respect to the consequences related to s. 8 of the *Charter*, *McKinlay Transport*, *supra*, makes it clear that taxpayers have very little privacy interest in the materials and records that they are obliged to keep under the ITA, and that they are obliged to produce during an audit. Moreover, once an auditor has inspected or required a given document under ss. 231.1(1) and 231.2(1), the taxpayer cannot truly be said to have a reasonable expectation that

au vu du dossier, que l'on aurait pu prendre la décision de procéder à une enquête criminelle?

b) L'ensemble de la conduite des autorités donnait-elle à croire que celles-ci procédaient à une enquête criminelle?

c) Le vérificateur avait-il transféré son dossier et ses documents aux enquêteurs?

d) La conduite du vérificateur donnait-elle à croire qu'il agissait en fait comme un mandataire des enquêteurs?

e) Semble-t-il que les enquêteurs aient eu l'intention d'utiliser le vérificateur comme leur mandataire pour recueillir des éléments de preuve?

f) La preuve recherchée est-elle pertinente quant à la responsabilité générale du contribuable ou, au contraire, uniquement quant à sa responsabilité pénale, comme dans le cas de la preuve de la *mens rea*?

g) Existe-t-il d'autres circonstances ou facteurs susceptibles d'amener le juge de première instance à conclure que la vérification de la conformité à la loi était en réalité devenue une enquête criminelle?

Il faut aussi souligner que le présent pourvoi concerne l'ADRC. Il se pourrait toutefois que d'autres ministères ou organismes gouvernementaux fédéraux ou provinciaux aient des structures organisationnelles différentes. Il pourrait alors être nécessaire, pour cette raison, d'appliquer certains facteurs, dont les facteurs qui précèdent, en tenant compte de leur contexte particulier.

E. *Conséquences sur l'application de la Charte*

95

En ce qui concerne l'application de l'art. 8 de la *Charte*, l'arrêt *McKinlay Transport*, précité, établit clairement que le droit au respect de la vie privée du contribuable est très restreint en ce qui concerne les documents et registres qu'il doit tenir conformément à la LIR et produire au cours d'une vérification. En outre, lorsque le vérificateur a examiné ou exigé un document en vertu des par. 231.1(1) et 231.2(1), on ne peut véritablement prétendre que le contribuable

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the auditor will guard its confidentiality. It is well known, as Laskin C.J. stated in *Smerchanski*, *supra*, at p. 32, that "[t]he threat of prosecution underlies every tax return if a false statement is knowingly made in it". It follows that there is nothing preventing auditors from passing to investigators their files containing validly obtained audit materials. That is, there is no principle of use immunity that prevents the investigators, in the exercise of their investigative function, from making use of evidence obtained through the proper exercise of the CCRA's audit function. Nor, in respect of validly obtained audit information, is there any principle of derivative use immunity that would require the trial judge to apply the "but for" test from *S. (R.J.)*, *supra*. If a particular piece of evidence comes to light as a result of the information validly contained in the auditor's file, then investigators may make use of it.

96 On the other hand, with respect to s. 7 of the *Charter*, when the predominant purpose of a question or inquiry is the determination of penal liability, the "full panoply" of *Charter* rights are engaged for the taxpayer's protection. There are a number of consequences that flow from this. First, no further statements may be compelled from the taxpayer by way of s. 231.1(1)(*d*) for the purpose of advancing the criminal investigation. Likewise, no written documents may be inspected or examined, except by way of judicial warrant under s. 231.3 of the ITA or s. 487 of the *Criminal Code*, and no documents may be required, from the taxpayer or any third party for the purpose of advancing the criminal investigation. CCRA officials conducting inquiries, the predominant purpose of which is the determination of penal liability, do not have the benefit of the ss. 231.1(1) and 231.2(1) requirement powers.

97 The predominant purpose test does not thereby prevent the CCRA from conducting parallel criminal investigations and administrative audits. The fact

s'attendait raisonnablement à ce que le vérificateur en préserve la confidentialité. Comme le juge en chef Laskin l'a affirmé dans l'arrêt *Smerchanski*, précité, p. 32, il est bien établi qu'« [a]ucune déclaration d'impôt n'échappe à la menace de poursuites en cas de déclaration frauduleuse délibérée ». Il s'ensuit donc que rien n'empêche les vérificateurs de transmettre leurs dossiers, qui renferment des documents de vérification validement obtenus, aux enquêteurs. Ainsi, aucun principe d'immunité contre l'utilisation n'empêche les enquêteurs, dans l'exercice de leur fonction d'enquête, d'utiliser des éléments de preuve obtenus dans l'exercice régulier de la fonction de vérification de l'ADRC. En ce qui concerne les renseignements validement obtenus au cours d'une vérification, il n'existe pas non plus de principe d'immunité contre l'utilisation de la preuve dérivée qui exigerait du juge de première instance qu'il applique le critère « n'eût été » formulé dans *S. (R.J.)*, précité. Lorsque des renseignements validement contenus dans le dossier du vérificateur révèlent un élément de preuve particulier, les enquêteurs peuvent l'utiliser.

Par contre, en ce qui concerne l'application de l'art. 7 de la *Charte*, lorsqu'un examen ou une question a pour objet prédominant d'établir la responsabilité pénale du contribuable, « toute la panoplie » des droits garantis par la *Charte* entrent en jeu pour le protéger. Il en résulte certaines conséquences. Premièrement, le contribuable ne peut être contraint de faire aucune nouvelle déclaration sous le régime de l'al. 231.1(1)*d*) pour faire progresser l'enquête criminelle. De même, aucun document écrit ne peut être inspecté ni examiné, sauf sur obtention d'un mandat judiciaire sous le régime des art. 231.3 de la LIR ou 487 du *Code criminel*, et ni le contribuable, ni les tiers ne peuvent être contraints à produire des documents pour les besoins de l'enquête criminelle. Les fonctionnaires de l'ADRC qui procèdent à un examen ayant pour objet prédominant d'établir la responsabilité pénale du contribuable ne peuvent exercer les pouvoirs de contrainte conférés par les par. 231.1(1) et 231.2(1).

Le critère de l'objet prédominant n'empêche pas l'ADRC de mener parallèlement une enquête criminelle et une vérification administrative. Le fait

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that the CCRA is investigating a taxpayer's penal liability, does not preclude the possibility of a simultaneous investigation, the predominant purpose of which is a determination of the same taxpayer's tax liability. However, if an investigation into penal liability is subsequently commenced, the investigators can avail themselves of that information obtained pursuant to the audit powers prior to the commencement of the criminal investigation, but not with respect to information obtained pursuant to such powers subsequent to the commencement of the investigation into penal liability. This is no less true where the investigations into penal liability and tax liability are in respect of the same tax period. So long as the predominant purpose of the parallel investigation actually is the determination of tax liability, the auditors may continue to resort to ss. 231.1(1) and 231.2(1). It may well be that there will be circumstances in which the CCRA officials conducting the tax liability inquiry will desire to inform the taxpayer that a criminal investigation also is under way and that the taxpayer is not obliged to comply with the requirement powers of ss. 231.1(1) and 231.2(1) for the purposes of the criminal investigation. On the other hand, the authorities may wish to avail themselves of the search warrant procedures under ss. 231.3 of the ITA or 487 of the *Criminal Code* to access the documents necessary to advance the criminal investigation. Put another way, the requirement powers of ss. 231.1(1) and 231.2(1) cannot be used to compel oral statements or written production for the purpose of advancing the criminal investigation.

In summary, wherever the predominant purpose of an inquiry or question is the determination of penal liability, criminal investigatory techniques must be used. As a corollary, all *Charter* protections that are relevant in the criminal context must apply.

F. *Summary*

By way of summary, the following points emerge:

1. Although the ITA is a regulatory statute, a distinction can be drawn between the audit

que l'ADRC enquête sur la responsabilité pénale d'un contribuable n'écarte pas la possibilité que soit menée simultanément une enquête dont l'objet prédominant consiste à évaluer l'obligation fiscale du même contribuable. Toutefois, si une enquête sur la responsabilité pénale est engagée postérieurement, les enquêteurs peuvent utiliser les renseignements obtenus conformément aux pouvoirs de vérification avant le début de l'enquête criminelle, mais non les renseignements obtenus conformément à ces pouvoirs après le début de l'enquête sur la responsabilité pénale. Cela vaut tout autant lorsque les enquêtes touchant la responsabilité pénale et l'obligation fiscale visent la même période d'imposition. Tant que l'enquête parallèle a effectivement pour objet prédominant d'évaluer l'obligation fiscale du contribuable, les vérificateurs peuvent continuer d'avoir recours aux par. 231.1(1) et 231.2(1). Il pourrait bien survenir des circonstances dans lesquelles les fonctionnaires de l'ARDC qui évaluent l'obligation fiscale du contribuable voudront l'informer qu'une enquête criminelle est également en cours et qu'il n'est pas tenu de se soumettre aux pouvoirs de contrainte prévus par les par. 231.1(1) et 231.2(1) pour les besoins de l'enquête criminelle. Par contre, les autorités pourraient décider d'avoir recours à la procédure de délivrance d'un mandat de perquisition prévue aux art. 231.3 de la LIR ou 487 du *Code criminel* pour avoir accès aux documents nécessaires à l'enquête criminelle. En d'autres termes, les pouvoirs de contrainte conférés par les par. 231.1(1) et 231.2(1) ne peuvent être exercés pour obtenir des déclarations verbales ou la production de documents écrits dans le but de faire progresser une enquête criminelle.

98 En bref, dès qu'un examen ou une question a pour objet prédominant d'établir la responsabilité pénale du contribuable, il faut utiliser les techniques d'enquête criminelle. À titre corollaire, toutes les garanties prévues par la *Charte*, pertinentes dans le contexte criminel, s'appliquent obligatoirement.

F. *Résumé*

99 Voici, en résumé, les points qui se dégagent :

1. Bien que la LIR soit une loi de nature réglementaire, il est possible d'établir une

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Solicitors for the appellant: Macleod Dixon, Calgary.

Solicitor for the respondent: The Department of Justice, Vancouver.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

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

Solicitor for the intervener the Criminal Lawyers' Association (Ontario): Scott K. Fenton, Toronto.

Procureurs de l'appelant : Macleod Dixon, Calgary.

Procureur de l'intimée : Le ministère de la Justice, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Le ministère du Procureur général, Toronto.

Procureur de l'intervenant le procureur général du Québec : Le ministère de la Justice, Sainte-Foy.

Procureur de l'intervenante la Criminal Lawyers' Association (Ontario) : Scott K. Fenton, Toronto.

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Kligman per Letourneau JA.
Found at **Tab 49, Volume 9** of Google's BOA.

Supp.), c. 1 (Act).

[mod. par L.C. 2000, ch. 30, art. 176] de la *Loi de l'impôt sur le revenu*, L.R.C. (1985) (5e suppl.), ch. 1 (la Loi).

[3] I do not accept the respondent's contention that the appellants should comply with the requirements and, as it was done in *R. v. Jarvis*, [2002] 3 S.C.R. 757, later oppose the admissibility into evidence of the information thus provided. In *Jarvis*, the documents had already been obtained and the only option left to the accused in his criminal trial for tax evasion was to object to their admissibility. The respondent's contention means that a taxpayer would be prohibited from asserting preventively his Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] right to protection against unreasonable searches and seizures and from impeding its imminent violation. He would only be entitled to apply for a discretionary remedy under subsection 24(2) of the Charter. This would seriously undermine the beneficial and protective effect of the Charter.

[3] Je n'accepte pas la prétention de l'intimé selon laquelle les appelantes devraient se conformer aux demandes péremptoires et, comme on l'a fait dans l'affaire *R. c. Jarvis*, [2002] 3 R.C.S. 757, s'opposer par la suite à l'admissibilité en preuve des renseignements ainsi fournis. Dans l'affaire *Jarvis*, les documents avaient déjà été obtenus et la seule possibilité qui s'offrait à l'accusé dans son procès criminel pour fraude fiscale était de s'opposer à l'admissibilité de ces documents. Selon la prétention de l'intimé, il serait interdit au contribuable de faire valoir à titre préventif le droit à la protection contre les fouilles, les perquisitions et les saisies abusives qui lui est reconnu par la Charte [*Charte canadienne des droits et libertés*, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.) [L.R.C. (1985), appendice II, nº 44]] et d'empêcher la violation imminente de ce droit. Le contribuable pourrait uniquement demander une réparation discrétionnaire en vertu du paragraphe 24(2) de la Charte, ce qui minerait sérieusement l'effet bénéfique protecteur de la Charte.

[4] In *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, at page 160, Dickson J. [as he then was] stressed the importance of prior authorization before a search is conducted:

> If the issue to be resolved in assessing the constitutionality of searches under s. 10 were in fact the governmental interest in carrying out a given search outweighed that of the individual in resisting the governmental intrusion upon his privacy, then it would be appropriate to determine the balance of the competing interests after the search had been conducted. Such a *post facto* analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation. [Emphasis in original.]

[4] Dans l'arrêt *Hunter et autres c. Southam Inc.*, [1984] 2 R.C.S. 145, à la page 160, le juge Dickson [alors juge puîné] a insisté sur le fait qu'il est important d'obtenir au préalable l'autorisation nécessaire pour procéder à une fouille ou à une perquisition:

> Si la question à résoudre en appréciant la constitutionnalité des fouilles et des perquisitions effectuées en vertu de l'art. 10 était de savoir si en fait le droit du gouvernement d'effectuer une fouille ou une perquisition donnée l'emporte sur celui d'un particulier de résister à l'intrusion du gouvernement dans sa vie privée, il y aurait alors lieu de déterminer la prépondérance des droits en concurrence après que la perquisition a été effectuée. Cependant, une telle analyse après le fait entrerait sérieusement en conflit avec le but de l'art. 8. Comme je l'ai déjà dit, cet article a pour but de protéger les particuliers contre les intrusions injustifiées de l'État dans leur vie privée. Ce but requiert un moyen de prévenir les fouilles et les perquisitions injustifiées avant qu'elles ne se produisent et non simplement un moyen de déterminer, après le fait, si au départ elles devaient être effectuées. Cela ne peut se faire, à mon avis, que par un système d'autorisation préalable et non de validation subséquente. [Souligné dans l'original.]

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Wilson J. extended this rationale to seizures in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425. At page 495, she wrote:

> In my opinion, Dickson J.'s remarks with regard to searches are equally applicable to seizures. It makes no sense to say that s. 8 is only engaged once the private information becomes public. If that were the case, the protections afforded by s. 8 would be completely illusory. The fact that an individual can challenge the validity of the order before producing the documents goes, in my opinion, not to the question whether a seizure has occurred but to the question whether the seizure is a reasonable one. [Emphasis added.]

[5] Furthermore, I believe that the Supreme Court made it clear, in the *Jarvis* case, that subsection 231.2(1) of the Act is not available for the purpose of criminal investigations, i.e. investigations whose predominant purpose is to establish the penal liability of the taxpayer. At paragraphs 88, 97-98, Iacobucci and Major JJ. wrote in this respect:

> In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1).
>
> . . .
>
> Put another way, the requirement powers of ss. 231.1(1) and 231.2(1) cannot be used to compel oral statements or written production for the purpose of advancing the criminal investigation.
>
> In summary, wherever the predominant purpose of an inquiry or question is the determination of penal liability, criminal investigatory techniques must be used. As a corollary, all *Charter* protections that are relevant in the criminal context must apply. [My emphasis.]

These conclusions of the Supreme Court mean that, in the context of a criminal investigation, barring exigent circumstances, searches and seizures are subject for their validity to prior judicial authorization. Their legality cannot be secured by an after-the-fact validation as it turned out to be the case in the present instance.

La juge Wilson a appliqué ce raisonnement aux saisies dans l'arrêt *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425. À la page 495, la juge a dit ce qui suit:

> À mon avis, ce que dit le juge Dickson concernant les fouilles et les perquisitions s'applique également aux saisies. Il est illogique de prétendre que l'art. 8 ne joue que dès que les renseignements confidentiels deviennent publics. S'il en était ainsi, l'art. 8 n'accorderait qu'une protection tout à fait illusoire. Le fait qu'un individu puisse contester la validité de l'ordonnance avant de produire les documents est, à mon avis, pertinent non pas relativement à la question de savoir s'il y a eu une saisie, mais relativement à celle de savoir si la saisie effectuée est raisonnable. [Non souligné dans l'original.]

[5] En outre, je crois que la Cour suprême a clairement dit, dans l'arrêt *Jarvis*, que le paragraphe 231.2(1) de la Loi ne peut pas être invoqué pour les besoins d'une enquête criminelle, c'est-à-dire une enquête dont l'objet prédominant est d'établir la responsabilité pénale du contribuable. Aux paragraphes 88, 97 et 98, les juges Iacobucci et Major ont écrit ce qui suit sur ce point:

> À notre avis, lorsqu'un examen dans un cas particulier a pour objet prédominant d'établir la responsabilité pénale du contribuable, les fonctionnaires de l'ADRC doivent renoncer à leur faculté d'utiliser les pouvoirs d'inspection et de demande péremptoire que leur confèrent les par. 231.1(1) et 231.2(1).
>
> [. . .]
>
> En d'autres termes, les pouvoirs de contrainte conférés par les par. 231.1(1) et 231.2(1) ne peuvent être exercés pour obtenir des déclarations verbales ou la production de documents écrits dans le but de faire progresser une enquête criminelle.
>
> En bref, dès qu'un examen ou une question a pour objet prédominant d'établir la responsabilité pénale du contribuable, il faut utiliser les techniques d'enquête criminelle. À titre corollaire, toutes les garanties prévues par la *Charte*, pertinentes dans le contexte criminel, s'appliquent obligatoirement. [Non souligné dans l'original.]

Ces conclusions de la Cour suprême signifient que, dans le contexte d'une enquête criminelle, en l'absence de circonstances urgentes, les fouilles, les perquisitions et les saisies doivent, pour être valides, faire l'objet d'une autorisation judiciaire préalable. Leur légalité ne peut pas être assurée par une validation subséquente comme c'est ici le cas.

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[6] I should add that the Supreme Court's conclusions relating to the availability of the requirement powers in subsection 231.2(1) of the Act do not distinguish between an individual and a corporate taxpayer: such powers are not available for the purpose of advancing a criminal investigation. I agree with my colleague that the Motions Judge, after having found that the investigation was a criminal investigation, could not use Charter considerations to authorize the use of the requirement powers. The Charter protections are a corollary to a finding that the investigation is a criminal investigation. They cannot be resorted to in order to undermine, or circumvent, the legal consequences of that finding.

[6] J'aimerais ajouter que, dans les conclusions qu'elle a tirées au sujet de la possibilité d'utiliser les pouvoirs de contrainte conférés au paragraphe 231.2(1) de la Loi, la Cour suprême ne fait pas de distinction entre un particulier et une société: ces pouvoirs ne peuvent pas être utilisés pour faire progresser une enquête criminelle. Je suis d'accord avec ma collègue lorsqu'elle dit que le juge des requêtes, après avoir conclu que l'enquête était une enquête criminelle, ne pouvait pas se fonder sur des considérations liées à la Charte pour autoriser le recours aux pouvoirs de contrainte. Les protections accordées par la Charte sont le corollaire d'une conclusion selon laquelle l'enquête est une enquête criminelle. On ne saurait y avoir recours afin de miner ou de contourner les effets juridiques de cette conclusion.

The determination of a preliminary issue

[7] Whether the inquiry's predominant purpose was to establish the penal liability of the taxpayers was a key issue common to all five applicants before the Motions Judge. Two of the applicants were individuals who were the directors of the three other corporate applicants. The conclusion of the Judge was adverse to the Minister who did not appeal it with respect to the two individuals. However, the Minister attacked that conclusion in the context of this appeal by the corporate appellants.

La détermination d'une question préliminaire

[7] La question de savoir si l'objet prédominant de l'enquête était d'établir la responsabilité pénale des contribuables était une question cruciale commune aux cinq demandeurs devant le juge des requêtes. Deux demandeurs étaient des particuliers; ils étaient administrateurs des trois sociétés demanderesses. La conclusion du juge était défavorable au ministre, qui n'a pas interjeté appel à l'égard des deux particuliers. Toutefois, le ministre a contesté cette conclusion dans le contexte du présent appel interjeté par les sociétés.

[8] At the hearing, an issue arose as to whether the Minister could relitigate this adverse conclusion without either appealing it or filing a cross-appeal in the present appeal. The Minister, having failed to appeal against the decision favourable to the two individuals on this issue, the argument goes, would be prohibited from seeking a reversal of that conclusion. Concerns were expressed about the possibility of conflicting decisions whereby the very same inquiry would receive two different and incompatible qualifiers: criminal in nature for two of the applicants and civil or administrative for the other three.

[8] À l'audience, la question s'est posée de savoir si le ministre pouvait débattre de nouveau cette conclusion défavorable sans interjeter appel sur ce point ou sans interjeter un appel incident. Selon l'argument soumis, le ministre, qui n'en avait pas appelé de la décision qui avait été rendue en faveur des deux particuliers sur ce point, ne pouvait pas demander l'annulation de cette conclusion. Certaines préoccupations ont été exprimées au sujet de la possibilité que des décisions contradictoires soient rendues, par lesquelles une même enquête serait qualifiée de deux façons non seulement différentes, mais incompatibles: elle serait de nature criminelle pour deux demandeurs et de nature civile ou administrative pour les trois autres.

[9] Upon careful consideration of the matter, I have come to the conclusion that the doctrine of issue estoppel, which can arise when a party wants to relitigate an issue that has been decided in an earlier case, does not

[9] J'ai minutieusement examiné la question et je suis arrivé à la conclusion selon laquelle la doctrine de l'irrecevabilité découlant d'une question déjà tranchée (*issue estoppel*), qui peut être invoquée lorsqu'une partie

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or enforcement" or, in French, "*pour l'application et l'exécution*" of the Act. And that although these terms are, at first glance, extremely broad, they do not include the prosecution of section 239 offences. At paragraph 88, they observed that "where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1)" of the Act. Search warrants under section 231.3 of the Act or section 487 of the *Criminal Code* [R.S.C., 1985, c. C-46] are then required (paragraph 83).

l'exécution» ou, en anglais, «*for any purpose related to the administration or enforcement*» de la Loi et que, bien que ces expressions soient à première vue extrêmement générales, elles n'incluent pas la poursuite des infractions prévues à l'article 239. Au paragraphe 88, les juges ont fait remarquer que «lorsqu'un examen dans un cas particulier a pour objet prédominant d'établir la responsabilité pénale du contribuable, les fonctionnaires de l'ADRC doivent renoncer à leur faculté d'utiliser les pouvoirs d'inspection et de demande péremptoire que leur confèrent les paragraphes 231.1(1) et 231.2(1)» de la Loi. Les mandats de perquisition dont il est question à l'article 231.3 de la Loi et à l'article 487 du *Code criminel* [L.R.C. (1985), ch. C-46] sont ensuite nécessaires (paragraphe 83).

[139] Having found that a criminal investigation had begun, a conclusion, I repeat, I do not share, the Motions Judge could not have concluded to the validity of the requirements under the Charter. As a matter of statutory construction, search warrants would have been required if such a situation had arisen.

[139] Puisqu'il a conclu qu'une enquête criminelle avait été engagée, conclusion que je ne partage pas comme je l'ai déjà dit, le juge des requêtes n'aurait pas pu conclure à la validité des demandes péremptoires en vertu de la Charte. Sur le plan de l'interprétation législative, des mandats de perquisition auraient été nécessaires en pareil cas.

IX. Disposition

[140] For the above reasons, I would dismiss this appeal with costs.

IX. Dispositif

[140] Pour les motifs susmentionnés, je rejette l'appel avec dépens.

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Found at **Tab 58, Volume 11** of Google's BOA.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***R. v. Alexander,***
2003 BCCA 386

Date: 20030627
Docket: CA029458

Between:

Regina

Respondent

And

William John Alexander

Appellant

Before: The Honourable Madam Justice Southin
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Hollinrake

D.A. Betton — Counsel for the Appellant

R. Flannigan — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
April 3, 2003

Place and Date of Judgment: Vancouver, British Columbia
June 27, 2003

Written Reasons by:
The Honourable Mr. Justice Hollinrake

Concurred in by:
The Honourable Madam Justice Southin
The Honourable Madam Justice Ryan

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(ii) any person.

[7] The appellant identifies the error of the trial judge as being one of law "by finding that the search was authorized by the Forest Practices Code; and . . . in admitting the evidence of the shake blocks . . . . "

[8] The Crown says the trial judge made no such error and that the "inspection/search" was not contrary to s. 8 of the ***Charter***. In the alternative, the Crown says if it could be said the "inspection/search" violated the appellant's s. 8 rights "the evidence obtained from such inspection/search was admissible pursuant to s. 24(2) of the ***Charter***."

[9] I have concluded that the search was contrary to the appellant's s. 8 rights but that the evidence is admissible against him under s. 24(2) of the ***Charter***.

[10] On the issue of s. 8 of the ***Charter***, the trial judge concluded that "search and inspection as set out in section 108 are one and the same." The view I take of this case is such that it is not necessary for me to decide whether what happened here was a search or an inspection within s. 108 of the ***Code***.

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[17] The question before this Court is what was the predominant purpose of the inquiry at the relevant time entered into by Constable Harvey and the answer to that question will determine the application of ***Charter*** jurisprudence to this case.

[18] To put this question into the factual background of this case, can it be said that at the time Constable Harvey opened the back of the cube van and saw the cedar blocks, was this a part of the regulatory power under s. 108 of the ***Code***? Or was the predominant purpose of this opening of the van door done for the purpose of determination of penal liability? If for a penal liability purpose, then it cannot be said this activity was authorized by s. 108 of the ***Code*** as an inspection but rather must be seen as a warrantless search within ***Charter*** jurisprudence. If viewed as a warrantless search, then s. 24(2) of the ***Charter*** is engaged. On the issue of predominant purpose, I have concluded that at the relevant time this purpose was the determination of penal liability.

[19] In ruling on the *voir dire* as to the admissibility of certain statements made by the appellant to Constable Harvey, the trial judge said this:

> THE COURT: Insofar as the issue of whether or not your client's right to be informed of his right to counsel was breached, I'm of the view that

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

The *Competition Act (R.S.C. , 1985, c. C-34)*

Duration of inquiry

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

Extension

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

Sending draft to certain persons

(7) Before the report is published, the Commissioner must send to every person who was required to do anything under an order made under subsection 11(1) a complete or partial draft of the report and inform the person that they may, within three working days after the day on which it was sent, provide the Commissioner with the person's concerns regarding factual inaccuracies or confidential information that should not be disclosed in the final report.
2023, c. 31, s. 3.

Order for oral examination, production or written return

11 (1) If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 or 10.1 and that a person has or is likely to have information that is relevant to the inquiry, the judge may order the person to

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

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

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

Records or information in possession of affiliate

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

(a) produce the records; or

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

No person excused from complying with order

(3) No person shall be excused from complying with an order under subsection (1) or (2) on the ground that the testimony, record or other thing or return required of the person may tend to criminate the person or subject him to any proceeding or penalty, but no testimony given by an individual pursuant to an order made under paragraph (1)(a), or return made by an individual pursuant to an order made under paragraph (1)(c), shall be used or received against that individual in any criminal proceedings thereafter instituted against him, other than a prosecution under section 132 or 136 of the *Criminal Code*.

Effect of order

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

Person outside Canada

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

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

Witness competent and compellable

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

Fees

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

Representation by counsel

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

Attendance of person whose conduct is being inquired into

Application of *Criminal Code* — preservation demand and orders for preservation or production of data

14.1 (1) Sections 487.012, 487.013, 487.015, 487.016 and 487.018 of the *Criminal Code*, which apply to the investigation of offences under any Act of Parliament, also apply, with any modifications that the circumstances require,

(a) to an investigation in relation to a contravention of an order made under section 32, 33 or 34 or Part VII.1 or VIII; or

(b) to an investigation in relation to whether grounds exist for the making of an order under Part VII.1 or VIII.

The *Competition Act (R.S.C., 1985, c. C-34)*

Clarification

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

2014, c. 31, s. 29.

Warrant for entry of premises

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

(a) that there are reasonable grounds to believe that

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

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

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

(b) that there are reasonable grounds to believe that there is, on any premises, any record or other thing that will afford evidence with respect to the circumstances referred to in subparagraph (a)(i), (ii) or (iii), as the case may be,

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

(c) enter the premises, subject to such conditions as may be specified in the warrant, and

(d) search the premises for any such record or other thing and copy it or seize it for examination or copying.

Contents of warrant

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

AND IN THE MATTER OF an inquiry under section 10 of the *Competition Act* relating to certain alleged anti-competitive conduct in the markets for e-books in Canada;

AND IN THE MATTER OF an *ex parte* application by the Commissioner of Competition for an Order requiring Pearson Canada Inc. and Penguin Canada Books Inc. to produce records pursuant to paragraph 11(1)(*b*) of the *Competition Act* and to make and deliver written returns of information pursuant to paragraph 11(1)(*c*) of the *Competition Act*.

BETWEEN:

The Commissioner of Competition (*Applicant*)

v.

Pearson Canada Inc. and **Penguin Canada Books Inc.** (*Respondents*)

INDEXED AS: CANADA (COMMISSIONER OF COMPETITION) v. PEARSON CANADA INC.

Federal Court, Crampton C.J.—Ottawa, February 26 and April 23, 2014.

Competition — Ex parte application by Commissioner of Competition for order requiring respondents to produce records pursuant to Competition Act (Act), s. 11(1)(b), make and deliver written returns pursuant to Act, s. 11(1)(c) — Respondents publishers and distributors of books — Commissioner commencing inquiry under Act, s. 10(1)(b)(ii), on basis Commissioner had reason to believe grounds existed for making order with respect to certain alleged anti-competitive conduct to restrict price competition — Issues: Court's role on applications under s. 11(1); scope of information sought by Commissioner; relevance of arguments going to substantive merits of Commissioner's inquiry; role of respondents in such applications — Application under Act, ss. 11(1)(b),(c), for production of records and written returns simply requiring Court to be satisfied of two things, namely,

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AFFAIRE INTÉRESSANT la *Loi sur la concurrence*, L.R.C. 1985, c. C-34, modifiée;

ET une enquête en vertu de l'article 10 de la *Loi sur la concurrence* relative à certaines conduites anticoncurrentielles sur les marchés des livres au Canada;

ET une demande *ex parte* déposée par le commissaire de la concurrence en vue d'obtenir une ordonnance enjoignant à Pearson Canada Inc. et Penguin Canada Books Inc. de produire des documents en vertu de l'alinéa 11(1)*b*) de la *Loi sur la concurrence* et de préparer et donner des déclarations écrites conformément à l'alinéa 11(1)*c*) de la *Loi sur la concurrence*.

ENTRE :

Le commissaire de la concurrence (*demandeur*)

c.

Pearson Canada Inc. et **Penguin Canada Books Inc.** (*défenderesses*)

RÉPERTORIÉ : CANADA (COMMISSAIRE DE LA CONCURRENCE) c. PEARSON CANADA INC.

Cour fédérale, juge en chef Crampton—Ottawa, 26 février et 23 avril 2014.

Concurrence — Demande ex parte déposée par le commissaire de la concurrence en vue d'obtenir une ordonnance enjoignant aux défenderesses de produire des documents en vertu de l'art. 11(1)b) de la Loi sur la concurrence (la Loi) et de préparer et donner des déclarations écrites conformément à l'art. 11(1)c) de la Loi — Les défenderesses sont des éditeurs et des distributeurs de livres — Le commissaire a ouvert une enquête en vertu de l'art. 10(1)b)(ii) de la Loi au motif qu'il avait des raisons de croire qu'il existait des motifs justifiant une ordonnance relativement à certains comportements anticoncurrentiels visant à restreindre la concurrence — Il s'agissait de savoir : le rôle que joue la Cour dans le contexte de demandes faites en vertu de l'art. 11(1); la portée des renseignements que le commissaire cherche à obtenir; la pertinence des arguments relatifs au bien-fondé de l'enquête

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SOLICITORS OF RECORD

Deputy Attorney General of Canada for applicant.
Blake, Cassels & Graydon LLP, Toronto, for respondents.

AVOCATS INSCRITS AU DOSSIER

Le sous-procureur général du Canada pour le demandeur.
Blake, Cassels & Graydon LLP, Toronto, pour les défenderesses.

The following are the reasons for order rendered in English by

[1] CRAMPTON C.J.: These are the reasons for the order that I issued in this proceeding on March 3, 2014. In that order, I granted the *ex parte* application by the Commissioner of Competition [Commissioner] for the production of records and the delivery of written returns by the respondents pursuant to paragraphs 11(1)(*b*) and 11(1)(*c*) of the *Competition Act*, R.S.C., 1985, c. C-34 (the Act), respectively.

[2] The purpose of these reasons is to clarify (i) the Court's role on applications under subsection 11(1), particularly with respect to the exercise of its discretion and what is expected from the Commissioner; (ii) the scope of information sought by the Commissioner; and (iii) the relevance of arguments going to the substantive merits of the Commissioner's inquiry.

[3] In addition, these reasons will also clarify the role of respondents in such applications.

[4] For the reasons set out below, the focus of the Court's attention in applications made under section 11 is not on whether the Commissioner has disclosed sufficient information to satisfy the Court that the Commissioner's inquiry is a *bona fide* one and that there is reason to believe that grounds exist for the making of an order under a specific section in Part VIII of the Act, or under Part VIII generally. Instead, in the typical proceedings initiated under section 11, the Court's focus will be on satisfying itself that (i) an inquiry is in fact being made; (ii) the Commissioner has provided full and frank disclosure; (iii) the information or records described in the order being sought are relevant to the inquiry in question; and (iv) the scope of such information or records is not excessive, disproportionate or unnecessarily burdensome.

Ce qui suit est la version française des motifs de l'ordonnance rendus par

[1] LE JUGE EN CHEF CRAMPTON : Voici les motifs de l'ordonnance que j'ai rendue dans la présente instance le 3 mars 2014. Dans cette ordonnance, j'ai accueilli la demande *ex parte* déposée par le commissaire de la concurrence [le commissaire] en vue de la production de documents et de la remise de déclarations écrites par les défenderesses en application respectivement des alinéas 11(1)*b*) et 11(1)*c*) de la *Loi sur la concurrence*, L.R.C. (1985), ch. C-34 (la Loi).

[2] Les présents motifs ont pour objet de préciser : i) le rôle de la Cour dans le contexte de demandes faites en vertu du paragraphe 11(1), en particulier en ce qui a trait à l'exercice de son pouvoir discrétionnaire et de ce qui est attendu du commissaire; ii) la portée des renseignements que le commissaire cherche à obtenir; et iii) la pertinence des arguments relatifs au bien-fondé de l'enquête du commissaire.

[3] En outre, les présents motifs préciseront le rôle des défendeurs dans le cadre de ce type de demandes.

[4] Pour les motifs exposés ci-après, la Cour ne s'intéresse pas, dans le cadre des demandes déposées en vertu de l'article 11, à la question de savoir si le commissaire a communiqué suffisamment de renseignements pour convaincre la Cour que l'enquête est une véritable enquête et qu'il y a des raisons de croire qu'il existe des motifs justifiant le prononcé d'une ordonnance en vertu d'un article précis de la partie VIII de la Loi, ou en vertu de la partie VIII en général. Dans le cadre d'une instance typique introduite en vertu de l'article 11, la Cour s'intéressera plutôt à la question de savoir si elle est convaincue : i) qu'une enquête est effectivement menée; ii) que le commissaire a procédé à une divulgation complète et franche; iii) que les renseignements ou les documents décrits dans l'ordonnance demandée sont pertinents pour l'enquête en question; iv) que la portée

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[37] The present application concerns something very different, namely, an application under paragraphs 11(1)(*b*) and (*c*) of the Act for the production of written returns and documents. The test for the Court on such an application simply requires the Court to be satisfied of two things, namely, that an inquiry is being made under section 10 and that a person is likely to have information that is relevant to the inquiry. In contrast to the situation in *Symbol Technologies*, there is no requirement in section 11 for the Court to consider whether there is reason to believe, or reasonable grounds to believe, that grounds exist for the making of an order under Part VII.1 or Part VIII of the Act *(Air Canada*, above, at paragraph 20; *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research)*, 1995 CanLII 7315, 61 C.P.R. (3d) 137 (Ont. Gen. Div.), at paragraph 8). That function was given by Parliament to the Commissioner, pursuant to subparagraph 10(1)(*b*)(ii) of the Act. This is an important difference from the test that must be satisfied to obtain a search warrant under subparagraph 15(1)(*a*)(ii) of the Act. Under that provision, it is the Court which must be satisfied by information on oath or solemn affirmation that there are reasonable grounds to believe that grounds exist for the making of an order under Part VII.1 or Part VIII of the Act.

[38] In further support of their position that the Commissioner is required to provide, in the affidavit filed in support of a request for an order under section 11, some explanation of why there is reason to believe that the grounds referred to in subparagraph 10(1)(*b*)(ii) exist, the respondents relied upon the following statement of Justice Reed, in *Air Canada*, above, at paragraph 31:

> Section 11 provides that a judge may, not shall, issue an order. Residual discretion exists. Also, I cannot conclude that section 11 authorizes the issuing of an order to produce information if the Commissioner were acting on a "whim". I cannot envisage a court granting a section 11 order on the basis of a bald assertion by the Commissioner that an inquiry has been commenced. It seems to me that any judge would require more than that. He or she is likely to require some description of the

[37] La présente demande concerne quelque chose de très différent, à savoir, une demande de production de déclarations écrites et de documents en vertu des alinéas 11(1)*b*) et *c*) de la Loi. Selon le critère applicable à l'égard d'une telle demande, la Cour doit simplement être convaincue de deux choses, à savoir qu'une enquête est menée en vertu de l'article 10 et qu'une personne détient vraisemblablement des renseignements qui sont pertinents quant à cette enquête. Par contraste avec la situation dans l'affaire *Symbol Technologies*, l'article 11 n'exige pas que la Cour examine la question de savoir s'il existe des raisons de croire, ou des motifs raisonnables de croire, qu'il existe des motifs justifiant une ordonnance en vertu de la partie VII.1 ou de la partie VIII de la Loi (décision *Air Canada*, précitée, au paragraphe 20; *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research)*, 1995 CanLII 7315, 61 C.P.R. (3d) 137 (Div. gén. Ont.), au paragraphe 8). Le Parlement a donné cette fonction au commissaire au sous-alinéa 10(1)*b*)(ii) de la Loi. Il s'agit là d'une différence importante par rapport au critère auquel il doit être satisfait pour obtenir un mandat de perquisition en vertu du sous-alinéa 15(1)*a*)(ii) de la Loi. Aux termes de cette disposition, c'est la Cour qui doit être convaincue, d'après une dénonciation faite sous serment ou affirmation solennelle, qu'il existe des motifs raisonnables de croire qu'il existe des motifs justifiant une ordonnance en vertu de la partie VII.1 ou de la partie VIII de la Loi.

[38] Toujours au soutien de leur prétention selon laquelle le commissaire est tenu de fournir, dans l'affidavit déposé au soutien d'une demande d'ordonnance en vertu de l'article 11, certaines explications concernant pourquoi il y a des raisons de croire qu'il existe des motifs visés au sous-alinéa 10(1)*b*)(ii), les défenderesses ont invoqué le passage suivant des motifs de la juge Reed dans la décision *Air Canada*, précitée, au paragraphe 31 :

> L'article 11 prévoit qu'un juge peut, et non pas doit, rendre une ordonnance. Un pouvoir discrétionnaire résiduel existe. De plus, je ne peux pas conclure que l'article 11 permet de rendre une ordonnance obligeant à produire des renseignements si le commissaire agissait par « caprice ». Je ne peux pas concevoir qu'un tribunal puisse rendre une ordonnance en application de l'article 11 en se fondant sur la simple affirmation du commissaire qu'une enquête a été commencée. Il me

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CANADA

CONSOLIDATION

CODIFICATION

Income Tax Act

Loi de l'impôt sur le revenu

R.S.C. 1985, c. 1 (5th Supp.)

S.R.C. 1985, ch. 1 (5e suppl.)

NOTE

Application provisions are not included in the consolidated text; see relevant amending Acts.

NOTE

Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées.

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authorized person means a person authorized by the Minister for the purposes of sections 231.1 to 231.5; (*personne autorisée*)

document includes money, a security and a record; (*document*)

dwelling-house means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence and includes

(a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passageway, and

(b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence; (*maison d'habitation*)

judge means a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court. (*juge*)

[NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts and regulations.] ; R.S., 1985, c. 1 (5th Supp.), s. 231; 1998, c. 19, s. 228; 2001, c. 17, s. 181; 2018, c. 27, s. 22.

document Sont compris parmi les documents les registres. Y sont assimilés les titres et les espèces. (*document*)

juge Juge d'une cour supérieure compétente de la province où l'affaire prend naissance ou juge de la Cour fédérale. (*judge*)

maison d'habitation Tout ou partie de quelque bâtiment ou construction tenu ou occupé comme résidence permanente ou temporaire, y compris :

a) un bâtiment qui se trouve dans la même enceinte qu'une maison d'habitation et qui y est relié par une baie de porte ou par un passage couvert et clos;

b) une unité conçue pour être mobile et pour être utilisée comme résidence permanente ou temporaire et qui est ainsi utilisée. (*dwelling-house*)

personne autorisée Personne autorisée par le ministre pour l'application des articles 231.1 à 231.5 (*authorized person*)

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois et règlements modificatifs appropriés.] ; L.R. (1985), ch. 1 (5e suppl.), art. 231; 1998, ch. 19, art. 228; 2001, ch. 17, art. 181; 2018, ch. 27, art. 22.

Information gathering

231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

(a) inspect, audit or examine any document, including books and records, of a taxpayer or any other person that may be relevant in determining the obligations or entitlements of the taxpayer or any other person under this Act;

(b) examine any property or process of, or matter relating to, a taxpayer or any other person, an examination of which may assist the authorized person in determining the obligations or entitlements of the taxpayer or any other person under this Act;

(c) enter any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, except that, if the premises or place is a dwelling-house, the authorized person may enter the dwelling-house without the consent of the occupant only under the authority of a warrant under subsection (3);

(d) require a taxpayer or any other person to give the authorized person all reasonable assistance, to answer all proper questions relating to the administration or enforcement of this Act and

Collecte de renseignements

231.1 (1) Une personne autorisée, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, peut :

a) inspecter, vérifier ou examiner tous documents, y compris les livres et registres, d'un contribuable ou d'une autre personne qui peuvent être pertinents pour déterminer les obligations ou les droits du contribuable ou de cette autre personne en vertu de la présente loi;

b) examiner tout bien ou tout procédé d'un contribuable ou d'une autre personne ou toute matière le concernant ou la concernant, dont l'examen peut aider la personne autorisée à établir les obligations ou les droits du contribuable ou de cette autre personne en vertu de la présente loi;

c) pénétrer dans un lieu où est exploitée une entreprise, est gardé un bien, est faite une chose en rapport avec une entreprise ou sont tenus ou devraient l'être des livres ou registres, sauf que, si le lieu est une maison d'habitation, la personne autorisée ne peut y pénétrer sans la permission de l'occupant, qu'après l'obtention d'un mandat décerné en vertu du paragraphe (3);

d) requérir le contribuable ou toute autre personne de lui fournir toute l'aide raisonnable et de répondre à

(i) to attend with the authorized person, at a place designated by the authorized person, or by video-conference or by another form of electronic communication, and to answer the questions orally, and

(ii) to answer the questions in writing, in any form specified by the authorized person; and

(e) require a taxpayer or any other person to give the authorized person all reasonable assistance with anything the authorized person is authorized to do under this Act.

(2) [Repealed, 2022, c. 19, s. 54]

Application

(3) Where, on *ex parte* application by the Minister, a judge is satisfied by information on oath that

(a) there are reasonable grounds to believe that a dwelling-house is a premises or place referred to in paragraph 231.1(1)(c),

(b) entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and

(c) entry into the dwelling-house has been, or there are reasonable grounds to believe that entry will be, refused,

the judge may issue a warrant authorizing an authorized person to enter the dwelling-house subject to such conditions as are specified in the warrant but, where the judge is not satisfied that entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, the judge may

(d) order the occupant of the dwelling-house to provide to an authorized person reasonable access to any document or property that is or should be kept in the dwelling-house, and

(e) make such other order as is appropriate in the circumstances to carry out the purposes of this Act,

to the extent that access was or may be expected to be refused and that the document or property is or may be expected to be kept in the dwelling-house.

[NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts and regulations.] ; R.S., 1985, c. 1 (5th Supp.), s. 231.1; 1994, c. 21, s. 107; 2022, c. 19, s. 54.

toutes les questions pertinentes à l'application ou l'exécution de la présente loi ainsi que :

(i) de l'accompagner à un lieu désigné par celle-ci, de participer avec elle par vidéo-conférence ou par tout autre moyen de communication électronique à une rencontre, et de répondre à ses questions de vive voix,

(ii) de répondre aux questions par écrit, en la forme qu'elle précise;

e) requérir un contribuable ou toute autre personne de lui fournir toute l'aide raisonnable concernant quoi que ce soit qu'elle est autorisée à accomplir en vertu de la présente loi.

(2) [Abrogé, 2022, ch. 19, art. 54]

Mandat d'entrée

(3) Sur requête *ex parte* du ministre, le juge saisi peut décerner un mandat qui autorise une personne autorisée à pénétrer dans une maison d'habitation aux conditions précisées dans le mandat, s'il est convaincu, sur dénonciation sous serment, de ce qui suit :

a) il existe des motifs raisonnables de croire que la maison d'habitation est un lieu mentionné à l'alinéa (1)c);

b) il est nécessaire d'y pénétrer pour l'application ou l'exécution de la présente loi;

c) un refus d'y pénétrer a été opposé, ou il existe des motifs raisonnables de croire qu'un tel refus sera opposé.

Dans la mesure où un refus de pénétrer dans la maison d'habitation a été opposé ou pourrait l'être et où des documents ou biens sont gardés dans la maison d'habitation ou pourraient l'être, le juge qui n'est pas convaincu qu'il est nécessaire de pénétrer dans la maison d'habitation pour l'application ou l'exécution de la présente loi peut ordonner à l'occupant de la maison d'habitation de permettre à une personne autorisée d'avoir raisonnablement accès à tous documents ou biens qui sont gardés dans la maison d'habitation ou devraient y être gardés et rendre tout autre ordonnance indiquée en l'espèce pour l'application de la présente loi.

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois et règlements modificatifs appropriés.] ; L.R. (1985), ch. 1 (5e suppl.), art. 231.1; 1994, ch. 21, art. 107; 2022, ch. 19, art. 54.

Requirement to provide documents or information

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a listed international agreement or, for greater certainty, of a tax treaty with another country, by notice sent or served in accordance with subsection (1.1), require that any person provide, within such reasonable time as is stipulated in the notice,

(a) any information or additional information, including a return of income or a supplementary return; or

(b) any document.

Notice

(1.1) A notice referred to in subsection (1) may be

(a) served personally;

(b) sent by registered or certified mail; or

(c) sent electronically to a bank or credit union that has provided written consent to receive notices under subsection (1) electronically.

Unnamed persons

(2) The Minister shall not impose on any person (in this section referred to as a "third party") a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).

Judicial authorization

(3) A judge of the Federal Court may, on application by the Minister and subject to any conditions that the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this subsection referred to as the "group") if the judge is satisfied by information on oath that

(a) the person or group is ascertainable; and

(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.

(c) and (d) [Repealed, 1996, c. 21, s. 58(1)]

Production de documents ou fourniture de renseignements

231.2 (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et, pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), d'un accord international désigné ou d'un traité fiscal conclu avec un autre pays, par avis signifié ou envoyé conformément au paragraphe (1.1), exiger d'une personne, dans le délai raisonnable que précise l'avis :

a) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;

b) qu'elle produise des documents.

Avis

(1.1) L'avis visé au paragraphe (1) peut être :

a) soit signifié à personne;

b) soit envoyé par courrier recommandé ou certifié;

c) soit envoyé par voie électronique à une banque ou une caisse de crédit qui a consenti par écrit à recevoir les avis visés au paragraphe (1) par voie électronique.

Personnes non désignées nommément

(2) Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).

Autorisation judiciaire

(3) Sur requête du ministre, un juge de la Cour fédérale peut, aux conditions qu'il estime indiquées, autoriser le ministre à exiger d'un tiers la fourniture de renseignements ou la production de documents prévues au paragraphe (1) concernant une personne non désignée nommément ou plus d'une personne non désignée nommément — appelée « groupe » au présent paragraphe —, s'il est convaincu, sur dénonciation sous serment, de ce qui suit :

a) cette personne ou ce groupe est identifiable;

b) la fourniture ou la production est exigée pour vérifier si cette personne ou les personnes de ce groupe ont respecté quelque devoir ou obligation prévu par la présente loi;

(4) to (6) [Repealed, 2013, c. 33, s. 21]

[NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts and regulations.] ; R.S., 1985, c. 1 (5th Supp.), s. 231.2; 1996, c. 21, s. 58; 2000, c. 30, s. 176; 2007, c. 35, s. 63; 2013, c. 33, s. 21, c. 34, s. 353; 2021, c. 23, s. 55; 2024, c. 17, s. 71.

Search warrant

231.3 (1) A judge may, on *ex parte* application by the Minister, issue a warrant in writing authorizing any person named therein to enter and search any building, receptacle or place for any document or thing that may afford evidence as to the commission of an offence under this Act and to seize the document or thing and, as soon as practicable, bring it before, or make a report in respect of it to, the judge or, where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section.

Evidence in support of application

(2) An application under subsection 231.3(1) shall be supported by information on oath establishing the facts on which the application is based.

Evidence

(3) A judge may issue the warrant referred to in subsection 231.3(1) where the judge is satisfied that there are reasonable grounds to believe that

(a) an offence under this Act was committed;

(b) a document or thing that may afford evidence of the commission of the offence is likely to be found; and

(c) the building, receptacle or place specified in the application is likely to contain such a document or thing.

Contents of warrant

(4) A warrant issued under subsection 231.3(1) shall refer to the offence for which it is issued, identify the building, receptacle or place to be searched and the person alleged to have committed the offence and it shall be reasonably specific as to any document or thing to be searched for and seized.

Seizure of document

(5) Any person who executes a warrant under subsection 231.3(1) may seize, in addition to the document or thing referred to in that subsection, any other document or thing that the person believes on reasonable grounds affords evidence of the commission of an offence under

c) et d) [Abrogés, 1996, ch. 21, art. 58(1)]

(4) à (6) [Abrogés, 2013, ch. 33, art. 21]

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois et règlements modificatifs appropriés.] ; L.R. (1985), ch. 1 (5e suppl.), art. 231.2; 1996, ch. 21, art. 58; 2000, ch. 30, art. 176; 2007, ch. 35, art. 63; 2013, ch. 33, art. 21, ch. 34, art. 353; 2021, ch. 23, art. 55; 2024, ch. 17, art. 71.

Requête pour mandat de perquisition

231.3 (1) Sur requête *ex parte* du ministre, un juge peut décerner un mandat écrit qui autorise toute personne qui y est nommée à pénétrer dans tout bâtiment, contenant ou endroit et y perquisitionner pour y chercher des documents ou choses qui peuvent constituer des éléments de preuve de la perpétration d'une infraction à la présente loi, à saisir ces documents ou choses et, dès que matériellement possible, soit à les apporter au juge ou, en cas d'incapacité de celui-ci, à un autre juge du même tribunal, soit à lui en faire rapport, pour que le juge en dispose conformément au présent article.

Preuve au soutien de la requête

(2) La requête visée au paragraphe (1) doit être appuyée par une dénonciation sous serment qui expose les faits au soutien de la requête.

Preuve

(3) Le juge saisi de la requête peut décerner le mandat mentionné au paragraphe (1) s'il est convaincu qu'il existe des motifs raisonnables de croire ce qui suit :

a) une infraction prévue par la présente loi a été commise;

b) des documents ou choses qui peuvent constituer des éléments de preuve de la perpétration de l'infraction seront vraisemblablement trouvés;

c) le bâtiment, contenant ou endroit précisé dans la requête contient vraisemblablement de tels documents ou choses.

Contenu du mandat

(4) Un mandat décerné en vertu du paragraphe (1) doit indiquer l'infraction pour laquelle il est décerné, dans quel bâtiment, contenant ou endroit perquisitionner ainsi que la personne à qui l'infraction est imputée. Il doit donner suffisamment de précisions sur les documents ou choses à chercher et à saisir.

Saisie d'autres documents

(5) Quiconque exécute un mandat décerné en vertu du paragraphe (1) peut saisir, outre les documents ou choses mentionnés à ce paragraphe, tous autres documents ou choses qu'il croit, pour des motifs raisonnables, constituer des éléments de preuve de la perpétration d'une

Examining the Canadian *Competition Act* in the Digital Era

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

Submission by the Competition Bureau

February 8, 2022

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    2.3. The Act should better address acquisitions of emerging competitive threats

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3. Abuse of Dominance

    3.1. Abuse of dominance should cover all forms of anti-competitive conduct

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.

Timeline of Commissioner's Actions and Statements

Date	Event	Citation
Oct. 12, 2021	Bureau seeks first s. 11 order against Google	Google M.R., Vol. 6, Tab E(6)
Oct. 22, 2021	**First Section 11 Order granted**	**Google M.R., Vol. 6, Tab E(7)**
Oct. 22, 2021	Bureau publicizes the fact that it "obtained a court order to advance a civil investigation into conduct by Google related to its online advertising business"	Google M.R., Vol. 22, Tab H 102
Feb. 8, 2022	**Competition Bureau provides comments to Sen. Wetston, calling for the penalties in the Impugned Provision and explicitly identifying Google**	**Google M.R., Vol. 24, Tab H(130), Volume 24**
June 23, 2022	**Bill C-19, including the Impugned Provision, receives Royal Assent**	**Google M.R., Vol. 22 & 23, Tab H(104)**
June 24, 2022	Bureau issues news release observing that the Bill C-19 amendments "increase maximum fines and penalties for those who break the law"	Google M.R., Vol. 24, Tab H(126),
Oct. 25, 2023	Bureau issues bullet noting that "[a]s a result [of the amendments], we may seek higher AMPs than were possible prior to the amendments"	Google M.R., Vol. 25, Tab H(141), p. 8550
Jan. 31, 2024	Bureau seeks second s. 11 order against Google	Google M.R., Vol. 6, Tab E(11)
Feb. 12, 2024	**Second Section 11 Order granted**	**Google M.R., Vol. 6 , Tab E(12)**

Date	Event	Citation
Feb. 29, 2024	Bureau issues a press release that is "obtained a court order to gather information and advance an ongoing investigation into Google's online advertising practices in Canada"	Google M.R., Vol. 26, Tab H(157)
Apr. 15 & 22, 2024	Google makes productions in response to Second Section 11 Order	Google M.R., Vol. 6, Tab E(13)
Apr. 29, 2024	Google makes further productions in response to Second Section 11 Order	Google M.R., Vol. 6, Tab E(14)
May 28, 2024	Google makes further productions in response to Second Section 11 Order	Google M.R., Vol. 6, Tab E(15)
Nov. 28, 2024	**Commissioner brings this Application**	**N/A**

Exhibit L to Affidavit of Corinne Lester.
Found at **Tab E(12), Volume 6** of Google's Motion Record.

Cour fédérale

Date: 20240212

Docket: T-188-24

Ottawa, Ontario, February 12, 2024

PRESENT: Justice Andrew D. Little

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

AND IN THE MATTER OF an inquiry under section 10 of the *Competition Act* into the conduct by Google LLC and Google Canada Corporation reviewable under Parts VIII and VII.1 of the *Competition Act;*

AND IN THE MATTER OF an *ex parte* application by the Commissioner of Competition for an Order requiring the Respondent to produce records pursuant to paragraphs 11(1)(b) and 11(2)(a) of the *Competition Act* and to make and deliver written returns of information pursuant to paragraphs 11(1)(c) and 11(2)(b) of the *Competition Act.*

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION

Respondent

ORDER TO PRODUCE RECORDS AND MAKE AND DELIVER WRITTEN RETURNS OF INFORMATION

UPON the *ex parte* application made by the Commissioner of Competition ("**Commissioner**") for an Order pursuant to paragraphs 11(1)(b) and 11(1)(c), and subsection 11(2) of the *Competition Act*, R.S.C., 1985, c. C-34 ("**Act**"), which was heard this day at the Federal Court, Ottawa, Ontario;

DAVIES

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Elisa Kearney
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ekearney@dwpv.com

File 275107

Exhibit M to Affidavit of Corinne Lester.
Found at **Tab E(13), Volume 6** of Google's Motion Record.

April 15, 2024

PROTECTED AND CONFIDENTIAL – HIGHLY CONFIDENTIAL

BY EMAIL

Competition Bureau
Monopolistic Practices Directorate
Place du Portage Phase I
50 Victoria Street
Gatineau, QC K1A 0C9

Attention: Kristen McLean, Senior Competition Law Officer

Department of Justice
Competition Bureau Legal Services
Place du Portage Phase I
50 Victoria Street
Gatineau, QC K1A 0C9

Attention: Ian Clarke, Senior Counsel

Dear Kristen and Ian:

T-188-24 – Google Canada Corporation – Response to Section 14(a) of the Section 11 Order served February 28, 2024

I write with reference to the Section 11 Order of the Federal Court of Canada dated February 12, 2024 (the "**Order**") but served upon Google Canada Corporation ("**Google Canada**") on February 28, 2024.

On behalf of Google Canada, and in accordance with the timeframes established under the Order, please find attached as **Appendices "A"** and **"B"** the responses of Google Canada in respect of section 14(a) of the Order.

The information contained in and attached to this letter is either confidential or competitively sensitive to Google Canada and its affiliates (collectively "**Google**"), and/or customers and partners of Google (the "**Confidential Information**"). Moreover, the confidentiality of the information contained in Appendices "A" and "B" is protected under US law, including provisions of the *Antitrust Civil Process Act* as well as protective and confidentiality orders issued by US courts. The disclosure of the Confidential Information will reasonably be expected to: (i) result in material financial loss to Google or its customers and partners; (ii) prejudice Google's competitive position; (iii) result in the dissemination of highly confidential intellectual property and trade secrets belonging to Google, including but not limited to confidential algorithms, patents and technologies; (iv) damage the competitive position of Google's customers and partners; and/or (v) interfere with Google's contractual relations with third parties.

DAVIES

Accordingly, Google Canada requests that all Confidential Information be treated as confidential by the Bureau under section 29 of the *Competition Act* and the Bureau's own policies concerning confidentiality. It is Google Canada's expectation that the Confidential Information will be kept confidential and not be publicly disclosed by the Bureau or the Commissioner of Competition (the "**Commissioner**"), whether for the purposes of the administration or enforcement of the *Competition Act* or otherwise without: (i) the consent of Google Canada; or (ii) providing reasonable advance notice to Google Canada and obtaining confidentiality protections satisfactory to Google Canada. In particular, Google Canada expects the Bureau to redact Confidential Information and obtain appropriate protective orders in respect of Confidential Information before filing any Confidential Information or documents referring to Confidential Information with any court for any purpose. Google Canada would be pleased to provide the Bureau and the Commissioner with assistance in identifying the Confidential Information to be redacted from any documents that the Commissioner may wish to file with a court in the future.

Given the highly confidential nature of the information downloadable from the links in the Appendices to this cover letter, download rights are currently granted only to those individuals for whom the Bureau has requested download rights as of this date. Should additional personnel at the Bureau require download rights, please provide the names, titles, and email addresses of those individuals such that we can enable download permissions for them.

Please let me know if you have any questions.

Yours very truly,

Elisa Kearney

cc Hugh Craig and John Syme, *Competition Bureau Legal Services*
Chenyang Li, *Davies Ward Phillips & Vineberg LLP*

DAVIES

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File 275107

April 22, 2024

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BY EMAIL

Competition Bureau
Monopolistic Practices Directorate
Place du Portage Phase I
50 Victoria Street
Gatineau, QC K1A 0C9

Attention: Kristen McLean, Senior Competition Law Officer

Department of Justice
Competition Bureau Legal Services
Place du Portage Phase I
50 Victoria Street
Gatineau, QC K1A 0C9

Attention: Ian Clarke, Senior Counsel

Dear Kristen and Ian:

T-188-24 – Google Canada Corporation – Response to Section 14(a) of the Section 11 Order served February 28, 2024

I write with reference to the Section 11 Order of the Federal Court of Canada dated February 12, 2024 (the "**Order**") but served upon Google Canada Corporation ("**Google Canada**") on February 28, 2024, as well as Ms. Kearney's letter dated April 15, 2024.

As described in Appendix "B" to Ms. Kearney's letter of April 15, 2024, our firm has uploaded to our ShareFile the files relevant to Google Canada's response to Specification III.10 of the Order. Please find those files downloadable from the link below.

[redacted]

The information downloadable from the link above is confidential and competitively sensitive to Google Canada and its affiliates (collectively "**Google**"), and/or customers and partners of Google (the "**Confidential Information**"). Moreover, the Confidential Information is protected under US law, including provisions of the *Antitrust Civil Process Act* as well as protective and confidentiality orders issued by US courts. The disclosure of the Confidential Information will reasonably be expected to: (i) result in material financial loss to Google or its customers and partners; (ii) prejudice Google's competitive position; (iii) result in the dissemination of highly confidential intellectual property and trade secrets belonging to Google, including but not limited to confidential algorithms, patents and

DAVIES

technologies; (iv) damage the competitive position of Google's customers and partners; and/or (v) interfere with Google's contractual relations with third parties.

Accordingly, Google Canada requests that the Confidential Information be treated as confidential by the Bureau under section 29 of the *Competition Act* and the Bureau's own policies concerning confidentiality. It is Google Canada's expectation that the Confidential Information will be kept confidential and not be publicly disclosed by the Bureau or the Commissioner of Competition (the "**Commissioner**"), whether for the purposes of the administration or enforcement of the *Competition Act* or otherwise without: (i) the consent of Google Canada; or (ii) providing reasonable advance notice to Google Canada and obtaining confidentiality protections satisfactory to Google Canada. In particular, Google Canada expects the Bureau to redact the Confidential Information and obtain appropriate protective orders in respect of the Confidential Information before filing any Confidential Information or documents referring to the Confidential Information with any court for any purpose. Google Canada would be pleased to provide the Bureau and the Commissioner with assistance in identifying the Confidential Information to be redacted from any documents that the Commissioner may wish to file with a court in the future.

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Please let me know if you have any questions.

Yours very truly,

Chenyang Li

cc Hugh Craig and John Syme, *Competition Bureau Legal Services*
Elisa Kearney, *Davies Ward Phillips & Vineberg LLP*

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File 275107

Exhibit N to Affidavit of Corinne Lester.
Found at **Tab E(14), Volume 6** of Google's Motion Record.

April 29, 2024

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BY EMAIL

Competition Bureau
Monopolistic Practices Directorate
Place du Portage Phase I
50 Victoria Street
Gatineau, QC K1A 0C9

Attention: Kristen McLean, Senior Competition Law Officer

Department of Justice
Competition Bureau Legal Services
Place du Portage Phase I
50 Victoria Street
Gatineau, QC K1A 0C9

Attention: Ian Clarke, Senior Counsel

Dear Kristen and Ian:

T-188-24 – Google Canada Corporation – Response to Section 14(a) of the Section 11 Order served February 28, 2024

I write with reference to the Section 11 Order of the Federal Court of Canada dated February 12, 2024 (the "**Order**") but served upon Google Canada Corporation ("**Google Canada**") on February 28, 2024.

On behalf of Google Canada, and in accordance with the timeframes established under the Order, please find attached as **Appendices "A"** and **"B"** the responses of Google Canada in respect of section 14(b) of the Order.

The information contained in and attached to this letter is either confidential or competitively sensitive to Google Canada and its affiliates (collectively "**Google**"), and/or customers and partners of Google (the "**Confidential Information**"). Moreover, the confidentiality of the information contained in Appendices "A" and "B" is protected under US law, including provisions of the *Antitrust Civil Process Act* as well as protective and confidentiality orders issued by US courts. The disclosure of the Confidential Information will reasonably be expected to: (i) result in material financial loss to Google or its customers and partners; (ii) prejudice Google's competitive position; (iii) result in the dissemination of highly confidential intellectual property and trade secrets belonging to Google, including but not limited to confidential algorithms, patents and technologies; (iv) damage the competitive position of Google's customers and partners; and/or (v) interfere with Google's contractual relations with third parties.

DAVIES

Accordingly, Google Canada requests that all Confidential Information be treated as confidential by the Bureau under section 29 of the *Competition Act* and the Bureau's own policies concerning confidentiality. It is Google Canada's expectation that the Confidential Information will be kept confidential and not be publicly disclosed by the Bureau or the Commissioner of Competition (the "**Commissioner**"), whether for the purposes of the administration or enforcement of the *Competition Act* or otherwise without: (i) the consent of Google Canada; or (ii) providing reasonable advance notice to Google Canada and obtaining confidentiality protections satisfactory to Google Canada. In particular, Google Canada expects the Bureau to redact Confidential Information and obtain appropriate protective orders in respect of Confidential Information before filing any Confidential Information or documents referring to Confidential Information with any court for any purpose. Google Canada would be pleased to provide the Bureau and the Commissioner with assistance in identifying the Confidential Information to be redacted from any documents that the Commissioner may wish to file with a court in the future.

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Please let me know if you have any questions.

Yours very truly,

Elisa Kearney

cc Hugh Craig and John Syme, *Competition Bureau Legal Services*
Chenyang Li, *Davies Ward Phillips & Vineberg LLP*

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File 275107

Exhibit O to Affidavit of Corinne Lester.
Found at **Tab E(15), Volume 6** of Google's Motion Record.

May 28, 2024

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BY EMAIL

Competition Bureau
Monopolistic Practices Directorate
Place du Portage Phase I
50 Victoria Street
Gatineau, QC K1A 0C9

Attention: Kristen McLean, Senior Competition Law Officer

Department of Justice
Competition Bureau Legal Services
Place du Portage Phase I
50 Victoria Street
Gatineau, QC K1A 0C9

Attention: Ian Clarke, Senior Counsel

Dear Kristen and Ian:

T-188-24 – Google Canada Corporation – Response to Section 14(c) of the Section 11 Order served February 28, 2024

I write with reference to the Section 11 Order of the Federal Court of Canada dated February 12, 2024 (the "**Order**") served upon Gooe Canada Corporation ("**Google Canada**") on February 28, 2024.

On behalf of Google Canada, and in accordance with the timeframes established under the Order, please find attached as **Appendices "A"** and **"B"** the responses of Google Canada in respect of section 14(c) of the Order. A statement describing and certifying the information set out in section 13 of the Order is attached as **Appendix "C"**.

Please note the following with regard to claims of privilege by Google Canada and its affiliates. Certain production volumes referred to in Appendix "A" contain slipsheet replacements and/or revised redactions for documents in other production volumes to account for the clawback and throwback review process that has been conducted to date in the U.S. All of the production volumes referred to in Appendix "A" should be uploaded to the Competition Bureau's ("**Bureau**") review platform by the Electronic Evidence Unit before access to the documents is granted to Bureau officers or lawyers from Competition Bureau Legal Services. If the Bureau begins to review the documents produced in Appendix "A" before all of the production volumes from Appendix "A" are uploaded to the Bureau's review platform, individuals at the Bureau may erroneously access information they are not entitled to, including privileged information. **We ask that you confirm that the Bureau will upload all production**

volumes referred to in this letter to its review database before commencing any review of the documents. We note that the clawback and throwback review process in the U.S. will remain ongoing given active litigation.

The information contained in and accompanying this letter is either confidential or competitively sensitive to Google Canada and its affiliates (collectively "**Google**"), and/or customers and partners of Google (the "**Confidential Information**"). Moreover, the confidentiality of the information contained in Appendices "A" and "B" is protected under US law, including provisions of the *Antitrust Civil Process Act* as well as protective and confidentiality orders issued by US courts. The disclosure of the Confidential Information will reasonably be expected to: (i) result in material financial loss to Google or its customers and partners; (ii) prejudice Google's competitive position; (iii) result in the dissemination of highly confidential intellectual property and trade secrets belonging to Google, including but not limited to confidential algorithms, patents and technologies; (iv) damage the competitive position of Google's customers and partners; and/or (v) interfere with Google's contractual relations with third parties.

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DAVIES

Please let me know if you have any questions.

Yours very truly,

Elisa Kearney

cc Hugh Craig and John Syme, *Competition Bureau Legal Services*
Chenyang Li, *Davies Ward Phillips & Vineberg LLP*

Found at **Tab E, Volume 6** of Google's Motion Record.

PUBLIC

CT-2024-010

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

-and-

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

AFFIDAVIT OF CORINNE LESTER
SWORN MAY 1, 2025

I, CORINNE LESTER, of the City of Toronto, in the Province of Ontario,

MAKE OATH AND SAY AS FOLLOWS:

1. I am a Senior Competition Law Clerk at Davies Ward Phillips & Vineberg LLP ("**Davies**"), counsel for the Respondents, Google LLC and Google Canada Corporation (together, "**Google**"), in the above-noted proceeding. As such, I have personal knowledge of the facts and matters deposed to in my Affidavit. Where I have relied upon information from others, I have identified the source of that information and believe it to be true.

8. Following a period of pre-issuance dialogue between counsel for the Commissioner and Davies, on October 12, 2021, the Commissioner served upon Davies, as counsel for Google, a Notice of Application seeking an order under section 11 of the *Competition Act* in respect of the Renewed Inquiry. A copy of the Notice of Application dated October 12, 2021 is attached hereto as **Exhibit "F"**.

9. On October 22, 2021, Justice Little of the Federal Court issued an order pursuant to section 11 of the *Competition Act* (the "**2021 Order**") requiring Google to produce records and written returns of information as set out in the 2021 Order. A copy of the 2021 Order is attached hereto as **Exhibit "G"**.

10. On January 20, 2022, Davies delivered to counsel for the Commissioner a letter attaching the records and written returns of information that Google was compelled to provide under the 2021 Order (the "**2021 Response**"). An excerpted copy of the 2021 Response is attached hereto as **Exhibit "H"**.

11. As required under the 2021 Order, the 2021 Response contained an affidavit sworn by a representative of Google Canada Corporation, approximately 70 pages of written answers prepared by Google to respond to the questions of the Commissioner in the 2021 Order and more than 1.1 million documents, all produced pursuant to the 2021 Order.

12. After the 2021 Response was delivered, Davies corresponded with counsel for the Commissioner to: (i) respond on behalf of Google to follow-up questions posed by the Commissioner in respect of the 2021 Response; and (ii) "true-up" the set of documents produced to the Commissioner pursuant to the 2021 Order to take into

20. As required under the 2024 Order, the 2024 Response contained an affidavit sworn by a representative of Google Canada Corporation, approximately 40 pages of written answers prepared by Google to respond to the questions of the Commissioner in the 2021 Order, more than 3.7 million documents, and more than 7 terabytes of data, all produced in compliance with the 2024 Order.

21. At no point prior the delivery by the Commissioner of his Notice of Application on November 28, 2024 did the Commissioner or his counsel advise Davies that the Commissioner would be seeking a financial penalty against Google for three times the value of the benefit derived from the anticompetitive practices the Commissioner alleges Google engaged in or 3% of Google's annual worldwide gross revenues.

SWORN remotely by Corinne Lester in the City of Toronto, in the Province of Ontario, before me in the City of Toronto, in the Province of Ontario on the 1st day of May, 2025 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

DocuSigned by:
54D0570FA025408...

Commissioner for Taking Affidavits
(or as may be)

LSO# 73249C

DocuSigned by:
Corinne Lester
C70239391388408...

CORINNE LESTER

STOCKWOODS

Barristers

Found at **Tab 2, Volume 1** of Google's Reply BOA.

Brian Gover
Direct Line: 416-593-2489
Direct Fax: 416-593-9345
briang@stockwoods.ca

June 19, 2008

PRIVILEGED AND CONFIDENTIAL
Delivered Via Email and Courier

John H. Sims
Deputy Minister of Justice
East Memorial Building, Room 4121
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Ms. Sheridan Scott
Commissioner of Competition
Competition Bureau
21st Floor
50 Victoria Street
Gatineau, Quebec
K1A 0C9

Dear Mr. Sims and Ms. Scott:

Re: Review of s. 11 of the *Competition Act*

You have asked us to review and provide an opinion on the Competition Bureau's process for obtaining orders under s. 11 of the *Competition Act*, R.S.C. 1985, c. C-34 (the *Act*). We set out our findings and recommendations in the following opinion.

Table of Contents

1. Executive Summary 3
2. Terms of Reference 5
3. Consultations 6
4. Section 11 of the *Act* 7
5. The Legal Test Under s. 11 9
   A. "An inquiry under section 10 has commenced" 10
   B. "A person has or is likely to have information that is relevant to the inquiry" 12

should be included in draft orders. This would comport with the practice in relation to *Anton Piller* orders and be consistent with the greater degree of judicial supervision implied by the decision in the *Labatt* case. Ultimately, however, we concluded that resorting to this practice is not warranted at this time. Our view is that including a date for re-attendance in the draft order could actually impair post-issuance dialogue and result in hardening of positions. It would also impact on limited judicial resources. Nevertheless, if further problems arise in the s. 11 application process, further consideration should be given to the return date concept.

H. Section 11 in Criminal Inquiries

Section 11 orders are used in criminal and dual-track inquiries. The Commissioner generally applies for s. 11 orders to the Superior Court of the jurisdiction in which the prosecution is likely to occur. Generally, counsel appear in person before the issuing judge where the s.11 application is made on a criminal inquiry.

Recommendations

Counsel should continue to attend before the issuing judge with the person who swears the affidavit. Likewise, the Commissioner should continue to apply to the Superior Court of the jurisdiction in which the prosecution is likely to occur. Where possible, all applications for s. 11 orders on a particular criminal inquiry should be made to the same judge.

As discussed above, the same standard of full, frank, and fair disclosure applies to both criminal and civil inquiries.

We would advise against seeking s. 11 orders, in furtherance of a criminal inquiry, against a person who is a suspect at the time of the s. 11 application. Where s. 11 is used to compel a suspect to produce documents, give testimony under oath, or prepare a written return for the

purpose of building a criminal case against him or her, it is questionable whether this would comply with ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*.[56]

I. Giving Formal Notice of s. 11 Applications

As a general rule, the Commissioner does not give formal notice of a s. 11 application. The question arises, when (if at all) is formal notice appropriate?

Recommendations

The Bureau expressed a concern that engaging in pre-application dialogue would require the Bureau to give respondents formal notice of s. 11 applications and thus lead to regular challenges to s. 11 applications. For pre-application dialogue to prove practicable, it will require an attitudinal shift by the private competition law bar. There are strong incentives for the respondent to a proposed s. 11 order to cooperate with the Bureau in tailoring the scope of the order, and limiting the number of custodians who must search for information, the relevant period for the search, and the nature of the information sought.

In our view, pre-application dialogue does not create the obligation on the Bureau to give formal notice to a respondent, nor does it give a respondent a right of audience on the s. 11 application. Section 11 contemplates an *ex parte* application process. This should be the norm. Concerns regarding disclosure of the pre-application dialogue are best addressed (and should be addressed) in the Commissioner's affidavit material put before the Court on the s. 11 application.

In our opinion, formal notice of a s. 11 application should be given to a respondent where a previous s. 11 order has been successfully varied or set aside in the same inquiry. Moreover, consideration should be given to providing formal notice where there is a previous s. 11 order against the same respondent and a challenge to a further s. 11 order is likely.

---

56. See *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. R.J.S.*, [1995] 1 S.C.R. 451; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; *R. v. Z.(L.)* (2001), 54 O.R. (3d) 97 (Ont. C.A.); *R. v. Jarvis*, [2002] 3 S.C.R. 757.

Found at **Tab 8, Volume 2** of Google's Reply BOA.

2000 CarswellNat 1533
Federal Court of Canada — Trial Division

Canada (Commissioner of Competition) v. Air Canada

2000 CarswellNat 1533, 2000 CarswellNat 3334, [2000] F.C.J. No. 1177, [2001] 1 F.C. 219, 186 F.T.R. 48, 78 C.R.R. (2d) 134, 8 C.P.R. (4th) 372, 98 A.C.W.S. (3d) 1188

The Commissioner of Competition, Applicant/Respondent and Air Canada Robert Milton Lise Fournel M. Robert Peterson Calin Rovinescu, Respondents/ Petitioners 853350 Alberta Ltd. Canadian Airlines Corporation Canadian Airlines International Ltd. Canadian Regional Airlines (1998) Ltd., Respondents

Reed J.

Heard: July 10, 2000
Judgment: July 21, 2000
Docket: T-1027-00

Counsel: *Mr. Wiliam Miller* and *Ms Donna Blois*, for Applicant.
Mr. Michel Décary, *Ms Mireille Tabib* and *Mr. Patrick Gérard*, for Respondents.

Subject: Intellectual Property; Property; Corporate and Commercial; Constitutional

Headnote

Trade and commerce --- Competition and combines legislation — Investigation and prosecution — Conduct of investigation — Disclosure of documents

Trade and commerce --- Competition and combines legislation — Investigation and prosecution — Orders — Miscellaneous orders

Trade and commerce --- Competition and combines legislation — Constitutional issues — Charter of Rights and Freedoms

Table of Authorities

Cases considered by *Reed, J.*:

Baron v. R., 93 D.T.C. 5018, *(*sub nom. *Baron v. Canada)* 78 C.C.C. (3d) 510, *(*sub nom. *Baron v. Minister of National Revenue)* 146 N.R. 270, 18 C.R. (4th) 374, *(*sub nom. *Baron v. Canada)* 99 D.L.R. (4th) 350, *(*sub nom. *Baron v. Canada)* [1993] 1 S.C.R. 416, *(*sub nom. *Baron v. Canada)* 13 C.R.R. (2d) 65, *(*sub nom. *Baron v. Canada)* [1993] 1 C.T.C. 111 (S.C.C.) — considered

Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc., 1998 CarswellOnt 3893, 83 C.P.R. (3d) 51 (Ont. Gen. Div.) — considered

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> 18. As the operators of these Routes, Air Canada, Canadian Airlines and CRAL are likely to have information which is relevant to this inquiry. Canadian Airlines Corporation is likely to have information which is relevant to this inquiry due to its position as the parent of Canadian Airlines. As the majority shareholder of Canadian Airlines Corporation, 853350 Alberta Ltd. is also likely to have relevant information.

17 Counsel from Air Canada argues that there are several elements of both the offence of predatory pricing, and the conduct of abuse of dominant position, for which no grounds are set out in the evidence that was presented to Madame Justice Tremblay-Lamer. Counsel notes that in order to find predatory pricing, as defined in paragraph 50(1)(c) of the *Act*, there has to be a *policy* of unreasonably low prices, and that the conduct has to have the "effect or tendency of substantially lessening competition or eliminating a competitor, or be designed to have that effect". Counsel notes that section 79 (abuse of dominance) requires a finding that the person has engaged in a *practice* of anti-competitive acts, and that that practice has had, or is likely to have the effect of preventing or lessening competition. Counsel argues that the material put before Madame Justice Tremblay-Lamer did not disclose any evidence of a policy, or a practice, or that the effect of the alleged conduct was a lessening of competition or an attempt to accomplish such.

18 In addition, counsel for Air Canada argues that the law is clear that the matching of a competitor's price is not abusive conduct (*Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.*, [1998] O.J. No. 4007 (Ont. Gen. Div.)). Mr. Craig Landry, Manager, North America Market Management of Air Canada, filed an affidavit that it is his belief that Air Canada did not undercut Westjet's fares, and if it did, it did so unwittingly. He states that he believes that the Commissioner and any airline consulting firm hired by him to review the pricing changes introduced by Air Canada following Westjet's entry into the market knew or must have known that Air Canada has never undercut Westjet's publicly announced fares, and that if Air Canada in fact undercut a" buy-up-level" fare of Westjet, it cannot have done so knowingly or intentionally (paragraphs 3-7 of his affidavit). He explains the competitive intelligence gathering undertaken by Air Canada, and the limited information obtained thereby. He asserts that Air Canada merely met the prices of a competitor.

19 When assessing whether a variation or setting aside of a section 11 order is justified, it is essential to keep in mind that the order relates to the production of information and documents for the purpose of an inquiry, not for the purpose of the prosecution of a criminal offence. Much of the jurisprudence cited by counsel for Air Canada refers to the latter, not the former.

20 The obligation on the Court is not that it must be satisfied that reasonable grounds exist to believe that either predatory pricing or abuse of dominance has occurred. Under section 11 of the *Competition Act*, the Court must satisfy itself that: (1) an inquiry has been commenced; and that (2) the person against whom the order is made is likely to have information relevant to the inquiry.

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The statutory scheme is different than, for example, section 15 of the *Competition Act* pursuant to which search and seizure warrants are issued.

21 In addition, it is obvious from the above description of Mr. Landry's affidavit that Air Canada's arguments are addressed to the merits of Air Canada's position in response to the allegation that the conduct in question occurred. It is the kind of evidence and arguments that are appropriately made to the Commissioner in the context of his enquiry. It is the kind of evidence and argument that would be appropriately addressed to the Court, or the Competition Tribunal, as the case may be, if a decision were eventually made by either the Attorney General or the Commissioner to proceed against Air Canada.

22 I have not been persuaded that Air Canada has demonstrated that the information that was provided to Madame Justice Tremblay-Lamer was incomplete, misleading or incorrect to a degree that would have led her to refuse to grant the order.

Relevance of Material Sought

23 Air Canada argues that much of the documentation and information that is requested is not relevant to the Commissioner's inquiry, or only marginally so, and that the burden placed on Air Canada, in being required to respond to the requests, outweighs the benefits to the Commissioner. Mr. John Baker, Vice President and General Counsel of Air Canada, filed an affidavit in this regard. It reads in part:

> 3. The Order is divided into the following two parts. First, pursuant to Appendix "A", Air Canada is required to provide all documents in its possession that are responsive to a list of twenty-seven (27) required records ("**Appendix" A" documents**"). Second, pursuant to Appendix "B" Air Canada is required to provide written interrogation type responses to nineteen (19) questions ("**Appendix B documents**"). The Appendix A documents and Appendix B documents are to be provided to the Commissioner (attention Charles Schwartzman) by no later than 4:00 o'clock (EST) on July 7, 2000.
>
> 4. In order to comply with the Order in the period set out in same, Air Canada retained the services of the law firm of Stikeman Elliott to assist it in compiling the information. As well, certain employees of Air Canada have been assigned to prepare the Appendix B documents. From June 19, 2000 to the present, at least four (4) lawyers and/or articling students of Stikeman Elliott have been working at Air Canada specifically with respect to the Order.
>
> 5. I have reviewed the Order and believe that the information requested is not essential nor relevant to the Commissioner's inquiry or is excessively burdensome, including certain of the Appendix A documents and/or Appendix B documents ...

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Found at **Tab 41, Volume 8** of Google's BOA.

CITATION: Commissioner of Competition v. X, 2018 ONSC 3374
COURT FILE NO.: 17-13302
DATE: 2018/05/30

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
COMMISSIONER OF COMPETITION Respondent	Marisa Ferraiuolo and Gary Caracciolo, Public Prosecution Service of Canada, Competition Law Section, for the Respondent
– and –	
X Applicant	Scott K. Fenton and Lynda E. Morgan, for the Applicant
– and –	
THE GLOBE AND MAIL INC., CANADIAN BROADCASTING CORPORATION, POSTMEDIA NETWORK INC., AND CTV NEWS, A DIVISION OF BELL MEDIA INC. Interveners	Tae Mee Park and Peter M. Jacobsen, for the Interveners
	HEARD: April 26, 2018

DECISION ON APPLICATION BY PERSON X

RATUSHNY J.

[1] Person X (also, the "Applicant") is an alleged participant in a price-fixing conspiracy in the fresh commercial bread industry in Canada.

2018 ONSC 3374 (CanLII)

[2] Person X seeks an Order prohibiting the publication of specific information in four Informations to Obtain (the "ITOs") that directly or indirectly reveal the Applicant's identity.

1. The Facts

[3] On March 3, 2015, the Competition Bureau (the "Bureau") granted an immunity marker to Loblaw Companies Limited/Weston Foods (Canada) Incorporated (the "Immunity Applicants"). The Immunity Applicants provided proffers to the Bureau pursuant to the Bureau's Immunity Program under the *Competition Act*, R.S.C. 1985, c. C-34.

[4] In December 2016 and March 2017, respectively, the Bureau interviewed two of the Immunity Applicants' witnesses whose identities are presently redacted from public view.

[5] In August 2017, the Bureau commenced an inquiry to investigate allegations that Canada Bread Company Limited ("Canada Bread"), the Immunity Applicants, Wal-Mart Canada Corporation ("Walmart"), Sobeys Incorporated ("Sobeys"), Metro Incorporated ("Metro"), Giant Tiger Stores Limited ("GT"), and other persons known and unknown, had participated in a conspiracy to fix the wholesale and retail price of fresh commercial bread in Canada. It is alleged that the price-fixing conspiracy commenced in November 2001 and continued until October 31, 2017.

[6] On October 26, 30 and 31 and November 1, 2017, the Bureau made *ex parte* applications for search warrants against Canada Bread, the Immunity Applicants, Walmart, Sobeys, Metro, GT and Overwaitea Food Group (the "Searched Parties"), pursuant to sections 15 and 16 of the *Competition Act* (the "Search Warrants"). The Search Warrants were issued on the basis of four similar ITOs sworn by Senior Competition Law Officer Simon Bessette (the "Affiant").

[7] Since October 31, 2017, there has been extensive media coverage across Canada about the Investigation.

[8] In December 2017, the Immunity Applicants publicly admitted to participating in industry-wide anti-competitive activity by bread price-fixing for over 14 years. They revealed

2018 ONSC 3374 (CanLII)

PUBLIC

965 6919

Competition Bureau Canada | Bureau de la concurrence Canada

Found at **Tab E(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

PUBLIC 966 6924

THE YEAR IN NUMBERS

$572,100,000
Estimated dollar savings to consumers in 2013–2014 from Bureau actions that stop anti-competitive activity

$55,720,000
Fines imposed by the Courts

$500,000
Administrative monetary penalties imposed by the Courts or Tribunal

40
Leniency markers granted

82
Immunity markers granted

5
Convictions without guilty pleas

11
Guilty pleas

35
Search warrants executed

233
Merger examinations concluded

21
Publications

598
Media enquiries received

14,515
Requests received by the Bureau Information Centre

Found at **Tab 93, Volume 21** of Google's Motion Record.

STAYING COMPETITIVE IN A CHANGING WORLD

Protecting and Promoting Competition for the Benefit of All Canadians

ANNUAL REPORT OF THE COMMISSIONER OF COMPETITION FOR THE YEAR ENDING MARCH 31, 2016

Canada

Enforcement

12
GUILTY PLEAS (NON-CONTESTED) BY INDIVIDUALS OR COMPANIES

16
ONGOING CIVIL APPLICATIONS BEFORE THE COMPETITION TRIBUNAL OR THE COURTS

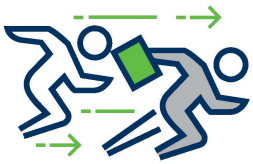
7
MERGER-RELATED CONSENT AGREEMENTS SIGNED AND IMPLEMENTED

24
ALTERNATIVE CASE RESOLUTIONS EMPLOYED

13
SEARCH WARRANTS ISSUED

15
SECTION 11 ORDERS ISSUED

Advocacy and Outreach



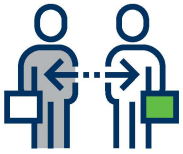
4
REPRESENTATIONS TO REGULATORY BODIES

64
PUBLICATIONS

33,860
PUBLICATION DOWNLOADS

490
MEDIA REQUESTS

Partnerships



2
NEW INTERNATIONAL COOPERATION AGREEMENTS

7
NEW DOMESTIC PARTNERSHIP AGREEMENTS

15
BILATERAL MEETINGS WITH FOREIGN LAW ENFORCEMENT AND COMPETITION AGENCIES

17
MEETINGS AND WORKSHOPS WITH INTERNATIONAL ORGANIZATIONS

Found at **Tab H(97), Volume 21** of Google's Motion Record.

COMPETITION BUREAU

BUILDING A MORE COMPETITIVE AND INNOVATIVE CANADA

ANNUAL REPORT OF THE COMMISSIONER OF COMPETITION FOR THE YEAR ENDING MARCH 31, 2017

Canada

PUBLIC 970 7159

THE YEAR IN NUMBERS

$44.85 MILLION

IN FINES, ADMINISTRATIVE MONETARY PENALTIES[2] IMPOSED AND CONSUMER RESTITUTION

- **$13.73 MILLION** TOTAL FINES IMPOSED
- **$19.3 MILLION** ADMINISTRATIVE MONETARY PENALTIES
- **UP TO $11.82 MILLION** CUSTOMER RESTITUTIONS

222 MERGER REVIEWS COMPLETED

61 INVESTIGATIONS (NON-MERGER) CONCLUDED

5 GUILTY PLEAS IN CARTEL CASES[3]

4 COMPANIES SENTENCED FOR CRIMINAL CONDUCT UNDER THE *COMPETITION ACT*

160 SPEECHES AND PRESENTATIONS TO STAKEHOLDERS

35 ADVOCACY INITIATIVES

10,589 COMPLAINTS AND INFORMATION REQUESTS RECEIVED BY THE BUREAU INFORMATION CENTRE[4]

2 Administrative monetary penalties (AMPs) are different from fines in that they are used to promote and encourage compliance with the *Competition Act*. Failure to pay an AMP may be enforced civilly as a debt due to the Crown. A fine, by contrast, is a punishment imposed by a court upon conviction of a criminal offence and failure to pay it may lead to imprisonment.

3 The Bureau also secured one guilty plea in a contested proceeding.

4 Number of complaints and information requests which relate to the Bureau's four statutes: the *Competition Act*, *Consumer Packaging and Labelling Act*, *Textile Labelling Act* and the *Precious Metals Marking Act*.

AT A GLANCE

Enforcement

74 NEW INVESTIGATIONS COMMENCED

61 INVESTIGATIONS CONCLUDED

138 ONGOING INVESTIGATIONS

11 SEARCH WARRANTS ISSUED

33 ALTERNATIVE CASE RESOLUTIONS REACHED

10 CONSENT AGREEMENTS IN NON-MERGER CASES

8 CONSENT AGREEMENTS IN MERGER CASES

Advocacy and outreach

62 PUBLICATIONS

696,517 VISITS TO THE BUREAU'S WEBSITE

44,736 VIEWS OF THE BUREAU'S VIDEOS

301 MEDIA REQUESTS

35 ADVOCACY INITIATIVES

- **4** REPRESENTATIONS TO REGULATORY BODIES
- **29** OTHER ADVOCACY INITIATIVES
- **2** ISSUES OF THE *COMPETITION ADVOCATE* PUBLISHED

Partnerships

2 NEW INTERNATIONAL COOPERATION AGREEMENTS

3 NEW DOMESTIC PARTNERSHIP AGREEMENTS

43 FORMAL BILATERAL MEETINGS WITH FOREIGN LAW ENFORCEMENT AND COMPETITION AGENCIES

35 MEETINGS AND WORKSHOPS WITH INTERNATIONAL FORA

Found at Tab 33, Volume 10 of Google's Reply BOA.

Benjamin Cain MacKenzie *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, British Columbia Civil Liberties Association, Canadian Civil Liberties Association and Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic *Interveners*

Benjamin Cain MacKenzie *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario, Association des libertés civiles de la Colombie-Britannique, Association canadienne des libertés civiles et Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko *Intervenants*

INDEXED AS: R. *v.* MacKENZIE

2013 SCC 50

File No.: 34397.

2013: January 22; 2013: September 27.

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

RÉPERTORIÉ : R. *c.* MacKENZIE

2013 CSC 50

N° du greffe : 34397.

2013 : 22 janvier; 2013 : 27 septembre.

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

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Charter of Rights — Search and seizure — Sniffer dogs — Accused seeking to exclude evidence of marihuana seized during highway traffic stop — Whether police had reasonable grounds to suspect accused was involved in drug-related offence — Whether search was unreasonable — Whether evidence should be excluded — Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Constitutional law — Charter of Rights — Arbitrary detention — Accused seeking to exclude evidence of marihuana seized during highway traffic stop — Whether accused was arbitrarily detained — Canadian Charter of Rights and Freedoms, s. 9.

The accused was charged with possession of a controlled drug for the purpose of trafficking. He takes issue with a police sniffer-dog search of his vehicle that occurred during the course of a highway traffic stop. He says the police lacked reasonable suspicion that he was

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Droit constitutionnel — Charte des droits — Fouilles, perquisitions et saisies — Chiens renifleurs — Exclusion de la preuve que constitue la marihuana saisie lors d'un contrôle routier demandée par l'accusé — La police avait-elle des motifs raisonnables de soupçonner l'accusé d'une infraction liée à la drogue? — La fouille était-elle abusive? — La preuve doit-elle être écartée? — Charte canadienne des droits et libertés, art. 8, 24(2).

Droit constitutionnel — Charte des droits — Détention arbitraire — Exclusion de la preuve que constitue la marihuana saisie lors d'un contrôle routier demandée par l'accusé — La détention de l'accusé était-elle arbitraire? — Charte canadienne des droits et libertés, art. 9.

L'accusé a été inculpé de possession d'une substance réglementée en vue d'en faire le trafic. Il conteste la fouille de son véhicule effectuée par la police à l'aide d'un chien renifleur lors d'un contrôle routier. Selon lui, les agents de police n'avaient pas de motifs raisonnables

2013 SCC 50 (CanLII)

He says the police lacked reasonable suspicion that he was involved in a drug-related offence when they had their dog sniff his vehicle. Asserting that the sniff was thus an unconstitutional search, he seeks to have the 31.5 lbs of marihuana found in the rear hatch of his car excluded, leaving the Crown with no case against him. The trial judge agreed with Mr. MacKenzie and excluded the evidence, but the Court of Appeal for Saskatchewan reversed the decision. Because the police did have reasonable grounds to suspect that Mr. MacKenzie was involved in a drug-related offence, I am satisfied the sniff was lawful. I would accordingly dismiss the appeal.

[2] In this appeal, and in the companion case of *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, we seek to clarify certain principles concerning sniffer-dog searches first articulated in *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, and *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569. Those cases established that the police may use sniffer dogs for routine crime prevention in contexts where individuals have a reasonable, but lesser, expectation of privacy, such as bus terminals and schools, and the police have reasonable grounds to suspect that a search will reveal evidence of a criminal offence. In the present cases, which concern analogous contexts of an airport and a motor vehicle on a public highway, we consider the meaning of the term "reasonable suspicion" and the types of evidence a court can look to in deciding whether the standard of "reasonable suspicion" has been met. We also consider how the police should proceed when a dog provides a positive indication, or "alerts", to the presence of a targeted substance.

[3] I have had the benefit of reading the reasons of Karakatsanis J. in *Chehil*. My colleague's efforts have spared me the heavy lifting in this case, as the broader questions that I have just mentioned are fully canvassed in her reasons. I therefore concentrate

routier. Selon lui, les agents de police n'avaient pas de motifs raisonnables de le soupçonner d'une infraction liée à la drogue lorsqu'ils ont utilisé le chien. En affirmant que la fouille était ainsi inconstitutionnelle, il demande l'exclusion de la preuve — 31,5 lb de marihuana découverte dans le coffre de sa voiture — ce qui prive le ministère public de toute preuve à charge. Le juge de première instance a accepté les arguments de M. MacKenzie et écarté la preuve, mais la Cour d'appel de la Saskatchewan a infirmé sa décision. Puisque les policiers avaient effectivement des motifs raisonnables de soupçonner M. MacKenzie d'une infraction liée à la drogue, je suis convaincu que la fouille effectuée à l'aide du chien renifleur était légale. Par conséquent, je suis d'avis de rejeter le pourvoi.

[2] Dans le présent pourvoi et dans le pourvoi connexe, *R. c. Chehil*, 2013 CSC 49, [2013] 3 R.C.S. 220, nous cherchons à clarifier certains principes régissant les fouilles effectuées à l'aide de chiens renifleurs, principes énoncés pour la première fois dans les arrêts *R. c. Kang-Brown*, 2008 CSC 18, [2008] 1 R.C.S. 456, et *R. c. A.M.*, 2008 CSC 19, [2008] 1 R.C.S. 569. Suivant ces arrêts, les policiers peuvent faire appel à un chien renifleur pour les opérations courantes de prévention du crime là où les gens ont une attente en matière de vie privée raisonnable, quoique réduite, comme les gares d'autobus et les écoles, quand les policiers ont des motifs raisonnables de soupçonner que la fouille révélera des éléments de preuve d'une infraction. Dans les affaires dont nous sommes saisis, qui se sont produites dans des endroits analogues, à savoir un aéroport et une automobile roulant sur la voie publique, nous nous penchons sur le sens du terme « soupçons raisonnables » et sur les types de preuve permettant au tribunal de déterminer s'il a été satisfait à la norme « des soupçons raisonnables ». Nous examinons également la marche à suivre par les policiers lorsqu'un chien indique la présence d'une substance ciblée, c'est-à-dire lorsqu'il « alerte » son maître.

[3] J'ai eu l'occasion de lire les motifs de la juge Karakatsanis dans l'arrêt *Chehil*. Ses efforts m'ont épargné le gros du travail, comme ma collègue analyse en profondeur les grandes questions que je mentionne précédemment. Mon analyse portera

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their probative value was to be assessed "not in terms of unsubstantiated opinion" but as "*informed* opinion" in line with Cst. Sperlie's training and experience (para. 33 (emphasis in original)).

[30] In the end, while acknowledging that the case was "very close to the line", the court was satisfied that the "constellation of objective factors" was sufficient to meet the "reasonable suspicion standard" (para. 37). It followed that the sniffer-dog search was reasonable and conformed to the requirements of s. 8 of the *Charter*. Hence, the marihuana was lawfully obtained and there was no need to consider s. 24(2). In light of this conclusion, the court set aside the appellant's acquittal and remitted the matter to trial.

V. Analysis

A. *Introduction*

[31] This case concerns a sniff search by a drug-detection dog of a motor vehicle parked on the side of a public highway, having been pulled over for a regulatory infraction. That is the context against which the search in question is to be assessed. This Court has held that motor vehicles, though emphatically not *Charter*-free zones, are places in which individuals have a reasonable but "reduced" expectation of privacy (*R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 38; see also *R. v. Wise*, [1992] 1 S.C.R. 527, at p. 534). The privacy context here is thus analogous to the bus terminal in *Kang-Brown* and the school in *A.M.*, where the use of police sniffer dogs on the basis of reasonable suspicion was found to pass *Charter* muster. As a result, I am satisfied that the police here were entitled to enlist the aid of a sniffer dog for crime prevention on the same basis.

son expérience relatives à ces questions ». Leur valeur probante devait être déterminée « non pas comme une opinion sans fondement » mais plutôt comme une « opinion *éclairée* » par la formation et l'expérience de l'agent (par. 33 (italiques dans l'original)).

[30] En fin de compte, tout en reconnaissant que la preuve [TRADUCTION] « frôlait la limite », la cour était convaincue que « l'ensemble de facteurs objectifs » suffisait pour que soit respectée la « norme des soupçons raisonnables » (par. 37). Par conséquent, la fouille effectuée à l'aide du chien renifleur n'était pas abusive et ne contrevenait pas à l'art. 8 de la *Charte.* La marihuana avait donc été obtenue légalement, et point n'était besoin de se pencher sur l'application du par. 24(2). Compte tenu de cette conclusion, la cour a annulé l'acquittement de l'appelant et ordonné la tenue d'un procès.

V. Analyse

A. *Introduction*

[31] La présente affaire porte sur la fouille, effectuée à l'aide d'un chien détecteur de drogue, d'un véhicule à moteur garé en bordure d'une voie publique et qui avait été intercepté pour une infraction à une loi provinciale. Voilà le contexte dans lequel il faut situer la fouille en question pour l'analyse. La Cour, si elle a statué on ne peut plus clairement qu'un véhicule à moteur ne saurait constituer une zone soustraite à l'application de la *Charte*, a conclu que la personne qui s'y trouve a une attente raisonnable, mais « moindre », en matière de vie privée (*R. c. Belnavis*, [1997] 3 R.C.S. 341, par. 38; voir également *R. c. Wise*, [1992] 1 R.C.S. 527, p. 534). En l'espèce, le contexte relatif à la vie privée est analogue à ceux des affaires *Kang-Brown* (une gare d'autocar) et *A.M.* (une école). Dans ces arrêts, la Cour conclut à la constitutionnalité de l'utilisation par la police d'un chien renifleur en cas de soupçons raisonnables. Par conséquent, dans l'affaire qui nous occupe, je suis convaincu que les policiers étaient habilités suivant la même norme à faire appel à ce type de chien pour la prévention de la criminalité.

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[32] Neither *Chehil* nor this case "require a category-based decision on the constitutionality of the use of sniffer dogs by the police that will apply in all circumstances" (*Kang-Brown*, at para. 137, *per* Deschamps J.). We continue to approach the use of this police investigative technique one case at a time, in each instance having regard to the context of the situation, balancing the extent of any privacy interest and the state's countervailing interest in law enforcement. This case, for example, "does not involve explosives, guns or other public safety concerns" (*Kang-Brown*, at para. 18, *per* Binnie J.; see also *A.M.*, at para. 3, *per* Binnie J.). Nor does it involve the use of sniffer dogs in contexts such as the home, where courts have long recognized a heightened privacy interest (see, e.g., *R. v. Evans*, [1996] 1 S.C.R. 8; *Florida v. Jardines*, 133 S.Ct. 1409 (2013)).

[33] Because the sniff, arrest, and search incident to arrest occurred *after* the appellant was pulled over for speeding, it is important to identify the relevant legal authority for each of these actions, having regard to what the police knew and when they knew it (*R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, at para. 4). Accordingly, I propose to begin my analysis with the initial stop for speeding and will then consider both the appellant's detention and the searches. Though the courts below did not approach the case in the same manner, I do so for purposes of clarifying the framework that guides such inquiries. Nevertheless, and as I stated at the outset, the principal question in this appeal remains whether the police had reasonable grounds to suspect that the appellant was involved in a drug-related offence.

B. *The Detention*

[34] Counsel for the appellant acknowledged during the *voir dire* that the police had the authority to detain the appellant to investigate for speeding pursuant to *The Traffic Safety Act*, S.S. 2004, c. T-18.1.

[32] Dans la présente affaire et dans *Chehil*, « [i]l n'est [. . .] pas nécessaire [. . .] de rendre, au sujet de la constitutionnalité de l'utilisation des chiens renifleurs par les policiers, une décision fondée sur des catégories qui va s'appliquer dans tous les cas » (*Kang-Brown*, par. 137, la juge Deschamps). Nous continuons d'examiner l'utilisation de cette technique d'enquête policière au cas par cas, en prenant en compte le contexte et en soupesant d'une part le droit à la vie privée, quel qu'il soit et, d'autre part l'intérêt opposé de l'État à faire appliquer la loi. En l'espèce, par exemple, « [i]l n'est pas question d'explosifs, d'armes à feu ou d'autres problèmes de sécurité publique » (*Kang-Brown*, par. 18, le juge Binnie; voir également *A.M.*, par. 3, le juge Binnie). Il n'est pas non plus question de la fouille, au moyen d'un chien renifleur, d'une résidence, à l'égard de laquelle les tribunaux reconnaissent depuis longtemps l'application d'un intérêt supérieur à la vie privée (voir, p. ex., *R. c. Evans*, [1996] 1 R.C.S. 8; *Florida c. Jardines*, 133 S.Ct. 1409 (2013)).

[33] Vu que la fouille effectuée à l'aide du chien renifleur, l'arrestation et la fouille accessoire à l'arrestation sont survenues *après* que l'appelant a été intercepté pour excès de vitesse, il importe de déterminer le pouvoir légal habilitant chacune de ces actions, en ce qui a trait aux renseignements obtenus par la police à chacune de ces étapes (*R. c. Nolet*, 2010 CSC 24, [2010] 1 R.C.S. 851, par. 4). Par conséquent, je propose de commencer mon analyse par l'interception initiale pour excès de vitesse et d'examiner ensuite la détention et les fouilles. Bien que les tribunaux inférieurs aient abordé l'affaire sous un autre angle, ma démarche vise à préciser le cadre qui guide l'analyse. Néanmoins, comme je l'ai indiqué au départ, la principale question à trancher dans le présent pourvoi est toujours celle de savoir si les policiers avaient des motifs raisonnables de soupçonner l'appelant d'une infraction liée à la drogue.

B. *La détention*

[34] L'avocat de l'appelant a reconnu lors du voir-dire que la police avait le pouvoir de détenir son client pour enquêter sur un excès de vitesse en vertu de la *Traffic Safety Act*, S.S. 2004, ch. T-18.1. Il a

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[71] Reasonable suspicion must be assessed against the totality of the circumstances. Characteristics that apply broadly to innocent people and "no-win" behaviour — he looked at me, he did not look at me — cannot on their own, support a finding of reasonable suspicion, although they may take on some value when they form part of a constellation of factors.

[72] Exculpatory, common, neutral, or equivocal information should not be discarded when assessing a constellation of factors. However, the test for reasonable suspicion will not be stymied when the factors which give rise to it are supportive of an innocent explanation. We are looking here at possibilities, not probabilities. Are the facts objectively indicative of the *possibility* of criminal behaviour in light of the totality of the circumstances? If so, the objective component of the test will have been met. If not, the inquiry is at an end.

[73] Assessing whether a particular constellation of facts gives rise to a reasonable suspicion should not — indeed must not — devolve into a scientific or metaphysical exercise. Common sense, flexibility, and practical everyday experience are the bywords, and they are to be applied through the eyes of a reasonable person armed with the knowledge, training and experience of the investigating officer.

[74] Parenthetically, I note that there are several ways of describing what amounts to the same thing. Reasonable suspicion means "reasonable grounds to suspect" as distinguished from "reasonable grounds to believe" (*Kang-Brown*, at paras. 21 and 25, *per* Binnie J., and at para. 164, *per* Deschamps J.). To the extent one speaks of a "reasonable belief" in the context of reasonable suspicion, it is a reasonable belief that an individual *might* be connected to a particular offence, as opposed to a reasonable belief that an individual *is* connected to the offence. As Karakatsanis J. observes in *Chehil*, the bottom line is that while both concepts must be grounded in

[71] Les soupçons raisonnables doivent être examinés à la lumière de l'ensemble des circonstances. Les caractéristiques qui s'appliquent globalement aux personnes innocentes et les comportements susceptibles d'éveiller les soupçons sous un angle ou sous l'autre — par exemple, le fait que le suspect ait regardé ou non le policier — ne permettent pas de conclure, à eux seuls, à l'existence de soupçons raisonnables, même s'ils peuvent revêtir une certaine valeur lorsqu'ils s'inscrivent dans un ensemble de facteurs.

[72] Il n'y a pas lieu d'écarter les facteurs disculpatoires, communs, neutres ou équivoques lors de l'examen de l'ensemble. Néanmoins, on ne saurait dire qu'il n'est pas satisfait au critère des soupçons raisonnables si les facteurs y donnant naissance peuvent admettre une explication innocente. C'est une question de possibilités, non pas de probabilités. Les faits indiquent-ils objectivement la *possibilité* d'un comportement criminel compte tenu de l'ensemble des circonstances? Dans l'affirmative, il est satisfait à l'élément objectif du critère. Dans la négative, l'analyse prend fin.

[73] L'examen de la question de savoir si un ensemble particulier de faits donne lieu à des soupçons raisonnables ne saurait se muer en un exercice scientifique ou métaphysique. Le bon sens, la flexibilité et l'expérience pratique quotidienne sont les mots d'ordre qui doivent guider cette analyse qui s'effectue du point de vue d'une personne raisonnable munie des connaissances, de la formation et de l'expérience de l'enquêteur.

[74] Incidemment, il existe plusieurs façons de décrire une même notion. Les soupçons raisonnables signifient des « motifs raisonnables de soupçonner » par opposition aux « motifs raisonnables de croire » (*Kang-Brown*, par. 21 et 25, le juge Binnie, et par. 164, la juge Deschamps). Dans le contexte des soupçons raisonnables, par « motifs raisonnables » on entend des motifs raisonnables de croire qu'une personne *pourrait* être impliquée dans une infraction donnée, et non qu'elle l'*est*. Comme le fait observer la juge Karakatsanis dans *Chehil*, en définitive, même si les deux notions doivent se fonder sur des faits objectifs qui résistent à un examen

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in a pleading may be withdrawn on consent of the other party or with leave of the Tribunal.

Discovery

Affidavit of documents

60 (1) The applicant and each respondent who has filed a response shall, within the time prescribed at a case management conference, serve an affidavit of documents on each other party.

Content

(2) An affidavit of documents shall include

(a) a list identifying the documents that are relevant to any matter in issue and that are or were in the possession, power or control of the party;

(b) any claim that a document is confidential or contains confidential information;

(c) any claim that a document is privileged; and

(d) a statement of the grounds for each claim of privilege.

Power of the Tribunal

61 Upon the motion of a party who has served an affidavit of documents and who opposes a claim for privilege of another party, the Tribunal may inspect the document and determine the validity of the claim.

Application of deemed undertaking

62 (1) This rule applies to evidence obtained during documentary, written and oral discovery and information obtained from that evidence.

Deemed undertaking

(2) All parties and their counsel are deemed to undertake not to use evidence or information to which this rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

Exceptions

(3) Subrule (2) does not prohibit

de reconnaissance ou contenu dans un acte de procédure, ainsi que l'aveu réputé tel aux termes de la règle 57 peuvent faire l'objet d'une rétractation.

Communication préalable

Affidavit de documents

60 (1) Le demandeur et chaque défendeur qui a déposé une réponse signifient aux autres parties un affidavit de documents dans le délai imparti lors de la conférence de gestion de l'instance.

Contenu

(2) L'affidavit de documents comporte les renseignements suivants :

a) une liste des documents qui sont pertinents quant aux questions soulevées et qui sont ou étaient en la possession, sous l'autorité ou sous la garde de la partie;

b) toute allégation de confidentialité à l'égard d'un document ou de renseignements dans un document;

c) toute allégation de privilège à l'égard d'un document;

d) les motifs à l'appui de chaque allégation de privilège.

Pouvoirs du Tribunal

61 À la requête d'une partie qui a signifié un affidavit de documents et qui s'oppose à une allégation de privilège formulée par une autre partie, le Tribunal peut examiner le document en cause afin de déterminer le bien-fondé de l'allégation.

Application de la présomption d'engagement implicite

62 (1) La présente règle s'applique aux éléments de preuve obtenus durant la communication des documents, l'interrogatoire préalable oral et l'interrogatoire préalable par écrit, et aux renseignements tirés de ces éléments de preuve.

Présomption d'engagement

(2) Toutes les parties et leurs avocats sont réputés s'engager à ne pas utiliser les éléments de preuve ou les renseignements auxquels la présente règle s'applique à des fins autres que celles de l'instance au cours de laquelle les éléments de preuve ont été obtenus.

Exception

(3) Le paragraphe (2) n'a pas pour effet d'interdire :

Found at **Tab 95, Volume 18** of Google's BOA.

1991 CarswellAlta 192
Supreme Court of Canada

R. v. Stinchcombe

1991 CarswellAlta 559, 1991 CarswellAlta 192, [1991] 3 S.C.R. 326, [1991] A.W.L.D. 882, [1991] S.C.J. No. 83, [1992] 1 W.W.R. 97, 120 A.R. 161, 130 N.R. 277, 14 W.C.B. (2d) 266, 18 C.R.R. (2d) 210, 68 C.C.C. (3d) 1, 83 Alta. L.R. (2d) 193, 8 C.R. (4th) 277, 8 W.A.C. 161, J.E. 91-1713, EYB 1991-66887

WILLIAM B. STINCHCOMBE v. R.

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

Heard: May 2, 1991
Judgment: November 7, 1991
Docket: Doc. 21904

Counsel: *William E. Code, Q.C.*, and *John Kingman Phillips*, for appellant
Daniel M. McDonald, Q.C., and *Bruce R. Fraser, Q.C.*, for respondent

Subject: Criminal; Evidence
Headnote
Criminal Law --- Evidence — Crown evidence — Disclosure — Duty to disclose
Criminal Law --- Evidence — Evidence at trial — Witnesses — Duties of prosecutor — General
Criminal law — Evidence — Disclosure by Crown — Evidence favourable to defence — Police recording prospective witness's statement before trial and taking further written statement during trial — Crown not calling witness and refusing to produce statements on ground that witness not worthy of credit — Crown having duty to disclose all material evidence to defence — Absence of evidence possibly affecting outcome of trial — Supreme Court of Canada ordering new trial with statements produced.
Criminal law — Trial — Full answer and defence — Police recording prospective witness's statement before trial and taking further written statement during trial — Crown not calling witness and refusing to produce statements on ground that witness not worthy of credit — Crown having duty to disclose all material evidence to defence — Absence of evidence possibly affecting outcome of trial — Supreme Court of Canada ordering new trial with statements produced.
A lawyer was charged with theft, breach of trust and fraud by appropriating certain financial instruments which he held in trust for his client. The defence contended that despite the lawyer's formal status as trustee of the property, the client had in fact made the lawyer his business partner. Under this theory, the lawyer had acted as he was legally entitled to act. After the lawyer's former

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rejection was that at this stage it would be impossible to determine whether the statements would have been material to the defence if produced at trial.

II. Crown's Obligation to Disclose

9 The circumstances which give rise to this case are testimony to the fact that the law with respect to the duty of the Crown to disclose is not settled. A number of cases have addressed some aspects of the subject: see, for example, *Cunliffe v. Law Society of British Columbia*, [1984] 4 W.W.R. 451, 11 D.L.R. (4th) 280, 13 C.C.C. (3d) 560, 40 C.R. (3d) 67 (B.C.C.A.); *Savion v. R.* (1980), 13 C.R. (3d) 259, 52 C.C.C. (2d) 276 (Ont. C.A.); *R. v. Bourget* (1987), 56 C.R. (3d) 97, 46 M.V.R. 246, 54 Sask. R. 178, 35 C.C.C. (3d) 371, 41 D.L.R. (4th) 756, 29 C.R.R. 25 (C.A.). No case in this court has made a comprehensive examination of the subject. The Law Reform Commission of Canada, in a 1974 working paper titled *Criminal Procedure: Discovery* (the "1974 working paper"), and a 1984 report titled *Disclosure by the Prosecution* (the "1984 report"), recommended comprehensive schemes regulating disclosure by the Crown but no legislative action has been taken implementing the proposals. Apart from the limited legislative response contained in s. 603 of the *Criminal Code*, R.S.C. 1985, c. C-46, enacted in the 1953-54 overhaul of the *Criminal Code* (which itself condensed pre-existing provisions), legislators have been content to leave the development of the law in this area to the courts.

10 Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. Surprisingly, in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system has lingered on. While the prosecution bar has generally co-operated in making disclosure on a voluntary basis, there has been considerable resistance to the enactment of comprehensive rules which would make the practice mandatory. This may be attributed to the fact that proposals for reform in this regard do not provide for reciprocal disclosure by the defence (see 1974 working paper at pp. 29-31; 1984 report at pp. 13-15; Marshall Commission Report, infra, vol. 2, at pp. 242-44).

11 It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the

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fundamental difference in the respective roles of the prosecution and the defence. In *Boucher v. R.*, [1955] S.C.R. 16, 20 C.R. 1, 110 C.C.C. 263, Rand J. states (at pp. 23-24) [S.C.R.]:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

12 I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.

13 Other grounds advanced by advocates of the absence of a general duty to disclose all relevant information are that it would impose onerous new obligations on the Crown prosecutors resulting in increased delays in bringing accused persons to trial. This ground is not supported by the material in the record. As I have already observed, disclosure is presently being made on a voluntary basis. The extent of disclosure varies from province to province, from jurisdiction to jurisdiction and from prosecutor to prosecutor. The adoption of uniform, comprehensive rules for disclosure by the Crown would add to the workload of some Crown counsel but this would be offset by the time saved which is now spent resolving disputes such as this one surrounding the extent of the Crown's obligation and dealing with matters that take the defence by surprise. In the latter case an adjournment is frequently the result of non-disclosure or more time is taken by a defence counsel who is not prepared. There is also compelling evidence that much time would be saved and therefore delays reduced by reason of the increase in guilty pleas, withdrawal of charges and shortening or waiver of preliminary hearings. The 1984 report (at pp. 6-9) refers to several experimental projects which were established after the publication of the 1974 working paper in order to test the viability of pre-trial disclosure. The result of these experiments, and in particular the Montreal experiment, which was the most exhaustively evaluated, was that there was a significant increase in the number of cases settled and pleas of guilty entered or charges withdrawn.

14 In England, under the provisions of the *Criminal Justice Act 1967* (U.K.), 1967, c. 80, a "packet" of material is furnished to defence counsel. The provision of such material has led to a reduction in the length and number of preliminary hearings in that jurisdiction: *Report of the*

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Section 11

Found at **Tab 91, Volume 18** of Google's BOA.

1986 CarswellOnt 95
Supreme Court of Canada

R. v. Oakes

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

R. v. OAKES

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

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

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

Subject: Criminal; Constitutional; Criminal; Human Rights

Headnote

Criminal law --- Illegal drugs — Offences — Possession for purpose of trafficking — Narcotic Control Act [repealed]

Reverse onus provisions — Under s. 8 of Act, if accused found to be in possession of narcotic, accused presumed to be in possession for purpose of trafficking unless accused able to establish otherwise — Right to be presumed innocent as guaranteed by s. 11(d) of Charter rendering reverse onus in s. 8 of Act inoperative.

Criminal law --- Charter of Rights and Freedoms — Principles of interpretation

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

Criminal law --- Charter of Rights and Freedoms — Demonstrably justified reasonable limit [Oakes test] [s. 1]

The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee — The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited — The standard of proof under s. 1 is the civil standard,

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34 Further evidence of the widespread acceptance of the principle of the presumption of innocence is its inclusion in the major international human rights documents. Article 11(1) of the Universal Declaration of Human Rights, adopted 10th December 1948 by the General Assembly of the United Nations, provides:

> 11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

In the International Covenant on Civil and Political Rights (1966), art. 14(2) states:

> (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Canada acceded to this covenant, and the optional protocol which sets up machinery for implementing the covenant, on 19th May 1976. Both came into effect on 19th August 1976.

35 In light of the above, the right to be presumed innocent until proven guilty requires that s. 11(*d*) have, at a minimum, the following content. First, an individual must be proven guilty beyond a reasonable doubt. Second, it is the state which must bear the burden of proof. As Lamer J. stated in *Dubois v. R.*, S.C.C., 21st November 1985 (unreported) [now reported [1985] 2 S.C.R. 350, 48 C.R. (3d) 193[1986] 1 W.W.R. 19341 Alta. L.R. (2d) 9722 C.C.C. (3d) 51366 A.R. 20262 N.R. 50], at p. 6 [p. 215 (C.R.)]:

> Section 11(*d*) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or calling other evidence.

Third, criminal prosecutions must be carried out in accordance with lawful procedures and fairness. The latter part of s. 11(*d*), which requires the proof of guilt "according to law in a fair and public hearing by an independent and impartial tribunal", underlines the importance of this procedural requirement.

(c) Authorities on Reverse Onus Provisions and the Presumption of Innocence

36 Having considered the general meaning of the presumption of innocence, it is now, I think, desirable to review briefly the authorities on reverse onus clauses in Canada and other jurisdictions.

(i) The Canadian Bill of Rights Jurisprudence

37 Section 2(*f*) of the Canadian Bill of Rights, which safeguards the presumption of innocence, provides:

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[2] Section 11(d) of the *Canadian Charter of Rights and Freedoms* guarantees all persons "charged with an offence" the right to be presumed innocent until proven guilty. This Court has long held that this presumption requires guilt to be proven beyond a reasonable doubt (see *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 121). This Court has also recognized that s. 7 of the *Charter* provides residual protection for the presumption of innocence in circumstances where s. 11 does not apply (see *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 688). In proceedings where a moral judgment is made and severe liberty-depriving consequences are imposed as punishment, such as sentencing hearings with contested aggravating factors, s. 7's residual protection operates to require proof beyond a reasonable doubt (*ibid.*, at p. 686; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at paras. 78-80).

[3] The John Howard Society of Saskatchewan ("JHS") argues that s. 68 of Saskatchewan's *Correctional Services Regulations, 2013*, R.R.S., c. C-39.2, Reg. 1 ("*Regulations*"), infringes ss. 7 and 11(d) of the *Charter* because it sets the applicable standard of proof in inmate disciplinary proceedings at a balance of probabilities. This civil standard of proof is used even in circumstances where severe liberty-depriving consequences may be imposed. Under s. 77(1) of Saskatchewan's *Correctional Services Act, 2012*, S.S. 2012, c. C-39.2 ("*Act*"), inmates in provincial correctional institutions who have been found guilty of a "major disciplinary offence" face potential sanctions that include disciplinary segregation for up to 10 days and loss of up to 15 days of earned remission.

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Found at **Tab 40, Volume 7** of Google's BOA.

Competition Tribunal | Tribunal de la concurrence

PUBLIC VERSION

2019 CACT 6 (CanLII)

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6
File No.: CT-2016-015
Registry Document No.: 429

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34 as amended;

BETWEEN:

The Commissioner of Competition
(applicant)

and

Vancouver Airport Authority
(respondent)

Dates of hearing: October 2-5, 9-10, 15-17 and 30-31, November 1-2 and 13-15, 2018
Before: D. Gascon (Chairperson), P. Crampton C.J. and Dr. D. McFetridge
Date of Reasons for Order and Order: October 17, 2019

REASONS FOR ORDER AND ORDER

2019 CACT 6 (CanLII)

I. EXECUTIVE SUMMARY

[1] On September 29, 2016, the Commissioner of Competition ("**Commissioner**") filed a Notice of Application ("**Application**"), seeking relief against the Vancouver Airport Authority ("**VAA**") under section 79 of the *Competition Act*, RSC 1985, c C-34 ("**Act**"), commonly referred to as the abuse of dominance provision of the Act. The Application concerns VAA's decision to allow only two in-flight caterers to operate at the Vancouver International Airport ("**YVR**" or "**Airport**") and its refusal to grant licences to new providers of in-flight catering services. VAA is responsible for the management and operation of YVR.

[2] The Commissioner claims that, by limiting the number of providers of in-flight catering services at YVR, and by excluding new-entrant firms and denying the benefits of competition to the in-flight catering marketplace at the Airport, VAA has engaged in a practice of anti-competitive acts that have prevented or lessened competition substantially, and are likely to continue to do so. In the Commissioner's view, in-flight catering comprises the sourcing and preparation of the food served to passengers on commercial aircraft ("**Catering**") as well as the loading and unloading of such food on the airplanes ("**Galley Handling**").

[3] VAA responds that, at all times, it has been acting in accordance with its statutory mandate to manage and operate YVR in furtherance of the public interest, and that the regulated conduct doctrine ("**RCD**") shields the challenged practices from the operation of section 79 of the Act. VAA further asserts that it does not control the alleged markets for Galley Handling services or for access to the airside at YVR, and that since it has no involvement with in-flight catering services, it does not have any plausible competitive interest ("**PCI**") in the market for Galley Handling services. VAA adds that it has a legitimate business justification for not allowing additional in-flight caterers to operate at YVR. In brief, it states that this would imperil the viability of the two firms currently operating at the Airport. It maintains that it did not have an anti-competitive purpose, and that its decision to restrict the number of caterers at YVR has not prevented or lessened competition substantially in any relevant market, and is not likely to do so.

[4] For the reasons that follow, the Tribunal will dismiss the Application brought by the Commissioner. The Commissioner has failed to establish, on a balance of probabilities, that all three elements of section 79 have been satisfied. The Tribunal[1] first concludes that, in the circumstances of this case, the RCD does not shield VAA from the application of section 79 to its impugned conduct. The Tribunal further finds that VAA substantially or completely controls the supply of Galley Handling services at YVR, within the meaning of paragraph 79(1)(*a*) of the Act. However, even though the judicial members of the Tribunal consider that VAA has a PCI in the relevant market, the Tribunal unanimously concluded that VAA has not engaged in a practice of anti-competitive acts, as contemplated by paragraph 79(1)(*b*). The Tribunal is satisfied that VAA had and continues to have a legitimate business justification for its decision to limit the number of in-flight catering firms at YVR. This latter finding is sufficient to dismiss the

[1] Where the words "Tribunal" or "panel" are used and the decision relates to a matter of law alone, that decision has been made solely by the judicial members of the Tribunal.

Commissioner's Application. The Tribunal also concludes that the Commissioner has not established that VAA's conduct has prevented or lessened competition substantially, or is likely to do so, as contemplated by paragraph 79(1)(*c*). The Tribunal reaches that conclusion after finding that VAA's conduct has not materially reduced the degree of price or non-price competition in the supply of Galley Handling services at YVR, relative to the degree that would likely have existed in the absence of such conduct.

2019 CACT 6 (CanLII)

II. INTRODUCTION AND OVERVIEW

A. The parties

[5] The Commissioner is the public official appointed by the Governor in Council under section 7 of the Act to be responsible for the enforcement and administration of the Act.

[6] VAA is a not-for-profit corporation established in 1992 pursuant to Part II of the *Canada Corporations Act*, RSC 1970, c C-32, and continued in 2013 under the *Canada Not-for-profit Corporations Act*, SC 2009, c 23. It manages and operates YVR pursuant to a ground lease entered into on June 30, 1992 with the Government of Canada, represented by the Minister of Transport ("**1992 Ground Lease**").

B. Section 79 of the Act

[7] Pursuant to subsection 79(1) of the Act, the Tribunal may make an order prohibiting all or any of the persons described in paragraph 79(1)(*a*) from engaging in a practice described in paragraph 79(1)(*b*), where it finds, on a balance of probabilities, that the three elements articulated in that subsection have been met. Those are 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.

[8] The foregoing three elements must each be independently assessed. In *Canada (Commissioner of Competition) v Canada Pipe Company Ltd*, 2006 FCA 233 ("***Canada Pipe FCA***"), leave to appeal to SCC refused, 31637 (10 May 2007), the Federal Court of Appeal ("**FCA**") stressed that, in abuse of dominance cases, the Tribunal must avoid "the interpretive danger of impermissible erosion or conflation of the discrete underlying statutory tests" (*Canada Pipe FCA* at para 28). However, the same evidence can be relevant to more than one element (*Canada Pipe FCA* at paras 27-28).

[9] Pursuant to subsection 79(2), if an order is not likely to restore competition in a market, the Tribunal may, in addition to or in lieu of making an order under subsection 79(1), make an order directing any or all of the persons against whom an order is sought to take such actions as are reasonable and necessary to overcome the effects of the practice in a market in which the Tribunal has found the three above-mentioned elements to have been met.

[10] The Commissioner bears the burden of satisfying the three elements of subsection 79(1), and the Tribunal must make a positive determination in respect of each of those elements before it may issue an order (*Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 ("***TREB FCA***") at para 48, leave to appeal to SCC refused, 37932 (23 August 2018); *Canada Pipe FCA* at paras 27-28). The burden of proof with respect to each element is the civil standard, that is, the balance of probabilities (*TREB FCA* at para 48; *Canada Pipe FCA* at para 46).

[11] The full text of section 79 of the Act, and of section 78, which sets forth a non-exhaustive list of anti-competitive acts, is reproduced in Schedule "A" to this decision.

C. The parties' pleadings

[12] In his Application, the Commissioner alleges that each of the three elements that must be satisfied under subsection 79(1) of the Act has been met.

[13] With respect to paragraph 79(1)(*a*), the Commissioner contends that there are two relevant product markets in this Application: (1) the market for the supply of Galley Handling services at YVR ("**Galley Handling Market**"), as these services are defined by the Commissioner; and (2) the market for airport airside access for the supply of Galley Handling services ("**Airside Access Market**"). The Commissioner further submits that the relevant geographic market is YVR. The Commissioner claims that VAA substantially or completely controls the Airside Access Market at YVR, as well as the Galley Handling Market at the Airport.

[14] With respect to paragraph 79(1)(*b*) of the Act, the Commissioner asserts that VAA has engaged in and is engaging in a practice of anti-competitive acts through two forms of exclusionary conduct (together, "**Practices**"). First, through its ongoing refusal to grant access to the airside at YVR to new-entrant firms for the supply of Galley Handling services at the Airport ("**Exclusionary Conduct**"). Second, through its continued tying of access to the airport airside for the supply of Galley Handling with the leasing of airport land from VAA for the operation of catering kitchen facilities. As it turned out, the Commissioner's focus in this proceeding was primarily on the first alleged practice of anti-competitive acts, namely, the Exclusionary Conduct. The Tribunal notes that in early 2018, VAA granted a licence to a new provider of in-flight catering services, dnata Catering Services Ltd. ("**dnata**"), who was scheduled to start operating in 2019 with a flight kitchen located outside of YVR's airport land.

[15] The Commissioner alleges that until dnata received a licence in 2018, no new entry in the in-flight catering marketplace had occurred at YVR in more than 20 years. He further maintains that in 2014, VAA refused requests from two new-entrant firms which are both well established at other Canadian airports. The Commissioner submits that VAA refused to authorize new

2019 CACT 6 (CanLII)

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)

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 82, Volume 16 Google's BOA.

K.R.J. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Association des avocats de la défense de Montréal, David Asper Centre for Constitutional Rights, Criminal Lawyers' Association (Ontario) and British Columbia Civil Liberties Association *Interveners*

INDEXED AS: R. *v.* K.R.J.

2016 SCC 31

File No.: 36200.

2015: December 2; 2016: July 21.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Benefit of lesser punishment — Sentencing — Accused pleaded guilty to incest and making child pornography — Retrospective application of amendments to Criminal Code expanding scope of community supervision measures sentencing judge can impose on sexual offenders — Offences committed prior to amendments but accused sentenced after — Whether new prohibition measures contained in Criminal Code constitute punishment such that their retrospective operation limits right protected by s. 11(i) of Charter — If so, whether limit is justified — Reformulation of s. 11(i) test for punishment — Canadian Charter of Rights and Freedoms, ss. 1, 11(i) — Criminal Code, R.S.C. 1985, c. C-46, s. 161(1)(c), (d).

K.R.J. *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général du Canada, procureur général de l'Ontario, Association des avocats de la défense de Montréal, David Asper Centre for Constitutional Rights, Criminal Lawyers' Association (Ontario) et Association des libertés civiles de la Colombie-Britannique *Intervenants*

RÉPERTORIÉ : R. *c.* K.R.J.

2016 CSC 31

N° du greffe : 36200.

2015 : 2 décembre; 2016 : 21 juillet.

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

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

Droit constitutionnel — Charte des droits — Droit de bénéficier de la peine la moins sévère — Détermination de la peine — Plaidoyer de culpabilité inscrit par l'inculpé à l'égard d'accusations d'inceste et de production de pornographie juvénile — Application rétrospective de modifications du Code criminel ayant pour effet d'accroître la portée des mesures de surveillance dans la collectivité auxquelles le juge qui détermine la peine peut soumettre un délinquant sexuel — Modifications apportées après la perpétration des infractions, mais avant la détermination de la peine — Les nouvelles interdictions prévues par le Code criminel infligent-elles une peine, de sorte que leur application rétrospective restreigne le droit garanti par l'art. 11i) de la Charte? — Dans l'affirmative, cette restriction est-elle justifiée? — Reformulation du critère qui permet d'assimiler une mesure à une peine pour les besoins de l'art. 11i) — Charte canadienne des droits et libertés, art. 1, 11i) — Code criminel, L.R.C. 1985, c. C-46, art. 161(1)c), d).

2016 SCC 31 (CanLII)

Nicholas St-Jacques and *Lida Sara Nouraie*, for the intervener Association des avocats de la défense de Montréal.

John Norris and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

Matthew R. Gourlay, for the intervener the Criminal Lawyers' Association (Ontario).

Emily MacKinnon and *Michael A. Feder*, for the intervener the British Columbia Civil Liberties Association.

The judgment of McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ. was delivered by

KARAKATSANIS J. —

I. Introduction

[1] People's conduct and the legal consequences that flow from it should be judged on the basis of the law in force at the time. This is a basic tenet of our legal system.

[2] In recognition of this principle, s. 11(*i*) of the *Canadian Charter of Rights and Freedoms* provides that, if the punishment for an offence is varied after a person commits the offence, but before sentencing, the person is entitled to "the benefit of the lesser punishment". Like the other legal rights enshrined in s. 11 of the *Charter*, s. 11(*i*) is fundamentally important to our justice system because it protects the fairness of criminal proceedings and safeguards the rule of law.

[3] When offenders are convicted of certain sexual offences against a person under the age of 16 years, s. 161(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, gives sentencing judges the discretion to prohibit them from engaging in a variety of everyday conduct upon their release into the community, subject to any conditions or exemptions the judge considers appropriate. In 2012, Parliament expanded

Nicholas St-Jacques et *Lida Sara Nouraie*, pour l'intervenante l'Association des avocats de la défense de Montréal.

John Norris et *Cheryl Milne*, pour l'intervenant David Asper Centre for Constitutional Rights.

Matthew R. Gourlay, pour l'intervenante Criminal Lawyers' Association (Ontario).

Emily MacKinnon et *Michael A. Feder*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Version française du jugement de la juge en chef McLachlin et des juges Cromwell, Moldaver, Karakatsanis, Wagner, Gascon et Côté rendu par

LA JUGE KARAKATSANIS —

I. Introduction

[1] Un tribunal devrait se prononcer sur la conduite d'une personne et sur les conséquences juridiques qui en découlent en fonction du droit qui s'appliquait au moment de la conduite reprochée. C'est là un précepte fondamental de notre système juridique.

[2] Conformément à ce principe, l'al. 11*i*) de la *Charte canadienne des droits et libertés* prévoit, lorsque la peine qui sanctionne une infraction est modifiée après la perpétration de celle-ci, mais avant la détermination de la peine, que le contrevenant a le droit « de bénéficier de la peine la moins sévère ». Comme les autres droits consacrés par l'art. 11 de la *Charte*, celui conféré à l'al. 11*i*) revêt une importance fondamentale pour notre système de justice, car il assure l'équité des procédures criminelles et garantit la primauté du droit.

[3] Lorsqu'une personne est déclarée coupable d'une infraction sexuelle énumérée à l'égard d'une personne âgée de moins de 16 ans, le par. 161(1) du *Code criminel*, L.R.C. 1985, c. C-46, confère au juge qui détermine la peine un pouvoir discrétionnaire lui permettant de lui interdire de se livrer à différentes activités quotidiennes après sa libération et une fois de retour dans la collectivité,

2016 SCC 31 (CanLII)

[21] Section 11(*i*) is another such right:

> **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.

[22] Along with s. 11(*g*) — which protects an accused's right "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" — s. 11(*i*) constitutionally enshrines the fundamental notion that criminal laws should generally not operate retrospectively.

[23] This constitutional aversion to retrospective criminal laws is in part motivated by the desire to safeguard the rule of law. As Lord Diplock put it, "acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it" (*Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591 (H.L.), at p. 638). One author expressed the rule of law implications of retrospective laws in these terms:

> According to the ideal of the rule of law, the law must be such that those subject to it can reliably be guided by it, either to avoid violating it or to build the legal consequences of having violated it into their thinking about what future actions may be open to them. People must be able to find out what the law is and to factor it into their practical deliberations. The law must avoid taking people by surprise, ambushing them, putting them into conflict with its requirements in such a way as to defeat their expectations and frustrate their plans.

(J. Gardner, "Introduction", in H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd ed. 2008), xiii, at p. xxxvi)

[21] L'alinéa 11*i*) protège un autre de ces droits très importants :

> **11.** Tout inculpé a le droit :
>
> . . .
>
> *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.

[22] De pair avec l'al. 11*g*) — qui protège le droit de l'accusé « 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 » —, l'al. 11*i*) constitutionnalise la notion fondamentale voulant que, en matière pénale, une disposition ne doive généralement pas s'appliquer rétrospectivement.

[23] Cette aversion de la Constitution pour les dispositions pénales d'application rétrospective tient en partie à la volonté de garantir la primauté du droit. Comme le dit lord Diplock, [TRADUCTION] « l'acceptation de la primauté du droit en tant que principe constitutionnel exige qu'un citoyen, avant d'adopter une ligne de conduite, puisse connaître à l'avance les conséquences qui en découleront sur le plan juridique » (*Black-Clawson International Ltd. c. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591 (H.L.), p. 638). Un auteur formule comme suit les répercussions d'une disposition d'application rétrospective sur la primauté du droit :

> [TRADUCTION] L'idéal de la primauté du droit veut que la loi permette à celui qui y est assujetti de s'y fier afin de pouvoir éviter d'y contrevenir ou de pouvoir se représenter les conséquences juridiques d'une contravention au moment d'envisager quelque action. Les gens doivent pouvoir connaître la teneur de la loi et en tenir effectivement compte dans leur réflexion. La loi doit éviter de prendre les gens au dépourvu, de leur tendre un piège, de les mettre en opposition avec ses exigences de manière à tromper leurs attentes et à contrecarrer leurs plans.

(J. Gardner, « Introduction », dans H. L. A. Hart, *Punishment and Responsibility : Essays in the Philosophy of Law* (2e éd. 2008), xiii, p. xxxvi)

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[24] Retrospective laws threaten the rule of law in another way, by undercutting the integrity of laws currently in effect, "since it puts them under the threat of retrospective change" (L. L. Fuller, *The Morality of Law* (rev. ed. 1969), at p. 39).

[25] Relatedly, retrospective laws implicate fairness. "It is unfair to establish rules, invite people to rely on them, then change them in mid-stream, especially if the change results in negative consequences" (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 754). For example, an accused who declines to consider a plea and is prepared to take the risk of going to trial should not be subsequently ambushed by an increase in the minimum or maximum penalty for the offence. A retrospective law such as this could not only cause unfairness in specific cases, but could also undermine public confidence in the criminal justice system. Instead, fairness in criminal punishment requires rules that are clear and certain. As McLachlin J. wrote in *R. v. Kelly*, [1992] 2 S.C.R. 170:

> It is a fundamental proposition of the criminal law that the law be certain and definitive. This is essential, given the fact that what is at stake is the potential deprivation of a person of his or her liberty and his or her subjection to the sanction and opprobrium of criminal conviction. This principle has been enshrined in the common law for centuries, encapsulated in the maxim *nullum crimen sine lege, nulla poena sine lege* — there must be no crime or punishment except in accordance with law which is fixed and certain. [p. 203]

[26] Clearly, the concerns with retrospective laws are particularly potent in proceedings that are criminal, *quasi*-criminal, or in which a "true penal consequence" is at stake — the context to which s. 11 applies (*Wigglesworth*, at p. 559).

[27] In sum, s. 11(*i*) is rooted in values fundamental to our legal system, including respect for the rule

[24] La disposition d'application rétrospective compromet aussi la primauté du droit en compromettant l'intégrité des dispositions actuellement en vigueur [TRADUCTION] « parce qu'elle expose ces dernières au risque d'une modification rétrospective » (L. L. Fuller, *The Morality of Law* (éd. rév. 1969), p. 39).

[25] Dans le même ordre d'idées, la disposition d'application rétrospective met en cause l'équité. [TRADUCTION] « Il est injuste de fixer des règles, d'inviter les gens à s'y fier puis de les modifier en cours de route, surtout lorsqu'il en résulte des conséquences négatives » (R. Sullivan, *Sullivan on the Construction of Statutes* (6e éd. 2014), p. 754). Par exemple, l'accusé qui refuse d'inscrire un plaidoyer de culpabilité et qui est disposé à courir le risque de subir un procès ne devrait pas ensuite se trouver pris au piège par l'accroissement de la peine minimale ou maximale dont est passible l'auteur de l'infraction. Un tel effet rétrospectif pourrait non seulement causer une injustice dans certains cas, mais aussi miner la confiance du public dans le système de justice criminelle. L'équité de la sanction pénale commande plutôt que les règles soient claires et certaines. Comme l'écrit la juge McLachlin dans *R. c. Kelly*, [1992] 2 R.C.S. 170 :

> C'est un concept fondamental du droit pénal que les règles de droit doivent être précises et définitives. C'est là un concept essentiel puisqu'une personne risque d'être privée de sa liberté et de subir la sanction et l'opprobre que jette une déclaration de culpabilité criminelle. Ce principe est inscrit dans la common law depuis des siècles, et formulé dans la maxime *nullum crimen sine lege, nulla poena sine lege* — il ne saurait exister de crimes ou de sanctions sauf en conformité avec des règles de droit bien établies et précises. [p. 203]

[26] Manifestement, les inquiétudes que suscite une disposition d'application rétrospective sont particulièrement grandes en matière de procédures criminelles ou quasi criminelles, ou lorsqu'une « véritable conséquence pénale » est en jeu, ce qui correspond au contexte dans lequel s'applique l'art. 11 (*Wigglesworth*, p. 559).

[27] Bref, l'al. 11*i*) prend appui sur des valeurs fondamentales de notre système juridique, y compris

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of law and ensuring fairness in criminal proceedings.

(2) The Framework for Defining Punishment in Section 11(*i*) of the *Charter*

[28] In *Rodgers*, this Court developed a two-part test for determining whether a consequence amounts to "punishment" under s. 11(*i*): (1) the measure must be a consequence of a conviction that "forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence"; and (2) it must be "imposed in furtherance of the purpose and principles of sentencing" (para. 63).

[29] In the course of articulating this test, Charron J. observed that a "liberal and purposive approach" must be taken to defining punishment (para. 61), but also cautioned that "punishment" does not "encompas[s] every potential consequence of being convicted of a criminal offence" (para. 63). For example, if a consequence advances a legitimate non-punitive state interest, such as solving future crimes, it will likely not constitute punishment, even if it indirectly furthers a sentencing objective like deterrence (*Rodgers*, at para. 64). Applying this test, Charron J. concluded that post-conviction DNA databank orders do not constitute punishment because they are imposed to assist in the *investigation* of future crimes, not in furtherance of the purpose and principles of sentencing. The fact that a DNA profile may deter offenders is merely a "residual benefit" (para. 64, quoting *R. v. Murrins*, 2002 NSCA 12, 201 N.S.R. (2d) 288 (C.A.), at para. 102).

[30] While the first branch of the s. 11(*i*) test for punishment (consequence of conviction) has proven to be relatively straightforward, the second branch (imposed in furtherance of the purpose and principles of sentencing) has given rise to two key ambiguities. First, do laws that are primarily aimed at protecting the public necessarily fail to satisfy the second branch of the *Rodgers* test? Second, what

le respect de la primauté du droit et la garantie de l'équité des procédures criminelles.

(2) Le cadre dans lequel définir la peine au sens de l'al. 11*i*) de la *Charte*

[28] Dans *Rodgers*, la Cour dégage un critère à deux volets pour décider si une conséquence équivaut ou non à une « peine » au sens de l'al. 11*i*) : (1) la mesure doit être une conséquence de la déclaration de culpabilité et faire partie des « sanctions dont est passible un accusé pour une infraction donnée » et (2) elle doit être « conforme à l'objectif et aux principes de la détermination de la peine » (par. 63).

[29] Tout en formulant ce critère, la juge Charron fait remarquer que « l'interprétation libérale et téléologique » s'impose pour définir la peine (par. 61), mais elle fait aussi une mise en garde : « . . . la "peine" [n'englobe pas] toute conséquence pouvant découler du fait d'être déclaré coupable d'une infraction criminelle » (par. 63). Par exemple, lorsqu'une conséquence sert un intérêt non punitif et légitime de l'État, comme la résolution de crimes ultérieurs, elle ne constitue vraisemblablement pas une peine même si, indirectement, elle est conforme à un objectif de la détermination de la peine, telle la dissuasion (*Rodgers*, par. 64). Au vu de ce critère, la juge Charron conclut que l'autorisation de prélever un échantillon d'ADN qui fait suite à la déclaration de culpabilité ne constitue pas une peine, car elle intervient pour faciliter la tenue d'*enquêtes* sur de futurs crimes, non pour se conformer à l'objectif et aux principes de la détermination de la peine. La possibilité que l'existence d'un profil d'identification génétique décourage la récidive ne représente qu'un [TRADUCTION] « avantage secondaire » (par. 64, citant *R. c. Murrins*, 2002 NSCA 12, 201 N.S.R. (2d) 288 (C.A.), par. 102).

[30] Bien que l'application du premier volet du critère qui permet d'assimiler une mesure à une peine pour les besoins de l'al. 11*i*) (être la conséquence d'une déclaration de culpabilité) se révèle relativement simple, celle de son deuxième volet (la conformité à l'objectif et aux principes de la détermination de la peine) soulève deux ambiguïtés fondamentales. Premièrement, la disposition qui vise

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Found at **Tab 60, Volume 12** Google's BOA.

2024 SCC 35 (CanLII)

SUPREME COURT OF CANADA

CITATION: R. *v.* Archambault, 2024 SCC 35

APPEAL HEARD: February 14, 2024
JUDGMENT RENDERED: November 1, 2024
DOCKET: 40428

BETWEEN:

His Majesty The King
Appellant

and

Agénor Archambault and Gilles Grenier
Respondents

- and -

Attorney General of Canada, Attorney General of Ontario, Association québécoise des avocats et avocates de la défense, Association des avocats de la défense de Montréal-Laval-Longueuil, Criminal Lawyers' Association (Ontario) and Canadian Civil Liberties Association
Interveners

OFFICIAL ENGLISH TRANSLATION:
Reasons of Côté and Rowe JJ. and reasons of Kasirer J.

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

2024 SCC 35 (CanLII)

[25] The Crown argues that the Court of Appeal erred in finding that the right to a preliminary inquiry is governed by the law in force at the time the offence with which the accused is charged was committed. The effect that the new s. 535 *Cr. C.* must be given thus depends rather on the application of the presumption against interference with vested rights. According to the Crown, if there is a vested right to a preliminary inquiry, this right does not vest until a valid request for such an inquiry is made.

[26] In this case, assessing the merits of these arguments brings into play three well-established principles of transitional law, which one must be careful not to conflate: (1) the principle of legality; (2) the presumption against interference with vested rights; and (3) the exception based on the immediate application of purely procedural provisions. On the basis of the first principle, the Court of Appeal held that the right to a preliminary inquiry is accruing from the moment the offence is committed. On the basis of the second principle, it held that this right is vested at the date of the first appearance. None of the parties argues that the third principle applies here, but this principle must still be considered in order to resolve the question of the temporal application of the new s. 535 *Cr. C.*

[27] The principle of legality is a "pillar of the criminal law" whose purpose is to preserve the law as it stood at the time an offence was committed (*R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at para. 59). The principle was helpfully summarized by Iacobucci and Arbour JJ. in *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357: "As a general matter, persons accused of criminal conduct are to be charged and sentenced

2024 SCC 35 (CanLII)

under the criminal law provisions in place at the time that the offence allegedly was committed" (para. 41). This rule finds expression in two forms, both of which are embodied in the *Charter* (Côté and Devinat, at Nos. 566-67; G. Côté-Harper, P. Rainville and J. Turgeon, *Traité de droit pénal canadien* (4th ed. rev. 1998), at pp. 99-120). First, the new legislation cannot make criminal any act or omission that did not constitute an offence at the time it occurred; s. 11(g) guarantees to any person charged with an offence the right not to be found guilty under such legislation. Second, the new legislation cannot create more severe punishments for an offence committed before it came into force; s. 11(i) guarantees to any person charged with an offence the right to the benefit of the lesser punishment if the punishment has been varied between the time of commission of the offence and the time of sentencing. The rule of law and the fairness of criminal proceedings depend on this (*R. v. Kelly*, [1992] 2 S.C.R. 170, at p. 203, per McLachlin J.; *Poulin*, at para. 59; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at paras. 22-25).

[28] The presumption that Parliament does not intend to interfere with vested rights or privileges is one of the fundamental principles of transitional law. To ensure the certainty of the legal consequences attaching to facts and conduct predating a legislative amendment, "a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction" (*Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at pp. 282-83, citing *Spooner Oils Ltd. v. Turner Valley Gas Conservation*, [1933] S.C.R. 629, at p. 638; see also *Dikranian v. Quebec*

150. Google began to leverage its position across markets soon after it acquired DoubleClick in 2008, which included DFP and AdX. Almost immediately, Google began tying those products to Google's advertiser ad network, Google Ads. By conditioning effective access to any one of its ad tech tools on the use of its other tools, Google began locking-in publishers.

151. Subsequent to the tie being put in place, Google undertook a series of actions designed to further distort competition and entrench its dominance across the ad tech stack. Using DFP's market power, Google undertook to systematically advantage its ad tech tools and steer transactions away from rivals. Google did this in several ways including:

a) DFP granting AdX advantageous access to its ad inventory over rival exchanges through its Dynamic Allocation feature, which gave AdX an exclusive "first look" and later "last look" bid advantage;

b) using negative take rates to steer impressions towards Google Ads and away from other AdX buyers through a program Google internally called Project Bernanke (as detailed below, at paragraphs 179-185); and

c) implementing Unified Pricing Rules, which restricted publishers' ability to price AdX differently from rival ad exchanges.

152. Along the way, Google purposely identified, restrained, and deprecated innovative technologies that stood to benefit publishers and advertisers, but threatened its dominance.

153. Google's conduct has had (and is having) the intended effect of distorting competition and foreclosing to rival ad tech providers important access to transactions, scale and customers necessary to mount effective competition against Google's dominance. Each of DFP, AdX, and Google Ads have as a result become the default tools for publishers and advertisers — not because the

tools are superior to those of Google's rivals, but because Google has been able to leverage its market power in each market such that using its suite of tools became the only viable option for a significant majority of publishers and advertisers.

154. The conduct described herein constitutes a practice of anti-competitive acts that Google has and continues to engage in to preserve and enhance its dominant position across the ad tech stack.

1. Google locks publishers into its ad tech tools

155. Before its acquisition of DoubleClick in 2008, Google already had a large captive base of advertiser demand through its position in search advertising. With the acquisition of DoubleClick, Google added DFP and its sizeable pool of publishers to its customer base, and AdX, a then-nascent ad exchange. Not long thereafter Google began taking steps to lock publishers into its publisher ad server, DFP. This was done to secure its position not only in the Publisher Ad Server market, but also to cement its place in the Ad Exchange market.

156. Google knew that by leveraging its market power in the Publisher Ad Server market, it could strengthen its position in the Ad Exchange market. In effect, Google left publishers and advertisers with no choice but to transact through Google's own ad tech stack, and not with its rivals. The actions taken by Google to tie its products together manifested in two ways, as described below.

a) Google conditions access to Google Ads demand on the use of AdX

157. Since 2008, Google has substantially restricted advertisers using Google Ads from bidding on rival ad exchanges' inventory. If publishers want access to the millions of advertisers who use Google Ads' to purchase web advertising, they have no choice but to auction their inventory through AdX. Google thereby

COMPETITION TRIBUNAL
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CT- 2024-010

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OTTAWA, ONT. # 24

PUBLIC 1000

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*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

REPLY

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136. In any event, Google's dominant position, practice of anti-competitive acts, and effects over the three years preceding the Application warrant the remedies sought by the Commissioner.

VII. THE ENTIRETY OF GOOGLE'S ABUSE OF DOMINANCE MUST BE ASSESSED UNDER THE ACT AS CURRENTLY IN FORCE

137. The current Act applies both as it relates to the legal test that must be applied by the Tribunal in assessing Google's conduct and as it relates to the remedies that the Tribunal will be required to dispense, if any. However, the Application meets the test for liability under both the current and former provisions of ss. 79(1) of the Act.

138. The fact that some of the anti-competitive actions and anti-competitive programs that formed part of the single "practice" occurred before section 79 was amended is without legal consequence. Google has over the course of a decade, through the adoption of a series of anti-competitive actions and anti-competitive programs, tied together its different ad tech products, hamstrung rivals' ability to compete on the merits, and purposely restrained and deprecated innovative technologies that stood to threaten its market power.

139. Google's same and continuous single practice adapted and progressed as circumstances evolved. What is material for the purpose of assessing the application of the Act is that Google's "practice" continues through to today and engages section 79 of the Act, as it exists in its current form, including all remedies provided for under the Act.

140. With a finding 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, the remedies provided for under the Act, including the AMP provisions found in ss. 79(3.1), are available to the Tribunal. The fact that some of the anti-competitive actions and anti-

Found at **Tab 30, Volume 3**
Google's BOA.

COURT OF APPEAL FOR ONTARIO

CITATION: Canada (Attorney General) v. Lalonde, 2016 ONCA 923
DATE: 20161208
DOCKET: C61456

Doherty, Blair and Epstein JJ.A.

BETWEEN

Attorney General of Canada

Appellant

and

Rodney Lalonde

Respondent

Elizabeth Kikuchi, for the appellant

Brian A. Callender, for the respondent

Heard: November 3, 2016

On appeal from the order of Justice Robert F. Scott of the Superior Court of Justice, dated November 26, 2015, with reasons reported at 2015 ONSC 6937.

Doherty J.A.:

I

OVERVIEW

[1] The respondent, Rodney Lalonde, pled guilty to and was convicted of one count of conspiracy to traffic in cocaine and one count of conspiracy to traffic in marihuana. Both offences were alleged to have occurred between March 20,

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discretion in favour of hearing the moot appeal. As pointed out in the material filed by the Attorney General, the determination of the applicability of the accelerated parole provisions, despite their repeal, continues to have relevance for about 200 offenders serving sentences in penitentiaries across Canada. The parties agree that by addressing the merits of the appeal, the court can provide guidance to the Correctional authorities charged with the responsibility of determining parole eligibility dates.

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II

WHEN IS A CRIME COMMITTED FOR THE PURPOSES OF SECTION 11(I) OF THE *CHARTER*?

[10] Section 11(i) of the *Charter* provides:

> 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.

[11] Section 11(i) of the *Charter*, like s. 11(g) and s. 11(h), reflects a constitutional aversion to retrospective criminal legislation. Retrospective criminal laws are viewed as unfair and undermining the rule of law because they effectively change the rules in the middle of the "game" to the detriment of the individual affected by those rules. Fairness and respect for the rule of law

require that a person's maximum exposure to punishment for a criminal act be fixed as of "the time of commission" of the criminal act for which he or she is to be punished: see *R. v. K.R.J.*, 2016 SCC 31, 337 C.C.C. (3d) 285, at paras. 20-27.

[12] The abolition of eligibility for accelerated parole increased the punishment imposed on Mr. Lalonde: *Lewis*, at paras. 20-24. Consequently, if Mr. Lalonde committed his crimes before the punishment for those crimes was varied on March 28, 2011 by the elimination of eligibility for accelerated parole, Mr. Lalonde was constitutionally entitled to the benefit of "the lesser punishment", that is the parole scheme that included eligibility to be considered for early parole.

[13] Counsel for the Attorney General submits that while the crime of conspiracy is committed when two or more persons enter into an agreement to commit a crime, intending to carry out that agreement, the crime continues until the criminal object is achieved or the agreement is frustrated, usually by the arrest of the co-conspirators: see *R. v. J.F.*, 2013 SCC 12, [2013] 1 S.C.R. 565, at paras. 21, 44, 58; and *R. v. Bell*, [1983] 2 S.C.R. 471, at p. 488. Counsel submits that as long as a conspiracy continues, it is not completed and should not be treated as committed for the purposes of s. 11(i). On that approach, Mr. Lalonde continued to commit the offence of conspiracy beyond March 28, 2011 to July 2011 when he and his fellow conspirators were arrested. If the Attorney General's interpretation is correct, there is no variation in the penalty for the

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offence between “the time of commission” and “the time of sentencing”. Section 11(i) would have no application.

[14] Counsel for Mr. Lalonde does not take issue with counsel for the Attorney General’s description of the crime of conspiracy as a continuing offence. He submits, however, that conspiracy, like all crimes, is committed when the requisite *actus reus* and *mens rea* coexist. Counsel submits that the Attorney General’s submissions fail to distinguish between the commission of a continuing offence and the completion or termination of that offence. Counsel argues that on a plain reading, s. 11(i) of the *Charter* is concerned with the commission and not the termination or completion of an offence. Counsel argues that on the facts of this case, Mr. Lalonde entered into conspiracies to traffic in cocaine and marihuana before March 28, 2011. He had therefore committed his crimes before that date even though he and his co-conspirators carried on efforts to achieve the objects of the conspiracies after March 28, 2011.

[15] The distinction drawn by counsel for Mr. Lalonde between the point in time at which a crime is committed and the point at which that crime is completed or terminated is a valid one when the offence is a continuing offence. The commission of a crime connotes culpability for that crime. An offender is culpable in the sense that he or she is liable to be convicted for the offence when he or she has performed the required *actus reus* with the required *mens rea*. Criminal culpability exists from that point forward whether the offence is a

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continuing one or not: see *Bell*, at p. 488; and *Brodie v. The King*, [1936] S.C.R. 188, at p. 198. Events subsequent to the point in time at which the *actus reus* and *mens rea* coexist cannot remove or negative culpability, although they may mitigate or aggravate punishment: see *R. v. Kosh*, [1965] 1 C.C.C. 230, 44 C.R. 185, at p. 235 (Sask. C.A.); and *R. v. Roberts*, [1981] B.C.J. No. 1185, at para. 7 (C.A.). For example, a person who enters into a criminal conspiracy, intending to carry it out, but abandons the conspiracy before the object is achieved or the agreement is terminated, remains criminally liable for the crime of conspiracy. As explained by Taschereau J., in *R. v. O'Brien*, [1954] S.C.R. 666, at p. 669:

> If a person, with one or several others, agrees to commit an unlawful act, and later, after having had the intention to carry it through, refuses to put the plan into effect, that person is nevertheless guilty, because all the ingredients of conspiracy can be found in the accused's conduct. …

[16] If, as is clear on the authorities, culpability for criminal conspiracy attaches when a person enters into an agreement with one or more other persons to commit a criminal offence, intending to achieve that criminal object, it is illogical to say that the conspiracy is not committed until the unlawful object is achieved or the conspiracy terminated. The continuing nature of the offence of conspiracy has significance for various issues. However, the continuing nature of the crime has no impact on the determination of the point in time at which liability for the commission of the offence attaches. If a person engages in the required *actus*

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This Web page has been archived on the Web.

Version of document from 2007-06-22 to 2009-03-11:

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,

(2) The Governor in Council may, on the recommendation of the Minister and the Minister of Transport, make regulations

(a) specifying acts or conduct for the purpose of paragraph (1)(j); and

(b) specifying facilities or services that are essential to the operation of an air service for the purpose of paragraph (1)(k).

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2000, c. 15, s. 13.

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) 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.

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.

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 or 92

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

(a) against whom proceedings have been commenced under section 45, or

(b) against whom an order is sought under section 92

on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.

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.

Unpaid monetary penalty

Legend:
Blue: text added
Red: text removed
Green: text moved

Blackline of the *Competition Act* from 2002 to Present

Abuse of Dominant Position

Definition of "*anti-competitive act*"

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

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

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

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

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

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

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

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

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

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

(j) ~~acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, that are specified under paragraph (2)(a); and~~ 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]

~~(k) the denial by a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms.~~

~~**Regulations**~~

~~**(2)** The Governor in Council may, on the recommendation of the Minister and the Minister of Transport, make regulations~~

~~(a) specifying acts or conduct~~ for the purpose of ~~paragraph (1)(k); and~~

~~(b) specifying facilities or services that are essential to the operation of an air service for the purpose of paragraph (1)(k).~~

Prohibition ~~where~~if abuse of dominant position

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

~~(a)~~ one or more persons substantially or completely control~~, throughout Canada or any area thereof,~~ a class or species of business~~,~~ 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~~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~~anti-competitive acts amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order

under subsection (1), make an order directing any or all ~~the~~ persons against whom an order is sought to take ~~such~~ actions, including the divestiture of assets or shares, ~~as~~that are reasonable and ~~as are~~ necessary to overcome the effects of the practice in that market.

Limitation

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

Administrative monetary penalty

~~**Administrative monetary penalty**~~

(3.1) ~~Where~~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)~~ 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~~them to pay, in ~~such~~any manner ~~as the Tribunal may specify, an~~ that it specifies, an administrative monetary penalty in an amount not exceeding the greater ~~than $15 million.~~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 ~~mitigation~~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 ~~frequency and duration of the practice~~effect on competition in the relevant market;

(b) the ~~vulnerability of the class of persons adversely~~gross revenue from sales affected by the practice;

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

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

(~~e~~f) any other relevant factor.

Purpose of order

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

~~**Superior competitive performance**~~

Factors to be considered

(4) In determining, for the purposes of ~~subsection~~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 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) ~~against whom~~ proceedings have been commenced against that person under section 45~~,~~ or
49; or

(b) ~~against whom~~ an order ~~is sought~~against that person has been made under section 76, 90.1 or 92.

~~on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.~~

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

Summary report: Litera Compare for Word 11.11.0.158 Document comparison done on 2025-09-19 5:51:00 PM	
Style name: Davies (with strikethrough for delete)	
Intelligent Table Comparison: Active	
Original filename: B. Competition Act Following the Passing of Bill C-23 (2002).docx	
Modified filename: F. Current Competition Act.docx	
Changes:	
Add	91
~~Delete~~	88
~~Move From~~	17
Move To	17
Table Insert	0
~~Table Delete~~	0
Table moves to	0
~~Table moves from~~	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	0
Embedded Excel	0
Format changes	0
Total Changes:	213

Found at Tab 70, Volume 14 Google's BOA.

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

v.

Pardeep Singh Chouhan *Respondent/Appellant on cross-appeal*

and

Attorney General of Canada,
Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General of Alberta,
Aboriginal Legal Services Inc.,
Association québécoise des avocats et avocates de la défense,
David Asper Centre for Constitutional Rights,
Canadian Association of Black Lawyers,
Canadian Muslim Lawyers Association,
Federation of Asian Canadian Lawyers,
South Asian Bar Association of Toronto,
Advocates' Society,
Defence Counsel Association of Ottawa,
Criminal Lawyers' Association (Ontario),
Debbie Baptiste and
British Columbia Civil Liberties Association
Interveners

Sa Majesté la Reine *Appelante/Intimée à l'appel incident*

c.

Pardeep Singh Chouhan *Intimé/Appelant à l'appel incident*

et

Procureur général du Canada,
procureur général du Manitoba,
procureur général de la Colombie-Britannique,
procureur général de l'Alberta,
Aboriginal Legal Services Inc.,
Association québécoise des avocats et avocates de la défense,
David Asper Centre for Constitutional Rights,
Canadian Association of Black Lawyers,
Association canadienne des avocats musulmans,
Federation of Asian Canadian Lawyers,
South Asian Bar Association of Toronto,
Société des plaideurs,
Defence Counsel Association of Ottawa,
Criminal Lawyers' Association (Ontario),
Debbie Baptiste et
British Columbia Civil Liberties Association
Intervenants

INDEXED AS: R. *v.* CHOUHAN

2021 SCC 26

File No.: 39062.

Hearing and judgment: October 7, 2020.

Reasons delivered: June 25, 2021.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

RÉPERTORIÉ : R. *c.* CHOUHAN

2021 CSC 26

N° du greffe : 39062.

Audition et jugement : 7 octobre 2020.

Motifs déposés : 25 juin 2021.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et Kasirer.

2021 SCC 26 (CanLII)

PUBLIC 1017 3242

B. *Temporal Application of the Amendments*

[86] When Parliament abolished peremptory challenges in Bill C-75, it indicated that the abolition would come into force on September 19, 2019. Regrettably, and contrary to Parliament's own legislative drafting guidelines, the legislation did not include transitional provisions that set out whether and how the amendments would apply to criminal prosecutions pending in the system (Canada, Privy Council Office, *Guide to Making Federal Acts and Regulations* (2nd ed. 2001), at p. 91).

[87] It thus fell to the courts to sort out the temporal application of the abolition of peremptory challenges. As is generally the case when Parliament fails to include transitional provisions in a legislative amendment, the temporal application of these amendments divided trial courts across the country. The debate centered on principles of statutory interpretation, namely the presumptions that procedural laws apply immediately in all cases, while laws that affect substantive rights can only apply prospectively to cases in which the relevant rights have not yet vested.

[88] Courts in Ontario generally found the amendments to be purely procedural and therefore immediate in their application, meaning that they would govern the jury selection processes for all trials beginning on or after the amendments' proclamation into force (see *R. v. Johnson*, 2019 ONSC 6754, 451 C.R.R. (2d) 167; *R. v. Muse*, 2019 ONSC 6119, 448 C.R.R. (2d) 266; *R. v. Lako*, 2019 ONSC 5362; *R. v. Khan*, 2019 ONSC 5646; *R. v. McMillan*, 2019 ONSC 5616; *R. v. Daniel*, 2019 ONSC 6920). The trial judge in this proceeding came to the same conclusion, as did some courts in other jurisdictions (see *R. v. Cumberland*, 2019 NSSC 307; *R. v. Stewart*, 2019 MBQB 171). Conversely, several courts concluded that the amendments affect substantive rights and therefore cannot apply to pending jury trials, but nevertheless divided on when the amendments applied in a particular case (see *R. v.*

B. *Application temporelle des modifications*

[86] Quand le Parlement a aboli les récusations péremptoires dans le projet de loi C-75, il a indiqué que l'abolition entrerait en vigueur le 19 septembre 2019. Malheureusement, et contrairement aux lignes directrices du Parlement lui-même en matière de rédaction législative, le nouveau texte ne contenait pas de dispositions transitoires précisant si et de quelle manière les modifications s'appliqueraient aux poursuites criminelles déjà en cours (Canada, Bureau du Conseil privé, *Lois et règlements : l'essentiel* (2e éd. 2001), p. 91).

[87] Il revient donc aux tribunaux de se prononcer sur l'application temporelle de l'abolition des récusations péremptoires. Comme c'est généralement le cas lorsque le Parlement ne prévoit pas de dispositions transitoires dans un texte législatif modificateur, l'application temporelle des modifications en cause ici a donné lieu à une jurisprudence partagée de la part des tribunaux de première instance de partout au pays. Le débat s'est centré sur des principes d'interprétation législative, à savoir la présomption selon laquelle les lois procédurales s'appliquent immédiatement dans tous les cas, tandis que les lois qui touchent aux droits substantiels ne valent que pour l'avenir et ne s'appliquent qu'aux situations dans lesquelles les droits concernés ne sont pas encore acquis.

[88] Les tribunaux de l'Ontario ont généralement conclu que les modifications sont purement procédurales et s'appliquent donc immédiatement, c'est-à-dire qu'elles régiraient les processus de sélection des jurés pour tous les procès entrepris à compter du jour de l'entrée en vigueur des modifications (voir *R. c. Johnson*, 2019 ONSC 6754, 451 C.R.R. (2d) 167; *R. c. Muse*, 2019 ONSC 6119, 448 C.R.R. (2d) 266; *R. c. Lako*, 2019 ONSC 5362; *R. c. Khan*, 2019 ONSC 5646; *R. c. McMillan*, 2019 ONSC 5616; *R. c. Daniel*, 2019 ONSC 6920). En l'espèce, le juge du procès est arrivé à cette conclusion, tout comme certains tribunaux d'autres provinces (voir *R. c. Cumberland*, 2019 NSSC 307; *R. c. Stewart*, 2019 MBQB 171). Inversement, plusieurs tribunaux ont conclu que les modifications concernent des droits substantiels et qu'elles ne pouvaient donc s'appliquer aux procès avec jury en

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PUBLIC 1018 3243

Dorion, 2019 SKQB 266; *R. v. Raymond (Ruling #4)*, 2019 NBQB 203, 379 C.C.C. (3d) 75; *R. v. LeBlanc*, 2019 NBQB 241, 447 C.R.R. (2d) 227; *R. v. S.B.*, 2019 ABQB 836, 447 C.R.R. (2d) 63; *R. v. Bragg*, 2019 NLSC 235; *R. v. Simard*, 2019 QCCS 4394; *R. v. Kebede*, 2019 ABQB 858, 448 C.R.R. (2d) 102; *R. v. Subramaniam*, 2019 BCSC 1601, 445 C.R.R. (2d) 49; *R. v. Bebawi*, 2019 QCCS 4393; *R. v. Ismail*, 2019 MBQB 150, 447 C.R.R. (2d) 150; *R. v. Lindor*, 2019 QCCS 4232; *R. v. Nazarek*, 2019 BCSC 1798).

[89] The decision on appeal is the only decision of an appellate court to have considered this issue. The Court of Appeal overturned the trial judge and determined that the abolition of peremptory challenges affects the substantive right to a jury trial, as provided for in the *Criminal Code*. The abolition therefore could not apply if, before September 19, 2019, the accused was charged with an offence within the exclusive jurisdiction of the Superior Court, was directly indicted, or elected trial by jury.

[90] Respectfully, we disagree with the Court of Appeal. The abolition of peremptory challenges is purely procedural and therefore applies immediately to all jury selection processes beginning on or after September 19, 2019.

(1) General Principles

[91] Most recently in *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, this Court set out the principles governing the temporal application of new legislation. Justice Deschamps, writing for the majority, summarized the rules of interpretation as follows, at paras. 10-11:

New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to

cours; ils ont néanmoins été divisés sur la question de savoir à quel moment les modifications s'appliquaient dans un cas donné (voir *R. c. Dorion*, 2019 SKQB 266; *R. c. Raymond (Ruling #4)*, 2019 NBQB 203, 379 C.C.C. (3d) 75; *R. c. LeBlanc*, 2019 NBQB 241, 447 C.R.R. (2d) 227; *R. c. S.B.*, 2019 ABQB 836, 447 C.R.R. (2d) 63; *R. c. Bragg*, 2019 NLSC 235; *R. c. Simard*, 2019 QCCS 4394; *R. c. Kebede*, 2019 ABQB 858, 448 C.R.R. (2d) 102; *R. c. Subramaniam*, 2019 BCSC 1601, 445 C.R.R. (2d) 49; *R. c. Bebawi*, 2019 QCCS 4393; *R. c. Ismail*, 2019 MBQB 150, 447 C.R.R. (2d) 150; *R. c. Lindor*, 2019 QCCS 4232; *R. c. Nazarek*, 2019 BCSC 1798).

[89] La décision qui a été rendue en appel dans la présente affaire est la seule où une juridiction d'appel a examiné cette question. La Cour d'appel a infirmé la décision du juge du procès et conclu que l'abolition des récusations péremptoires portait atteinte au droit substantiel à un procès avec jury que prévoit le *Code criminel*. L'abolition était donc sans effet si, avant le 19 septembre 2019, l'accusé avait été inculpé d'une infraction relevant de la compétence exclusive de la Cour supérieure, s'il avait fait l'objet d'une accusation directe, ou s'il avait opté pour un procès avec jury.

[90] Avec égards, nous devons exprimer notre désaccord avec la Cour d'appel. L'abolition des récusations péremptoires est purement procédurale et elle s'applique donc immédiatement à tous les processus de sélection de jurés entrepris à compter du 19 septembre 2019.

(1) Principes généraux

[91] Dans l'arrêt le plus récent sur la question, *R. c. Dineley*, 2012 CSC 58, [2012] 3 R.C.S. 272, notre Cour a exposé les principes régissant l'application temporelle des nouvelles lois. La juge Deschamps, s'exprimant au nom des juges majoritaires, résumait ainsi, aux par. 10-11, les règles d'interprétation applicables :

Ainsi, une nouvelle mesure législative qui porte atteinte à de tels droits est présumée n'avoir d'effet que pour l'avenir, à moins qu'il soit possible de discerner une intention

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apply retrospectively (*Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at pp. 266-67; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 57; *Wildman v. The Queen*, [1984] 2 S.C.R. 311, at pp. 331-32). However, new procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights. Such legislation is presumed to apply immediately to both pending and future cases (*Application under s. 83.28 of the Criminal Code (Re)*, at paras. 57 and 62; *Wildman*, at p. 331).

Not all provisions dealing with procedure will have retrospective effect. Procedural provisions may, in their application, affect substantive rights. If they do, they are not purely procedural and do not apply immediately (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 191). Thus, the key task in determining the temporal application of the Amendments at issue in the instant case lies not in labelling the provisions "procedural" or "substantive", but in discerning whether they affect substantive rights.

[92] Dissenting, but not on this point, Cromwell J. elaborated on the distinction between legislation which is purely procedural and legislation that is substantive or encroaches on substantive rights (paras. 52-66). From his summary we draw some general guidance. Broadly speaking, procedural amendments depend on litigation to become operable: they alter the method by which a litigant conducts an action or establishes a defence or asserts a right. Conversely, substantive amendments operate independently of litigation: they may have direct implications on an individual's legal jeopardy by attaching new consequences to past acts or by changing the substantive content of a defence; they may change the content or existence of a right, defence, or cause of action; and they can render previously neutral conduct criminal.

claire du législateur qu'elle s'applique rétrospectivement (*Angus c. Sun Alliance Compagnie d'assurance*, [1988] 2 R.C.S. 256, p. 266-267; *Demande fondée sur l'art. 83.28 du Code criminel (Re)*, 2004 CSC 42, [2004] 2 R.C.S. 248, par. 57; *Wildman c. La Reine*, [1984] 2 R.C.S. 311, p. 331-332). Les nouvelles dispositions procédurales destinées à ne régir que la manière utilisée pour établir ou faire respecter un droit n'ont pour leur part pas d'incidence sur le fond de ces droits. De telles mesures sont présumées s'appliquer immédiatement, à la fois aux instances en cours et aux instances à venir (*Demande fondée sur l'art. 83.28 du Code criminel (Re)*, par. 57 et 62; *Wildman*, p. 331).

Ce ne sont pas toutes les dispositions procédurales qui s'appliquent rétrospectivement. Certaines peuvent, dans leur application, porter atteinte à des droits substantiels. De telles dispositions ne sont pas purement procédurales et ne s'appliquent pas immédiatement (P.-A. Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009, p. 208). Par conséquent, la tâche qui s'impose pour statuer sur l'application dans le temps des modifications en cause consiste non pas à qualifier les dispositions de « dispositions procédurales » ou de « dispositions substantielles », mais à déterminer si elles portent atteinte à des droits substantiels.

[92] Dans une opinion dissidente, mais non sur ce point, le juge Cromwell a expliqué la distinction à faire entre une mesure législative qui est purement procédurale et une autre qui est substantielle ou qui empiète sur des droits substantiels (par. 52-66). À partir du résumé qu'il a fait de la question, nous tirons quelques directives générales. De façon générale, les modifications procédurales dépendent du litige pour devenir opérantes : elles modifient la méthode selon laquelle un plaideur conduit une action, établit un moyen de défense ou fait valoir un droit. À l'inverse, les modifications substantielles opèrent indépendamment du litige : elles peuvent avoir des implications directes sur le risque que court une personne sur le plan juridique en assortissant de conséquences nouvelles des actes passés ou en modifiant le contenu substantiel d'un moyen de défense; elles peuvent modifier le contenu ou l'existence d'un droit, d'un moyen de défense ou d'une cause d'action; et elles peuvent criminaliser un comportement auparavant neutre.

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1020 8961

Guide to the December 2023 amendments to the *Competition Act*

Found at **Tab H(155), Volume 26** Google's Motion Record.

December 18, 2023

Important amendments to the *Competition Act* became law on December 15, 2023, following Royal Assent of Bill C- 56, *An Act to amend the Excise Tax Act and the Competition Act*. The Government of Canada has made these amendments to the *Competition Act* as a part of the ongoing modernization of Canada's competition regime.

This guide provides an overview of these changes, including in the areas of market studies, merger reviews, collaborations between firms, and abuse of dominance.

> ℹ This guide is not a legal document and does not replace legal advice. The Competition Bureau will be reviewing and updating its enforcement guidance to ensure transparency and predictability for the business and legal communities.

On this page:

- Adding a new framework and information-gathering powers for market studies
- Removing the efficiency defence in merger reviews
- Expanding the scope of reviewable collaborations between firms
- Removing the efficiency defence for anti-competitive collaborations
- Restructuring the legal test for abuse of dominant position
- Adding excessive and unfair selling prices under abuse of dominant position

purpose" of the agreement, or part of the agreement, is to harm competition and the agreement has the effect of preventing or lessening competition substantially.

This change will come into force one year after Royal Assent on December 15, 2024.

Removing the efficiency defence for anti-competitive collaborations

Similar to the provisions for merger review, the *Competition Act* has also included an efficiency exception under the competitor collaborations provisions. This exception prevented the Competition Tribunal from remedying anti-competitive collaborations where parties could demonstrate that efficiency gains outweighed the collaboration's anti-competitive effects. The amendments repeal this efficiency exception under the competitor collaborations provisions of the *Competition Act* (subsections 90.1(4)-(6)). This change will come into force one year after Royal Assent, on December 15, 2024.

Restructuring the legal test for abuse of dominant position

In some cases, dominant firms act to undermine competitive market forces. In these instances, the Competition Bureau uses the provisions of the *Competition Act* to protect the competitive process.

Prior to the amendments, an abuse of dominant position occurred under the Act (section 79) when a dominant firm (or group of firms) engaged in an intentional practice of anti-competitive acts, with the effect of substantially

lessening or preventing competition. To constitute an abuse of dominant position, all three elements needed to be established: dominance, anti-competitive intent, and anti-competitive effects.

Following the amendments, the Competition Tribunal may make a prohibition order against a dominant firm (or group) if their conduct meets either the anti-competitive intent or effect requirement. This will provide a way of stopping dominant firm conduct that has either subverted competition in the marketplace or was intended to do so.

A broader range of remedies, including administrative monetary penalties, are available for instances where all three elements, i.e., dominance, anti-competitive intent and effects, are present.

Adding excessive and unfair selling prices under abuse of dominant position

For the purposes of establishing the anti-competitive intent of an abuse of dominance, the *Competition Act* enumerates a non-exhaustive list of acts that may be considered a practice of anti-competitive acts when engaged in by a dominant firm (section 78). Following the amendments, the practice of "directly or indirectly imposing excessive and unfair selling prices" has been added to this list.

Importantly, such a practice must be intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition.

Thanh Tam Tran *Appellant*

v.

Minister of Public Safety and Emergency Preparedness *Respondent*

and

Attorney General of British Columbia, Canadian Association of Refugee Lawyers, British Columbia Civil Liberties Association and African Canadian Legal Clinic *Interveners*

Thanh Tam Tran *Appelant*

c.

Ministre de la Sécurité publique et de la Protection civile *Intimé*

et

Procureur général de la Colombie-Britannique, Association canadienne des avocats et avocates en droit des réfugiés, British Columbia Civil Liberties Association et Clinique juridique africaine canadienne *Intervenants*

2017 SCC 50 (CanLII)

INDEXED AS: TRAN *v.* CANADA (PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)

2017 SCC 50

File No.: 36784.

2017: January 13; 2017: October 19.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

RÉPERTORIÉ : TRAN *c.* CANADA (SÉCURITÉ PUBLIQUE ET PROTECTION CIVILE)

2017 CSC 50

N° du greffe : 36784.

2017 : 13 janvier; 2017 : 19 octobre.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration — Inadmissibility and removal — Permanent residents — Serious criminality — Permanent resident convicted of federal offence receiving 12-month conditional sentence — Maximum sentence for offence increased after offence committed but before conviction and sentencing — Whether conditional sentence is "term of imprisonment" for purposes of assessing permanent resident's inadmissibility to Canada on grounds of serious criminality under s. 36(1)(a) of Immigration and Refugee Protection Act — Whether "maximum term of imprisonment" referred to in s. 36(1)(a) is maximum sentence that could have been imposed at time of commission of offence or of admissibility determination — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 36(1)(a).

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Immigration — Interdiction de territoire et renvoi — Résidents permanents — Grande criminalité — Résident permanent déclaré coupable d'une infraction fédérale et condamné à une peine d'emprisonnement avec sursis de 12 mois — Peine maximale accrue après la commission de l'infraction, mais avant la déclaration de culpabilité et l'infliction de la peine — Une peine d'emprisonnement avec sursis constitue-t-elle un « emprisonnement » pour l'évaluation de l'interdiction de territoire au Canada pour grande criminalité en application de l'art. 36(1)a) de la Loi sur l'immigration et la protection des réfugiés? — L'« emprisonnement maximal » dont il est question à l'art. 36(1)a) correspond-il à la peine maximale qui aurait pu être infligée au moment de la commission de l'infraction ou de la décision relative à l'interdiction de territoire? — Loi sur l'immigration et la protection des réfugiés, L.C. 2001, c. 27, art. 36(1)a).

done in this case. Conditional sentences are designed as an alternative to incarceration in order to encourage rehabilitation, reduce the rate of incarceration, and improve the effectiveness of sentencing (*Proulx*, at para. 20). These objectives would be sabotaged if individuals who are subject to conditional sentences sought to replace them with prison terms, thinking the latter to be their only path for a future in the Canadian communities from which incarceration would remove them.

[34] For these reasons, the phrase "term of imprisonment" in s. 36(1)(a) of the *IRPA* cannot, by either standard of review, be understood to include conditional sentences.

B. *The Maximum Term Is Determined as of the Time of the Commission of the Offence*

[35] Turning to the interpretation of "punishable by a maximum term", in my view, a contextual reading of s. 36(1)(a) supports only one conclusion: the phrase "punishable by a maximum term of imprisonment of at least 10 years" refers to the maximum sentence that the accused person could have received at the time of the commission of the offence.

[36] Section 36(1)(a) begins with "having been convicted", which sets the temporal marker at the time of conviction. As counsel for Mr. Tran underscored during oral argument, the fact of a conviction precedes the two disjunctive clauses: the maximum term and the actual term imposed. Both are rooted in the fact of having been convicted. It is at the moment of conviction that the two disjunctive clauses become operable, and it is with reference to that time that the clauses are to be understood.

[37] By the time of Mr. Tran's conviction (November 29, 2012) and sentencing (January 18, 2013),

de pouvoir demeurer au Canada, comme l'a fait M. Tran en l'espèce. Les peines d'emprisonnement avec sursis constituent une solution de rechange à l'incarcération, en ce qu'elles visent à encourager la réinsertion sociale, à réduire le taux d'incarcération et à accroître l'efficacité du processus de détermination de la peine : *Proulx*, par. 20. Ces objectifs ne seraient pas atteints si des individus condamnés à purger des peines de ce type cherchaient à y faire substituer des peines d'incarcération parce qu'ils seraient d'avis qu'il s'agit du seul moyen dont ils disposent pour avoir un futur dans les collectivités canadiennes, collectivités dont ils seraient par ailleurs exclus le temps de leur incarcération.

[34] Pour ces raisons, je conclus que le terme « emprisonnement » de l'al. 36(1)a) de la *LIPR* ne peut être interprété de façon à viser les peines d'emprisonnement avec sursis et ce, que l'on applique l'une ou l'autre des normes de contrôle.

B. *La peine maximale est celle qui s'applique au moment de la commission de l'infraction*

[35] À mon avis, une interprétation contextuelle de l'al. 36(1)a) n'étaye qu'une seule conclusion : l'expression « punissable d'un emprisonnement maximal d'au moins dix ans » renvoie à la peine maximale que la personne accusée aurait pu se voir infliger au moment de la commission de l'infraction.

[36] L'alinéa 36(1)a) commence par l'expression « être déclaré coupable », qui établit le marqueur temporel au moment de la déclaration de culpabilité. Comme l'avocat de M. Tran l'a souligné durant sa plaidoirie, la déclaration de culpabilité comme telle précède les deux clauses disjonctives : l'emprisonnement maximal et la peine réelle imposée. Ces derniers tirent tous les deux leur source dans le fait que la personne a été déclarée coupable. C'est au moment de la déclaration de culpabilité que les deux clauses disjonctives deviennent applicables, et c'est en fonction de ce moment que les clauses doivent être interprétées.

[37] Entre la déclaration de culpabilité de M. Tran (le 29 novembre 2012) et le prononcé de sa peine (le

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the maximum sentence for an offence under s. 7(1) of the *CDSA* had increased from imprisonment for 7 years to imprisonment for 14 years. However, in view of s. 11(*i*) of the *Charter*, Mr. Tran, or anyone else in his position, could not receive a sentence greater than seven years. This is so because production of a controlled substance, contrary to s. 7(1) of the *CDSA*, is a criminal offence. Hence, sentences for convictions under that provision must not offend s. 11(*i*) of the *Charter* which provides:

18 janvier 2013), la peine maximale pour l'infraction prévue au par. 7(1) de la *LRCDAS* est passée d'une peine d'emprisonnement de 7 ans à une peine d'emprisonnement de 14 ans. Toutefois, l'al. 11*i*) de la *Charte* limitait la peine de M. Tran, ou de quiconque dans la même situation, à une peine maximale de sept ans, puisque la production d'une substance désignée est une infraction criminelle selon le par. 7(1) de la *LRCDAS*. Les peines découlant de condamnations fondées sur cette disposition ne doivent donc pas contrevenir à l'al. 11*i*) de la *Charte*, qui prévoit ce qui suit :

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.

11. Tout inculpé a le droit :

. . .

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.

Accordingly, the maximum sentence Mr. Tran could have been sentenced to upon his conviction is limited by the maximum sentence available at the time of the commission of the offence. Mr. Tran was not punishable by a term of imprisonment of at least 10 years.

En conséquence, la peine maximale à laquelle M. Tran aurait pu être condamné à la suite de sa déclaration de culpabilité est limitée à la peine maximale prévue par la loi au moment de la commission de l'infraction. M. Tran n'était donc pas passible d'une peine d'emprisonnement d'au moins 10 ans.

[38] The Court of Appeal held that "punishable by a maximum term of imprisonment of at least 10 years" could be interpreted without reference to Mr. Tran or to a person in his position. I disagree. The criterion cannot simply be the abstract maximum penalty divorced from the actual "permanent resident . . . convicted" in a particular case. In my view, "punishable by a maximum term of imprisonment of at least 10 years" is to be understood as referring to the circumstances of the actual offender or of others in similar circumstances.

[38] La Cour d'appel a conclu que l'expression « punissable d'un emprisonnement maximal d'au moins dix ans » peut être interprétée sans référence à M. Tran ou à quiconque dans sa situation. Je ne suis pas d'accord. Le critère ne peut être simplement la peine maximale dissociée du résident permanent « déclaré coupable » dans un cas donné. À mon avis, l'expression « punissable d'un emprisonnement maximal d'au moins dix ans » doit plutôt être comprise en fonction des circonstances relatives au contrevenant visé, ou à d'autres personnes dans des situations semblables.

[39] This interpretation aligns with the purpose of the *IRPA*, as outlined in s. 3:

[39] Cette interprétation est conforme à l'objet de la *LIPR* énoncé à l'art. 3 :

3 (1) The objectives of this Act with respect to immigration are

3 (1) En matière d'immigration, la présente loi a pour objet :

In the Court of Appeal of Alberta

Citation: **Alberta Securities Commission v. Brost, 2008 ABCA 326**

Date: 20081003
Docket: 0701-0052-AC
0701-0064-AC
0701-0211-AC
0701-0214-AC
Registry: Calgary

Appeal No. 0701-0052-AC

Between:

Alberta Securities Commission

Respondent

- and -

Milowe Allen Brost and Capital Alternatives Inc.

Appellants

Appeal No. 0701-0064-AC

Between:

Alberta Securities Commission

Respondent

- and -

**Strategic Metals Corp., Edna Forrest,
Carol Weeks and Bradley Regier**

Appellants

- and -

Capital Alternatives Inc. and Milowe Brost

2008 ABCA 326 (CanLII)

2008 ABCA 326 (CanLII)

market and confidence in the integrity of that market. It noted that deterrence is a crucial consideration in ordering sanctions and referenced a number of factors that might be considered in determining whether sanctions are in the public interest in a particular case: Sanctions Decision at para. 26.

[53] The Commission concluded that it was in the public interest to order significant sanctions - including bans and administrative penalties - against all of the appellants. The Commission determined that the bans were necessary to remove the appellants from participation in the capital market and, thereby, protect investors and the capital market and provide specific and general deterrence. It said the administrative penalties would have the same ultimate goals (particularly specific and general deterrence) but would seek to send the message to the appellants, and to other market participants, that future conduct similar to theirs will not be tolerated and will come at a direct financial cost. Before ordering any specific sanctions, the Commission also noted that this was "one of the most egregious" cases it had ever seen: Sanctions Decision at paras. 28-31, 49 and 74.

[54] By relating the sanctions to the magnitude of the misconduct and by referring to the need to send a message, the Commission approached the case from the perspective of serving the larger objectives inherent in its oversight role. We see no error in this approach. Any penalty may well be regarded, from the perspective of the person on whom it is imposed, as "punitive". This is understandable. However, simply because sanctions may have a punitive effect on the wrongdoer does not mean that they do not also serve a valid regulatory or administrative purpose. Unless the *Act's* penalty section is found to be constitutionally infirm (and here there has been no constitutional challenge), the Commission's power to determine the quantum of sanction should not be fettered by a court-made rule limiting the Commission's scope of sanction on the basis that the penalties that might be imposed are perceived to be punitive. The Legislature has conferred on the Commission jurisdiction for administrative penalties up to $1,000,000.00. This increase in the maximum amount of administrative penalty reflects a legislative intent that these penalties ought not to be so low that they amount to nothing more than another cost of doing business. It also signals the Legislature's intent that the Commission should fit the sanction to the circumstances, including the magnitude of the illegality and the need to encourage lawful conduct by those involved with securities.

[55] Overall, the Commission's conclusions on the seriousness of the appellants' misconduct are entitled to deference, as is its conclusion that the misconduct warranted significant sanctions. We are of the view that the Commission made no reviewable error in ordering the sanctions it did. The Strategic appellants' suggestion that the sanctions are vexatious, capricious, penal and excessive, in light of previous sanctions decisions, are unfounded.

(iv) Retrospective Application of Increase to Potential Penalty

[56] The Commission held that the administrative penalty amendment that took effect on June 8, 2005 could be applied in this case. Prior to June 8, 2005, the maximum administrative penalty that could be imposed under the *Act* was $100,000; after June 8, 2005, it was $1 million. The

Commission held that, because administrative penalties are not punitive, the presumption against retrospective application did not bar it from imposing administrative penalties greater than the maximum administrative penalty that was available prior to June 8, 2005: Sanctions Decision at para. 32.

[57] The Commission was correct to conclude that the presumption against retrospective application did not apply in this case because administrative penalties under the *Act* are not punitive but are instead designed to protect the public: ***Brosseau v. Alberta Securities Commission***, [1989] 1 S.C.R. 301, 57 D.L.R. (4th) 458 at 471-3, cited in ***Re Morrison Williams Investment Management Ltd.*** (2000), 7 ASCS 2888. Moreover, contrary to what Brost and Alternatives suggest, it is well settled that "[e]xcept for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the *Charter*, there is no requirement of legislative prospectivity embodied in ... any provision of our Constitution": ***British Columbia v. Imperial Tobacco Canada Ltd.***, 2005 SCC 49, [2005] 2 S.C.R. 473 at para. 69.

VII. Disposition

[58] The appeals were, accordingly, dismissed.

Appeal heard on September 11, 2008

Memorandum filed at Calgary, Alberta
this 3rd day of October, 2008

Fraser C.J.A.

Costigan J.A.

Watson J.A.

2008 ABCA 326 (CanLII)

B — *Findings of the Court*

Archer Daniels Midland.
Found at **Tab 6, Volume 2**
Google's Reply BOA.

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

Section 7 and the *Bill of Rights*

PUBLIC 1032 3504

Found at Tab 78, Volume 15 of Google's BOA.

R.M.G. *Appellant*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: **R. *v.* G. (R.M.)**

File No.: 24709.

1996: June 20; 1996: October 3.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Trial — Charge to jury — Sexual assault — Defence denying assault and providing both reasons for possible fabrication of accusation and an alibi to some alleged incidents — Trial judge charging jury only with issue of who perpetrated assault — On objection, jury recharged on whether an assault occurred and then on the issue of who perpetrated the alleged assault — Whether charge and recharge adequately dealt with theory of defence.

Trial — Exhortation to jury — Jury hung — Trial judge urging jury to consider the public expense of a new trial, the inconvenience to all participants, the hardship to the accused and the complainant and suggesting that the minority might want to reconsider what the majority were saying — Guilty verdict rendered short time later — Whether exhortation objectionable or improper.

Trial — Verdict — Standard for setting aside verdict — Whether standard with respect to exhortation should be any ground there was a miscarriage of justice (s. 686(1)(a)(iii)) or whether it should focus on whether an error of law was committed (s. 686(1)(a)(ii)) — Criminal Code, R.S.C., 1985, c. C-46, ss. 686(1)(a)(ii), (iii).

The trial judge in a criminal trial dealing with the alleged sexual assault by a stepfather of his minor stepdaughter first charged the jury that the sole issue before them was whether the accused was the perpetrator of the alleged assault. Counsel for the defence objected to the

R.M.G. *Appelant*

c.

Sa Majesté la Reine *Intimée*

RÉPERTORIÉ: **R. *c.* G. (R.M.)**

Nº du greffe: 24709.

1996: 20 juin; 1996: 3 octobre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

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

Procès — Exposé au jury — Agression sexuelle — Défense niant l'existence d'une agression et soumettant deux raisons à l'appui d'une possibilité de fabrication d'accusation et un alibi relatif à certains épisodes allégués — Exposé du juge du procès au jury ne portant que sur la question de l'auteur de l'agression — À la suite d'une opposition, nouvel exposé au jury sur la question de l'existence d'une agression et, ensuite, sur la question de l'auteur de l'agression alléguée — L'exposé au jury et le nouvel exposé qui a suivi ont-ils traité adéquatement la thèse de la défense?

Procès — Exhortation au jury — Jury dans l'impasse — Juge du procès pressant le jury de tenir compte des dépenses de fonds publics qui seraient occasionnées par un nouveau procès, des inconvénients qui seraient causés à tous les participants, des difficultés qui en résulteraient pour l'accusé et la plaignante, et laissant entendre que les jurés minoritaires pourraient vouloir réexaminer les propos des jurés majoritaires — Verdict de culpabilité rendu peu après — L'exhortation était-elle répréhensible ou incorrecte?

Procès — Verdict — Norme applicable pour annuler un verdict — La norme applicable à l'exhortation devrait-elle consister à déterminer si, pour un motif quelconque, il y a eu erreur judiciaire (art. 686(1)a)(iii)) ou consister à se demander si une erreur de droit a été commise (art. 686(1)a)(ii))? — Code criminel, L.R.C. (1985), ch. C-46, art. 686(1)a)(ii), (iii).

Dans une affaire criminelle portant sur une agression sexuelle qu'un beau-père aurait commise sur sa belle-fille mineure, le juge du procès a d'abord donné au jury la directive selon laquelle la seule question qu'il avait à trancher était de savoir si l'accusé était l'auteur de

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These trials are expensive to operate in their conduct. That is not a particular [*sic*] important ingredient for trying to come to a decision in this matter, but it is a factor for your consideration.

More importantly, in all likelihood, if you are unable to arrive at a verdict, there will be another trial. That is not in my hands. That's up to the Crown, and maybe not Mr. McKimm [Crown counsel] either. But in all likelihood there would be another trial.

If that takes place, the accused would have to go through this again as would the witnesses, not the least of which is the young lady. It would not be easy for anybody to have to redo what we have done since Monday of this week.

You are members of the jury in as good a position as any other twelve persons who would be hearing this case to render verdicts in this case.

You took an oath when you commenced your duties in this case, and I am by no means asking you to betray that oath, but perhaps the minority of you might want to reconsider what the majority are saying. But again, I remind you — I emphasize — that I am not asking you to betray your oath. There are occasions when twelve people cannot decide. This may be one of them. There will be no aspersions cast on you people for not [*sic*] able to do so.

Counsel for the appellant submitted that the following three errors are apparent in these instructions. First, there is the improper and unnecessary reference to public expense and inconvenience. The second was the reference to the benefit to all, including the accused, of a verdict being reached. The last but certainly not the least important was the error of the trial judge in suggesting that the minority reconsider what the majority was saying without any reference or suggestion that the majority might equally consider what the minority was putting forward.

The Significance and the Importance of the Jury System in Canada

The jury system is clearly a significant factor in many democratic regimes. This is emphatically true in Canada. It is extremely important to our democratic society that jurors as representatives of

La tenue de ces procès coûte cher. Ce n'est pas un élément particulièrement important pour tenter d'en arriver à une décision dans la présente affaire, mais c'est un facteur que vous pouvez prendre en considération.

Qui plus est, selon toute probabilité, si vous êtes incapables de parvenir à un verdict, il y aura un autre procès. Cela ne dépend pas de moi. Cela relève du ministère public, et peut-être pas de Me McKimm [le substitut du procureur général] non plus. Mais il y aurait vraisemblablement un autre procès.

Le cas échéant, il faudra tout reprendre avec l'accusé et les témoins, y compris, et non au moindre titre, la jeune femme. Il ne sera facile pour personne de devoir refaire ce que nous avons fait depuis lundi de cette semaine.

Vous, les membres du jury, êtes autant en mesure de rendre un verdict, en l'espèce, que douze autres personnes qui entendraient l'affaire.

Vous avez prêté serment lorsque vous avez assumé vos fonctions dans la présente affaire, et je ne vous demande absolument pas de manquer à ce serment, mais il se pourrait que ceux d'entre vous qui sont minoritaires veuillent réexaminer les propos des jurés majoritaires. Mais, là encore, je vous rappelle — et j'insiste là-dessus — que je ne vous demande pas de manquer à votre serment. Il y a des circonstances où douze personnes sont incapables de décider. Il se peut que ce soit le cas ici. Vous n'en serez pas dénigrés pour autant.

12 L'avocat de l'appelant prétend que les trois erreurs suivantes ont été commises dans ces directives. Premièrement, il y a la mention incorrecte et inutile des dépenses et des inconvénients pour le public. Deuxièmement, il y a la mention de l'avantage d'un verdict pour tous, y compris l'accusé. La dernière erreur, mais certainement pas la moindre, est celle que le juge du procès a commise en proposant que les jurés minoritaires réexaminent les propos des jurés majoritaires, sans mentionner que ces derniers pourraient également examiner ce que les jurés minoritaires avançaient.

L'importance du système du jury au Canada

13 Le système du jury est clairement un facteur important dans bien des régimes démocratiques. Cela est nettement le cas au Canada. Il est extrêmement important pour notre société démocratique

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their community may make the decision as to the guilt or innocence of the accused before the court based solely on the evidence presented to them. There is a centuries-old tradition of juries reaching fair and courageous verdicts. That tradition has taken root and been so well and fearlessly maintained that it has flourished in this country. Our courts have very properly stressed the importance of jury verdicts and the deference that must be shown to those decisions. Today, as in the past, great reliance has been placed upon those decisions. That I think flows from the public awareness that 12 members of the community have worked together to reach a unanimous verdict.

que les jurés, en tant que représentants de leur collectivité, puissent décider de la culpabilité ou de l'innocence d'un accusé en se fondant uniquement sur la preuve qui leur a été présentée. La tradition des jurys prononçant des verdicts équitables et courageux est vieille de plusieurs siècles. Cette tradition s'est enracinée et a été si bien et si audacieusement maintenue qu'elle s'est épanouie ici dans notre pays. Nos tribunaux ont, à très juste titre, insisté sur l'importance des verdicts rendus par un jury et sur la retenue dont il faut faire preuve à l'égard de ces décisions. Aujourd'hui, comme par le passé, elles font l'objet d'une grande confiance. Je crois que cela découle de la conscience du public que 12 membres de la collectivité ont travaillé ensemble en vue de rendre un verdict unanime.

14 In reaching a verdict, jurors have heeded the wisdom of the prophet Isaiah whose advocacy of a reasoned approach to solving problems has echoed through the ages in the moving and memorable words "Come now, and let us reason together . . .": Isaiah 1:18. Of course, it is the great strength and virtue of the jury system that members of the community have indeed come together and reasoned together in order to reach their unanimous verdict. It is truly a magnificent system for reaching difficult decisions in criminal cases. It has proven itself in the centuries past and continues to do so today. Yet, this system is fragile.

Pour parvenir à un verdict, les jurés s'en remettent à la sagesse du prophète Isaïe, dont le plaidoyer en faveur d'une façon raisonnée de régler les problèmes a traversé les âges dans cette formule touchante et mémorable: «Venez donc et discutons . . .»: Isaïe 1:18. Évidemment, la force et le mérite du système du jury découlent du fait que des membres de la collectivité se réunissent et raisonnent ensemble afin de parvenir à un verdict unanime. Ce système est vraiment magnifique pour rendre des décisions difficiles en matière criminelle. Il a fait ses preuves au cours des siècles et continue de le faire aujourd'hui. Cependant, ce système est fragile.

15 If the process is subjected to unwarranted pressures, or to unnecessary distractions, the delicate reasoning process may be thwarted. The sole task of a jury is to reach a verdict based exclusively on the evidence presented. The sturdy independence of jurors may be overcome and unanimity compelled by a judge's suggestion that irrelevant factors be considered or by the judge's exerting unwarranted pressure. In those circumstances, the verdict may no longer be based on a reasoned approach to the evidence. It follows that the instructions given to an apparently deadlocked jury must be delicately balanced and carefully crafted. If they are not, the jury system as a bulwark of democracy will all too easily be breached. The

S'il est soumis à des pressions injustifiées ou à des distractions inutiles, le délicat processus de raisonnement peut être faussé. Le jury a pour unique tâche de parvenir à un verdict fondé exclusivement sur la preuve présentée. L'indépendance résolue des jurés peut être ébranlée et leur unanimité forcée par le juge qui leur propose de prendre en considération des facteurs non pertinents ou qui exerce sur eux une pression injustifiée. Dans ces circonstances, il se peut que le verdict ne soit plus fondé sur une façon raisonnée d'aborder la preuve. Il s'ensuit que les directives données à un jury qui paraît être dans l'impasse doivent être finement dosées et soignées. Sinon, le système du jury comme rempart de la démocratie ne sera que trop

1996 CanLII 176 (SCC)

PUBLIC 1035 2951

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Found at **Tab H(11), Volume 10** of Google's Motion Record.

CRIMINAL LAW

the jury in criminal trials

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III

Characteristics of the Jury

A. The Unanimity Requirement

Recommendation 1

The requirement that the jury be unanimous before it renders a verdict should continue to be an essential characteristic of the jury.

COMMENT

One of the most characteristic features of the criminal jury in Canada is the requirement that all jurors must be unanimous before a verdict can be returned. If, after a reasonable period of deliberation, the jurors are unable to agree on a verdict — either of conviction or acquittal — a hung jury results. A mistrial is declared in such a case, and the charges must be dropped or the accused retried.

The requirement of jury unanimity has an ancient history. As early as 1367, a recorded case noted that unanimity was a necessity.[29] The historical reasons for the rule are obscure. Explanations range from the theory that it developed to compensate for the lack of other rules ensuring that a defendant received a fair trial to the theory that it arose out of the

argument. All of the arguments given below which support the unanimity requirement retain their validity even though some verdicts may not reflect true unanimity. It is on the basis of a careful weighing of the benefits of unanimity against the costs that a decision for its retention or abandonment must be made. If the unanimity requirement has important benefits, the fact that it sometimes leads individual jurors to acquiesce in a decision which they might not support would not appear to be a serious cost. Indeed, this phenomenon would also be present in majority verdicts.

Arguments in Favour of Unanimity

The most fundamental rule of criminal procedure is that the accused can be found guilty only if a trier of fact is convinced of his guilt beyond a reasonable doubt. Many people argue that the unanimity requirement is necessary to preserve the integrity of this basic concept. Sir James Stephen propounded the argument in the following way:

> . . .[n]o one is to be convicted of a crime, unless his guilt is proved beyond reasonable doubt. How can it be alleged that this condition has been fulfilled, so long as some of the judges, by whom the matter to be determined, do in fact doubt.[52]

The concept of proof beyond a reasonable doubt performs at least two functions in the criminal justice system. First, it eliminates to the greatest possible extent the chance that an innocent person will be convicted because of an error in the evaluation of the evidence. Second, it ensures the moral acceptability of convictions because the public is not left in doubt as to whether innocent persons are being convicted. The unanimity requirement would appear to further both of these goals.

1. Increased Accuracy of Fact-Finding

The unanimity requirement reduces the risk that innocent people will be convicted by increasing the accuracy of jury fact-finding.

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Found at **Tab 24, Volume 2** of Google's BOA.

Anonymous Case, *Lib. Assisarum*, 41, 11 (1367),

Translated and reprinted in Roscoe Pound, *Readings on the History and System of the Common Law*, 2nd ed. (Boston: Boston Book Company 1913).

Please see pp. 123-124.

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BRITTON, Bk. I, chap. 5. Nichols's translation.

Afterwards let the jurors be charged of what fact they are to speak the truth. And then let them go and confer together, and be kept by a bailiff, so that no one speak to them; and if any one does so, or if there be any one among them who is not sworn, let him be committed to prison, and all the rest amerced for their folly in suffering it.

10. If they can not all agree in one mind, let them be separated and examined why they can not agree; and if the greater part of them know the truth and the other part do not, judgment shall be according to the opinion of the greater part. And if they declare upon their oaths, that they know nothing of the fact, let others be called who do know it; and if he who put himself on the first inquest will not put himself on a new jury, let him be remanded back to penance till he consents thereto.

ANONYMOUS CASE, COMMON PLEAS, 1393. (Year Book 21 and 22, Edw. I., 273.) Thayer's translation.

Roubery (J. to the assise): How say you he is next heir? The assize: Because he was born and begotten of the same father and the same mother, and his father on his death-bed acknowledged that he was his son and heir. Roubery (J.): You shall tell us in another way how he is next heir or be shut up without meat or drink till tomorrow morning. And then they said he was born before the ceremony, but after the betrothal.

ANONYMOUS CASE LIB. ASSISARUM, 41, 11, 1367. Thayer's translation.

In another assise before the same justices at Northampton, the assise was sworn; and they were all agreed but one, who would not agree with the xi, and afterwards they were remanded, and remained all day and the next day without eating or drinking, and afterwards the justices demanded of him if he would agree with his companions, and he said never, for he would die first in prison. Wherefore they took the verdict of the xi and commanded him to prison. And upon this a day was given in the Common Bench on the matter of the verdict. Kirketon (counsel for plaintiff) prayed judgment on the verdict, etc. Thorpe (C. J.) said they were all agreed that this was not a verdict taken from xi and that a verdict could not be taken from xi. But Kirketon told how Willoughby (J.) in trespass took the verdict of xi and sent the twelfth to prison

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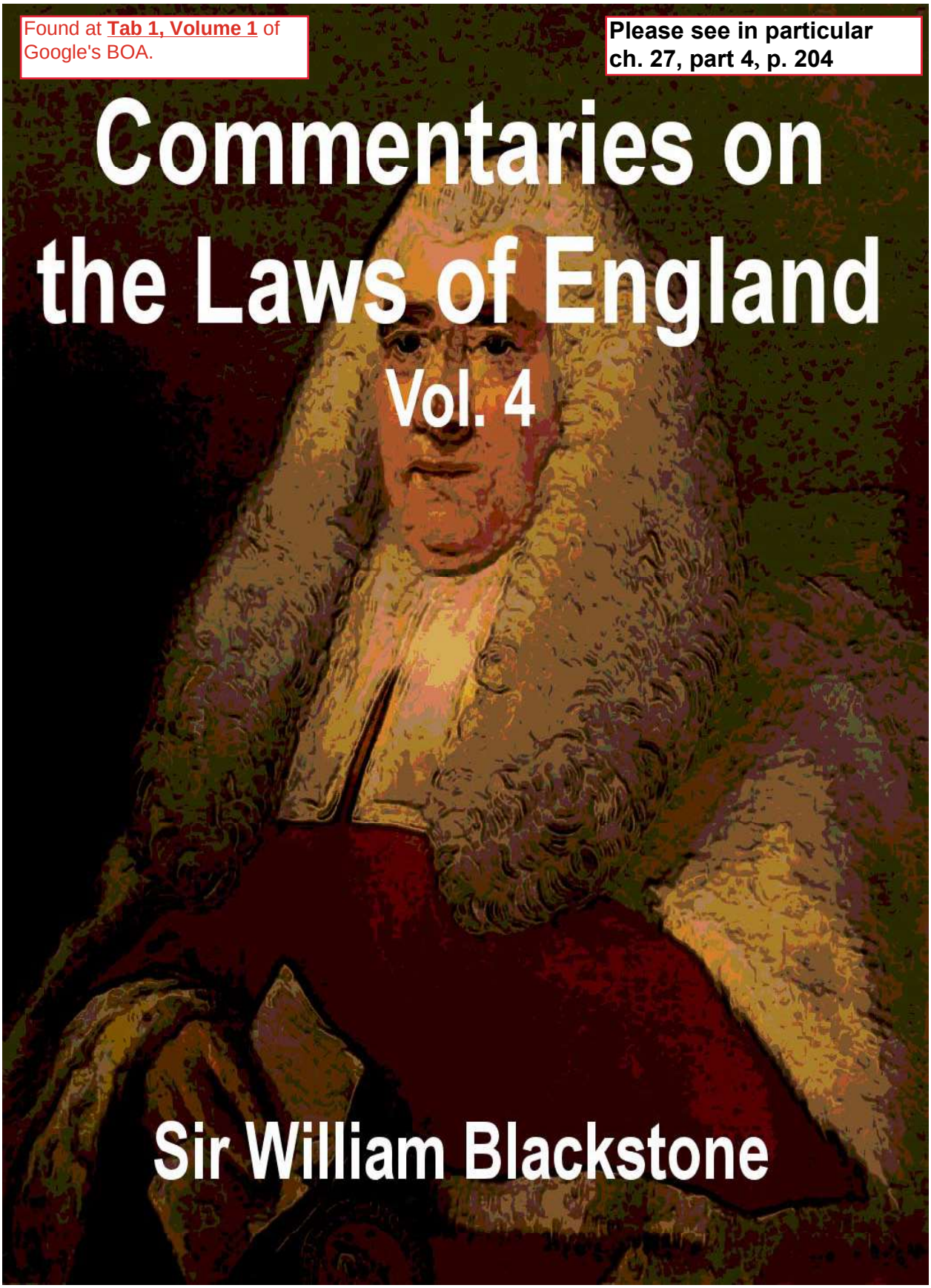
and the attaint was sued against the xi. and also W. Thorpe (J.) in an assise of the xx year of the present king (1345) took verdict of xi. Thorpe (C. J.): "That is no example to us, for they were greatly reproved for this." . . . And afterwards by assent of all the justices it was held that this was not a verdict, wherefore judgment was that the panel be quashed and null, and that he that was in prison be delivered. . . . Note that the justices said that they ought to have carried the assise with them in a cart until they were agreed.

FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE, chaps. 25, 26 (about 1453). Amos's translation.

25. Whensoever the parties contending in the King's Courts are come to the issue of the Plea, upon the matter of fact, the justices forthwith, by virtue of the King's writ, write to the sheriff of the county, where the fact is supposed to be, that he would cause to come before them, at a certain day, by them appointed, twelve good and lawful men of the neighborhood, where the fact is supposed, who stand in no relation to either of the parties who are at issue, in order to enquire and know upon their oaths, if the fact be so as one of the parties alleges, or whether it be as the other contends it, with him. At which day the sheriff shall make return of the said writ before the same Justices, with a panel of the names of them whom he had summoned for that purpose. In case they appear, either party may challenge the array, and allege that the Sheriff had acted therein partially, and in favor of the other party, (viz.) by summoning such as are too much parties in the cause and not indifferent; which exception, if it be found to be true upon the oath of two men of the same panel pitched on by the Justices, the panel shall immediately be quashed and then the Justices shall write to the Coroners of the same County, to make a new panel; in case that likewise should be excepted against, and be made to appear to be corrupt and vicious, this panel also be quashed. Then the justices shall choose two clerks of the court, or others of the same county, who, sitting in the court, shall upon their oaths, make an indifferent panel, which shall be excepted to by neither of the parties; but being so impanelled and appearing in Court, either party may except against any particular person; as he may at all times, and in all cases, by alleging that the person so impanelled is of kin, either by blood or affinity to the other party; or in some such particular interest, as he can not be deemed an indifferent person to

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

Please see in particular ch. 27, part 4, p. 204



COMMENTARIES ON THE LAWS OF ENGLAND

BOOK THE FOURTH (1769)

WILLIAM BLACKSTONE, Esq.

Based on the first edition, together with the most material corrections and additions in the second edition.

Translation of greek, latin, italian and french quotations (with some modifications) by J. W. Jones, Esq. (1823)

Footnotes have been converted to chapter end notes.
Spelling has been modernized.

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BOOK 4:
Public Wrongs

likewise for the same offense.

IV. THE fourth method of trial used in criminal cases is that by the peers of Great Britain, in the court of parliament, or the court of the lord high steward, when a peer is capitally indicted. Of this enough has been said in a former chapter;[27] to which I shall now only add, that, in the method and regulations of its proceedings, it differs little from the trial *per patriam*, or by jury: except that the peers need not all agree in their verdict; but the greater number, consisting of twelve at the least, will conclude, and bind the minority.[28]

V. THE trial by jury, or the country, *per patriam*, is also that trial by the peers, of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter,[29] "*nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale judicium parium suorum, vel per legem terrae*." ["No free man may be taken or imprisoned, or exiled, or in any manner deprived of life but by the lawful judgment of his peers, or by the law of the land."]

THE antiquity and excellence of this trial, for the settling of the civil property, has before been explained at large.[30] And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of *oyer* and *terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure. But the founders of the English laws have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury: and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist, so long as this *palladium* [safeguard] remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

WHAT was said of juries in general, and the trial thereby, in civil cases, will greatly shorten our

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HISTORY

OF

TRIAL BY JURY.

BY

WILLIAM FORSYTH, M.A.,

LATE FELLOW OF TRINITY COLLEGE, CAMBRIDGE, AND AUTHOR OF *HORTENSIUS*.

Jura certe paria debent esse eorum inter se, qui sunt cives in eadem republica.
CICERO.

C'est donc le jury civil qui a réellement sauvé les libertés de l'Angleterre.
DE TOCQUEVILLE.

LONDON:
JOHN W. PARKER AND SON, WEST STRAND.
M.DCCC.LII.

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PUBLIC 251046

citizens, is imposed the task of taking part in judicial enquiries. They are called upon to serve as the particular occasion arises, and then return to their usual avocations and pursuits, so as to be absolutely free from any professional bias or prejudice.

Few writers when speculating on the rise of the jury, have kept this principle of its being separate from the court and employed solely to determine questions of fact, steadily in view. They have generally confounded the jurors with the court, and have thus imagined an identity between the former and those ancient tribunals of Europe where a select number of persons—often twelve—were taken from the community and appointed to try causes, but who did so in the capacity of Judges, and when satisfied of the evidence awarded and pronounced the doom.

These are the *Geschwornen-Gerichte* to which the jurists of Germany of late years have been so fond of appealing, as the model upon which they wish to reform their modern courts of judicature, and which they assume to have been in principle the same as the English Jury[1].

But a little reflection will convince us that this is not so, and that the distinction above insisted on, is not a mere formal one, but of a radical and important kind. It involves, in fact, the question of the possibility of the tribunal continuing to exist. A court of justice where the whole judicial authority is vested in persons taken from time to time from

[1] See Rogge, *Gerichtswesen der Germanen*, and *Staats Lexicon*, Vol. VII. Art. *Jury*.

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Law Reform Commission of Canada
Commission de réforme du droit du Canada

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CRIMINAL LAW

the jury in criminal trials

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verdict than is a judge. Only 9 per cent felt a judge is more likely to arrive at a just and fair verdict, while 37 per cent felt that a jury is more likely to arrive at a just and fair verdict (54 per cent rated them both equally). Thus in this regard four times as many people favour the jury as favour the judge. As well, almost all Canadians, based on our survey, think that accused people should be given the option of trial by jury for at least some offences and about a third of the people went so far as to suggest that the accused should have the option of trial by jury for all criminal offences.

F. Other Functions of the Jury

Each of the functions discussed above would appear to provide a strong reason for retaining the jury. But as well as these, there are other positive features of jury trials which, while perhaps not in themselves sufficient reason to retain the jury, cumulatively constitute a strong case in the jury's favour.

First, to some extent the jury relieves the judge of the heavy responsibility of deciding the question of guilt or innocence in difficult and important cases. Second, the jury protects the court by deflecting the criticism that the public might make of judges in individual cases and thus "acts as a sort of lightning rod for animosity and suspicion which otherwise might centre on the more permanent judge."[27] Third, the jury tackles each case afresh; therefore it is able to avoid the biases and predispositions which judges must surely acquire after hearing hundreds of similar cases. As Justice Fortas has explained, "I think the major reason we cling to the jury system is because judges do become case-burdened. Judges do sometimes tend, after many years, to take a somewhat jaundiced view of defendants."[28] Fourth, in cases in which important evidence must be excluded because it infringes a rule of evidence, the evidence will usually be excluded in the jury's absence and thus their decision will be untainted by its existence. In a trial by judge alone the judge must, in most

1993 CarswellBC 512
Supreme Court of Canada

Found at **Tab 92, Volume 18** of Google's BOA.

R. v. Osolin

1993 CarswellBC 512, 1993 CarswellBC 1274, [1993] 4 S.C.R. 595, [1993] S.C.J. No. 135, [1994] B.C.W.L.D. 829, 109 D.L.R. (4th) 478, 162 N.R. 1, 19 C.R.R. (2d) 93, 21 W.C.B. (2d) 491, 26 C.R. (4th) 1, 38 B.C.A.C. 81, 62 W.A.C. 81, 86 C.C.C. (3d) 481, J.E. 94-62, EYB 1993-67115

STEPHEN WILLIAM OSOLIN v. R.; ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL FOR ONTARIO and ATTORNEY GENERAL OF QUEBEC (Intervenors)

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: June 17, 1993
Judgment: December 16, 1993
Docket: Doc. 22826

Proceedings: reversed *R. v. Osolin* ((1992)), 1992 CarswellBC 1115, 7 B.C.A.C. 203, 15 W.A.C. 203, 10 C.R. (4th) 159 at 191 ((B.C. C.A.))

Counsel: *John D. McAlpine, Q.C.* and *Paul R. Bennett*, for appellant.
Elizabeth Bennett, for the Crown.
Donna R. Valgardson and *Nancy L. Irving*, for intervenor Attorney General of Canada.
Susan Chapman, for intervenor Attorney General for Ontario.
Jacques Gauvin and *Daniel Grégoire*, for intervenor Attorney General of Quebec.

Subject: Criminal; Constitutional; Criminal; Human Rights

Headnote

Criminal law --- Charter of Rights and Freedoms — Right to trial by jury [s. 11(f)]

Section 265(4) of the Criminal Code does not infringe s. 11(f) of the Charter, as it is nothing more than a re-affirmation of the Judge's role in supervising a jury trial — The issue of whether there is sufficient evidence to raise a defence is a question of law which is properly within the domain of the trial Judge and, consequently, does not violate accused's right to trial by jury Constitution Act, 1982, s 11(f); Criminal Code, R.S.C. 1985, c. C-46, s 265(4).

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85 Section 265(4) leaves the burden on the Crown in regard to all the essential elements of the offence. The prosecution must prove both the mens rea and the actus reus beyond a reasonable doubt: that the accused engaged in sexual intercourse with a woman who was not consenting, and that he intended to engage in sexual intercourse without the consent of the woman. It is always open to the jury even with out the defence of mistake of fact as to consent to find that there was a reasonable doubt as to the accused's mens rea and acquit. The mere fact of the air of reality requirement does not displace the presumption of innocence.

86 In conclusion, then, the air of reality threshold set forth in s. 265(4) does not violate s. 11(*d*). While it creates an evidentiary burden on the accused in the sense that he must raise sufficient evidence to give the defence an air of reality to justify its presentation to the jury, the burden of proving all of the elements of the offence beyond a reasonable doubt rests squarely with the Crown.

(ii) Right to a trial by jury: section 11(f)

87 Section 11(*f*) confers on a person charged with an offence the right to be tried by a jury where the maximum punishment for the offence is imprisonment for five years or more.

88 It is a basic tenet of the jury system that the jury decides issues of fact while the judge determines questions of law. Whether there is sufficient evidence to determine if an issue has been properly raised is a question of law, and therefore is properly in the domain of the judge (*B. (E.H.)*, supra, at pp. 790-91 and 796).

89 The requirement that there be an air of reality to the defence of mistaken belief in consent set out in s. 265(4) is reasonable and entirely valid. It is no more than a reaffirmation of an integral part of the judge's role in supervising a jury trial. The trial judge must determine questions of law such as the relevance and admissibility of evidence and the competence and compellability of witnesses. In doing so the trial judge cannot be accused of usurping the role of the jury or violating the accused's rights. Similarly it is appropriate that the jury determine if there is sufficient evidence to raise the defence of mistaken belief in consent. In considering the evidence giving rise to the air of reality, it must be remembered that the trial judge is not weighing the evidence, but is simply examining it to determine what defences are available. See *Guthrie*, supra, at p. 84.

90 The appellant was provided with a trial by jury. The only elements of the trial that were decided by the trial judge were those things properly within his realm, namely those issues pertaining to trial process and questions of law. There is consequently no violation of the appellant's right to a trial by jury.

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HISTORY

OF

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BY

WILLIAM FORSYTH, M.A.,

LATE FELLOW OF TRINITY COLLEGE, CAMBRIDGE, AND AUTHOR OF *HORTENSIUS*.

Jura certe paria debent esse eorum inter se, qui sunt cives in eadem republica.
CICERO.

C'est donc le jury civil qui a réellement sauvé les libertés de l'Angleterre.
DE TOCQUEVILLE.

LONDON:
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M.DCCC.LII.

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and Saxon compurgators, who were generally twelve in number, and whose oaths were conclusive of the matter in dispute. Others derive it from the *Rachinburgen* or *Scabini* of the continental nations; others from the *sectatores* and *pares* of the ancient county and feudal courts in this country.

One important feature of the institution is by no means peculiar to it. I mean the fact that it is a sworn tribunal—that its members decide under the solemn sanction of an oath. This was the case with the Dicasts at Athens and the Judices at Rome, and the same principle prevailed in the old Norse THING and German MALLUM, when the right of all the inhabitants of the *gau* or *mark* to be present at the judicial proceedings of these periodical assemblies, became in practice limited to a few, as the representatives of the community.

But sufficient attention has not been paid to what is *the* distinctive characteristic of the system; namely, that the Jury consists of a body of men taken from the community at large, summoned *to find the truth of disputed facts*, who are quite distinct from the judges or court. Their office is to decide upon the effect of evidence, and thus inform the court truly upon the question at issue, in order that the latter may be enabled to pronounce a right judgment. But they are not the court itself, nor do they form part of it; and they have nothing to do with the sentence which follows the delivery of their verdict. Moreover, they are not members of any class or corporation, on whom, as distinct from the rest of their fellow-

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(1858), 169 E.R. 1079

Found at Tab 97, Volume 19 of Google's BOA.

[453] 1858.

REGINA v. WILLIAM TREBILCOCK.

(The prisoner was indicted for larceny under s. 4 of The Fraudulent Trustees Act, 20 & 21 Vict. c. 54, and, in a 2nd count, for larceny at common law. It appeared that the prosecutrix having deposited a box of plate with the prisoner for safe custody, he broke open the box and took the plate out and pawned it. The jury returned a verdict of guilty, but recommended the prisoner to mercy, on the ground that they believed that he intended ultimately to return the plate to the prosecutrix:—Held, that, although, as decided in *Regina* v. *Holloway* (1 Den. C. C. 370), to constitute larceny there must be an intention permanently to deprive the owner of the property, the recommendation by the jury did not so qualify the verdict as to bring the case within the principle of that decision. *Semble*, that if not a larceny of the plate at common law, it was not made so by section 4 of The Fraudulent Trustees Act.)

[27 L. J. M. C. 103; 30 L. T. O. S. 203; 22 J. P. 112; 4 Jur. N. S. 123; 6 W. R. 281; 7 Cox C. C. 408.]

The following case was reserved by the Recorder of Plymouth.

At the General Quarter Sessions of the Peace holden in and for the borough of Plymouth on the 1st day of January 1858, before Charles Saunders, Recorder, the prisoner, William Trebilcock, was tried on an indictment which charged him,

First. With a larceny, under the statute 20 & 21 Vict. c. 54, s. 4 (*a*), in having, as bailee of plate the property of the prosecutrix, fraudulently converted it to his own use.

Secondly. With a common larceny of the same plate.

The jury found the prisoner guilty on both counts of the indictment, but recommended him to mercy, "believing that he intended ultimately to return the property." The question for the opinion of the Court is, whether, consistently with the ground upon which [454] the jury recommended the prisoner to mercy, the conviction was right upon both or either of the counts.

The case was this.

The prosecutrix, Miss Palmer, resided at Plymouth, and, going to London for eight or ten days, deposited with the prisoner, a tradesman at Plymouth, who had offered to take care of anything for her during her absence, a chest of valuable plate for safe custody till she returned. The prisoner had been told that the prosecutrix would leave a parcel with him, which he said that he would put in his iron chest to keep for her. When the chest of plate was placed in the prisoner's hands it was locked (the prosecutrix keeping the key), then covered with a wrapper, sewn together, and sealed in a great number of places, and then tied with a cord. The prisoner was not informed of the contents of this parcel, nor was any key given to him. In a day or two after the prosecutrix left for London, the prisoner had uncorded the chest, broken the seals, taken off the wrapper, procured a key, opened the chest, and taken out a part of the plate and offered it to one Woolf, at Plymouth, as a security for the advance of £50. The pawnbroker took up one of the pieces of plate, which bore the crest, and also a superscription with the name of Sir George Magrath upon it, and expressing his dislike to have anything to do with it, the prisoner said that

(*a*) The section is as follows:—"If any person being a bailee of any property shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny."

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he was under an engagement to be married to Lady Magrath. The prosecutrix had lived with Sir George Magrath, and when he died the plate, among other property, came into her possession. Woolf ultimately declined any advance upon it. The prisoner then communicated by letter with another pawnbroker named Druiff, at Newport in Monmouthshire, with whom the prisoner had before had bill transactions. Druiff came to the **[455]** prisoner at Plymouth, and advanced him £200, taking bills for the amount and the whole chest of plate, worth from £500 to £600, as a collateral security for the loan. Druiff took the plate away with him to Newport. The prisoner, by way of accounting to Druiff for the possession of the plate, represented to him that he was going to get married to the lady of the late Sir George Magrath, and that she had given him the plate to take care of till they were married. The prosecutrix went to London on the 8th day of November, and returned on the 17th of the same month. On her return, the prosecutrix tried often to see the prisoner, but could not do so till the 26th, when she first saw him and asked for the parcel; the prisoner said he would send it to her the same evening. It was not sent. The prosecutrix went often backwards and forwards to the prisoner's shops and private residence to see the prisoner, but could not see him again till the 2nd December, when, the prosecutrix insisting upon instantly having her parcel, the prisoner said she could not have it, as it was out of town; he had sent it to Bristol. Then he said it was now further than Bristol; that it was in Wales, but that he would write a letter, and she should have it on Friday. The parcel did not arrive. The prisoner refused to tell in whose hands it was, but the prosecutrix had learnt from the prisoner's father that Druiff had it. The inspector of police went to Newport, and found the chest of plate there, but Druiff refused to give it up unless upon repayment of the two hundred pounds for which it was deposited with him as security. The prisoner could not redeem it; and upon the facts being made known to the prosecutrix, she had the prisoner taken into custody on a charge of stealing, and the police took possession of the chest of plate as stolen property.

[456] Upon the finding of the jury, with the recommendation to mercy above stated, the counsel for the prisoner contended that, to support either of the counts in the indictment, it was necessary that the prisoner should have intended permanently to deprive the prosecutrix of her property, and that, as the jury believed that his intention was ultimately to return it, the verdict was wrong.

The prisoner was committed to prison, and sentence deferred until the opinion of the Judges shall have been obtained on the question raised.

If the Court shall be of opinion that the ground upon which the jury recommended the prisoner to mercy may consist with the verdict upon both or either of the counts of the indictment, the verdict to stand upon both or either of the counts accordingly.

If the recommendation may not consist with the verdict on either count, then the verdict to be set aside, and a verdict of not guilty to be recorded.

This case was argued, on 1st February 1858, before Lord Campbell C. J., Coleridge J., Martin B., Crowder J. and Watson B.

Carter appeared for the Crown, and E. W. Cox for the prisoner.

Lord Campbell C. J. (addressing the counsel for the prisoner).—You need not consider the recent statute. If it is not larceny at common law, the statute will not make it so; but how do you shew that it is not a larceny at common law?

Coleridge J.—There was no need of the count upon the statute.

E. W. Cox. I contend that the prisoner was not, upon the finding of the jury, guilty of larceny at common law, inasmuch as he had no intention to deprive the owner permanently of her property. It **[457]** is decided, in *Regina* v. *Holloway* (1 Den. C. C. 370), that an essential element of larceny is an intention to deprive the owner wholly and permanently of his property, and the law as laid down in that case is confirmed by *Regina* v. *Poole and Yeates* (*ante*, p. 345).

Coleridge J.—Your proposition is clear, but how do you bring this case within it?

E. W. Cox. The jury have expressly found that the prisoner intended ultimately to return the plate, and that is quite inconsistent with the admitted requisite to larceny, an intention permanently to deprive the owner of it.

Lord Campbell C. J.—That is not a part of the verdict. The jury found the prisoner guilty without qualification. They then recommended him to mercy, and they say loosely that the reason is that they think he had an ultimate intention to return the plate, that is, if ever he could raise the money, which was improbable.

Coleridge J.—The jury do not say that the prisoner intended to return the plate at the time he took it.

E. W. Cox. The larceny, if larceny it was, was complete at the moment when the prisoner deposited the box with the pledge. That is the crime the jury were trying, not what may have passed in his mind afterwards. They found that at that time, at the moment of committing the larceny, he did not intend to deprive the prosecutrix permanently of the property. Their verdict could have had reference to no other time, and if no larcenous intention existed at that time, or, which is the same thing, if the jury believe that no such intention existed, then the crime of larceny was not complete, and the prisoner was entitled to an acquittal.

[458] Carter, for the Crown, was not called upon by the Court.

Lord Campbell C. J.—The general proposition contended for by Mr. Cox is perfectly correct. To constitute larceny there must be an intention on the part of the thief to appropriate the property to his own use, and usurp an entire dominion over it; and if, at the time of the asportation, his intention is to make a mere temporary use of the chattels taken, so that the *dominus* shall again have the use of them afterwards, that is a trespass, but not a larceny; but that law does not apply to this case. Here there was abundant evidence of a larceny at common law—abundant evidence from which the jury might find that the prisoner feloniously stole the plate; and in fact the jury have so found and have returned a verdict of guilty. But they have recommended the prisoner to mercy, and accompanied that recommendation with a statement as to the prisoner's intention to return the stolen property. Now I doubt whether what the jury say, in giving their reason for recommending the prisoner to mercy, is to be considered as part of their finding; but, even assuming it to be so, all that they say is that he intended ultimately to return the property—not that at the time of the wrongful taking he had any such intention.

Coleridge J.—I am of the same opinion. There is no question about the law in this case; but the question is merely as to the facts, and upon the facts it appears that the prisoner had put it out of his power to return the plate which he had taken. Then, what must we do in order to make sense of the finding of the jury? It is to be observed that the recommendation to mercy in itself assumes that the verdict of guilty is correct; but the jury seem to have thought that the prisoner had it in his mind at some uncertain **[459]** time, if he could get hold of it again, to restore the property; and they might consider that a sufficient reason for recommending him to mercy. That interpretation makes sense of their finding; whilst the construction put upon it by Mr. Cox renders their conduct quite inconsistent and insensible.

Martin B.—I am of the same opinion. The recommendation to mercy, and the words which accompanied it, were no part of the verdict, and had nothing to do with it; and when the jury said "guilty" there was an end of the matter, so far as the verdict was concerned. But I also think that, even if it did form part of the verdict, it would not have the effect of bringing it within the principle contended for. It seems to me quite clear that this prisoner stole the plate and then pledged it for £200; and I think that in so doing he "usurped the entire dominion over it" within the meaning of that expression as used by Parke B. in *Regina* v. *Holloway*. If, therefore, a special verdict had been found, in the very terms used by the jury when they recommended the prisoner to mercy, I should have said that he was still guilty of larceny.

Crowder J.—It seems to me also that upon the facts of this case no other rational conclusion could be arrived at, except that the prisoner stole the plate. He broke open the box and took out the plate and stole it; but the jury recommended him to mercy because they thought that he had an intention of restoring the property some time if he could. Probably it very often happens that if stolen goods are pawned there is an intention to get them back again, if the person pawning them should ever be able to do so, and in that case to return them; but such an intention affords no ground for setting aside a verdict of guilty **[460]** when the offence of larceny is satisfactorily proved by the evidence.

Watson B.—I also think that this is the clearest case of larceny possible, though the jury have recommended the prisoner to mercy because they thought that he would ultimately have restored the property if he could have got it back.

Lord Campbell C. J.—I wish to add that I think that what a jury may say in recommending a prisoner to mercy is not a matter upon which a case should be reserved for the opinion of this Court.

Conviction affirmed.

R. v. McKnight

Ontario Judgments

Found at **Tab 87, Volume 17** of Google's BOA.

Please see in particular para. 55

Ontario Court of Appeal

Toronto, Ontario

McMurtry C.J.O., Laskin and O'Connor JJ.A.

Heard: February 9, 1999.

Judgment: April 23, 1999.

Docket No. C23383

[1999] O.J. No. 1321 | 44 O.R. (3d) 263 | 135 C.C.C. (3d) 41 | 42 W.C.B. (2d) 198 | 1999 CanLII 3717 | 1999 CarswellOnt 1079

Between Her Majesty the Queen, (respondent), and Robert McKnight, (applicant/appellant)

(59 pp.)

On appeal from Cavarzan J.

Counsel

Edward L. Greenspan and Alison Wheeler, for the applicant/appellant. Michal Fairburn, for the respondent.

Reasons for judgment were delivered by Laskin J.A., concurred in by O'Connor J.A. Separate reasons were delivered by McMurtry C.J.O.

LASKIN J.A.

A. OVERVIEW

1 The appellant Robert McKnight was convicted by a jury of the second-degree murder of his wife Janet. The trial judge, Cavarzan J., imposed a period of parole ineligibility of 17 years. The appellant appeals the parole ineligibility period.

2 McKnight murdered his wife in their bedroom with a 10-inch serrated bread knife in the morning of January 10, 1994. The attack lasted 10 to 15 minutes. The victim sustained numerous injuries and had over 50 defensive wounds on her hands and forearms.

maximum period, 25 years. The trial judge imposed 14 years observing: "[I]t is that vulnerability and the betrayal of that trust which sets wife murder apart from other forms of murder. It is itself an exceptional circumstance which justifies the increase of the period of parole ineligibility". On appeal, the majority of a panel of this court reduced the period to 12 years concluding that "it was an error in principle for the trial judge to hold that wife murder is in itself an exceptional circumstance justifying an increase in the period of parole ineligibility".

52 Other relevant Ontario cases include R. v. Barry[11] in which the accused brutally killed his girlfriend. She suffered 62 stab wounds to her head, chest, abdomen, back, right arm and hands. She was unarmed and many of the wounds were defensive. The accused also superficially wounded himself to try to give credence to his story of being attacked by the victim. He had no previous criminal record but posed some risk of re-offending. Nine jurors recommended 10 years parole ineligibility and three recommended 15 years. The trial judge, Watt J., imposed a 12-year period, which was upheld by this court.

53 In R. v. Parmar[12], the accused stabbed his girlfriend to death in her house, after locking her children outside. He had a previous conviction for domestic assault. The trial judge imposed a 15-year period of parole ineligibility, the period recommended by the jury. Finally, in R. v. Morrow[13], the accused murdered his common law spouse by cutting her throat in front of their 2 1/2 year old son. The accused had a criminal record, which included a conviction for assault causing bodily harm to his son when the boy was four months old. The jury recommended a 20-year period of parole ineligibility. The trial judge imposed 15 years.

54 The trial judge in the case before us did not refer to any of this case law, and in fairness to him, several of the cases were decided around or just after the time that he sentenced the appellant. My survey of recent Ontario case law suggests a reasonable range of 12 to 15 years parole ineligibility for the appellant. I would fix his period of parole ineligibility at the upper end of that range, at 14 years.

55 The jury recommended a 20-year period of parole ineligibility and the jury's recommendation must be considered in fixing the appropriate period. Nonetheless the jury's recommendation need not be slavishly followed. As Watt J. pointed out in R. v. Barry:

> It is difficult to gauge with any accuracy the weight that should be attributed to a jury recommendation regarding parole ineligibility. In one sense, it might be said to represent the community view upon the issue. To so hold, however, as it appears to me, is somewhat to overstate the case. They are given no guidance on the precedents concerning the appropriate range. They are simply told the numbers. They are not required at least to endeavour to achieve unanimity. It is, as it was in this case, but a brief, somewhat informal exercise, after they have been earlier told that sentence forms no part of their responsibility in determining liability, and then

thereafter told it is but a recommendation. They receive no further evidence concerning, for example, the likelihood of recidivism, future danger to society or other matters which might logically bear upon the issue other than what they can recall was given at trial.

56 Here the jury recommended a significant increase in the period of parole ineligibility. In that sense, I would give effect to the jury's recommendation. However, although this was horrible and brutal killing of a kind and decent woman, I think a period of 20 years or even 17 years is excessive. Setting parole ineligibility at 14 years does not mean that the appellant will automatically be released from prison after serving this time. The appellant was sentenced to life imprisonment for the murder of his wife. After he has served 14 years, the parole authorities will assess whether he should remain in custody.

CONCLUSION

57 I would grant leave to appeal the period of parole ineligibility. I would allow the appeal and reduce the period of parole ineligibility to 14 years.

LASKIN J.A.
O'CONNOR J.A. -- I agree.

McMURTRY C.J.O. (dissenting)

58 The appellant, Robert McKnight, was convicted by the verdict of a jury of second degree murder in the killing of his wife, Janet McKnight. The jury that found him guilty made a parole ineligibility recommendation pursuant to section 743[14] of the Criminal Code, recommending a period of 20 years parole ineligibility. After hearing the submissions from the appellant and the Crown, the trial judge, Cavarzan J., sentenced the appellant to life imprisonment with no eligibility for parole for 17 years. The appellant appeals against his sentence.

FACTS

59 Counsel submitted an agreed statement of facts for consideration of this appeal.

60 The appellant and the deceased were married for over 20 years. They did not have any children. At the time of the offence, the appellant was 52 years old, and a member of good standing in the Law Society of Upper Canada. He was also a licensed physician, and he had his own medical practice in Hamilton, Ontario, focusing on musculo-skeletal injuries arising from motor vehicle accidents. The deceased was a tenured nursing professor at the McMaster University School of Nursing.

61 On January 10, 1994 at approximately 6:30 a.m., while the deceased was sleeping,

PUBLIC 1060 3817

Found at Tab 83, Volume 16 of Google's BOA.

Her Majesty The Queen *Appellant*

v.

Clifford Kokopenace *Respondent*

and

Advocates' Society, Nishnawbe Aski Nation, David Asper Centre for Constitutional Rights, Women's Legal Education and Action Fund, Inc. (LEAF), Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies and Aboriginal Legal Services of Toronto Inc. *Interveners*

Sa Majesté la Reine *Appelante*

c.

Clifford Kokopenace *Intimé*

et

Advocates' Society, Nation Nishnawbe Aski, David Asper Centre for Constitutional Rights, Fonds d'action et d'éducation juridiques pour les femmes, inc. (FAEJ), Association des femmes autochtones du Canada, Association canadienne des Sociétés Elizabeth Fry et Aboriginal Legal Services of Toronto Inc. *Intervenants*

2015 SCC 28 (CanLII)

INDEXED AS: **R. *v.* KOKOPENACE**

2015 SCC 28

File No.: 35475.

2014: October 6; 2015: May 21.

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

RÉPERTORIÉ : **R. *c.* KOKOPENACE**

2015 CSC 28

N° du greffe : 35475.

2014 : 6 octobre; 2015 : 21 mai.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Right to a fair hearing — Right to trial by jury — Jury representativeness — Definition — Aboriginal accused from First Nation reserve convicted of manslaughter — Aboriginal on-reserve residents underrepresented on jury roll from which jury selected for accused's trial — What is the appropriate legal test for representativeness — Whether state met its representativeness obligation — Canadian Charter of Rights and Freedoms, s. 11(d), (f).

Constitutional law — Charter of Rights — Right to equality — Aboriginal on-reserve residents — Aboriginal accused from First Nation reserve convicted of manslaughter — Aboriginal on-reserve residents underrepresented on jury roll from which jury selected for accused's trial — Whether state violated right to equality of accused or of

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

Droit constitutionnel — Charte des droits — Procès équitable — Droit à un procès avec jury — Représentativité du jury — Définition — Accusé autochtone d'une réserve des Premières Nations déclaré coupable d'homicide involontaire coupable — Résidents autochtones des réserves sous-représentés sur la liste des jurés à partir de laquelle a été constitué le jury pour le procès de l'accusé — Quel est le critère juridique convenable en matière de représentativité? — L'État s'est-il acquitté de son obligation de représentativité? — Charte canadienne des droits et libertés, art. 11d), f).

Droit constitutionnel — Charte des droits — Droit à l'égalité — Résidents autochtones des réserves — Accusé autochtone d'une réserve des Premières Nations déclaré coupable d'homicide involontaire coupable — Résidents autochtones des réserves sous-représentés sur la liste des jurés à partir de laquelle a été constitué le jury

PUBLIC 1061 3830

Mary Eberts, for the interveners the Native Women's Association of Canada and the Canadian Association of Elizabeth Fry Societies.

Christa Big Canoe and *Jonathan Rudin*, for the intervener the Aboriginal Legal Services of Toronto Inc.

The judgment of Rothstein, Moldaver, Wagner and Gascon JJ. was delivered by

MOLDAVER J. —

I. Introduction

[1] The right to be tried by a jury of one's peers is one of the cornerstones of our criminal justice system. It is enshrined in two provisions of the *Canadian Charter of Rights and Freedoms* — the s. 11(*d*) right to a fair trial by an impartial tribunal and the s. 11(*f*) right to a trial by jury. Yet despite the importance of this right, this is the first time the Court has been called upon to determine what efforts the state must make to ensure that a jury is "representative" of the community. In turn, this raises the related questions of how representativeness should be defined and what role it should play in the rights guaranteed by ss. 11(*d*) and 11(*f*) of the *Charter*. In answering these questions, it must be remembered that the right to a representative jury is an entitlement held by the accused that promotes the fairness of his or her trial, in appearance and in reality. It is not a mechanism for repairing the damaged relationship between particular societal groups and our criminal justice system more generally — and it should not be tasked with that responsibility.

[2] In my view, representativeness focuses on the process used to compile the jury roll, not its ultimate composition. Consequently, the state satisfies an accused's right to a representative jury by providing a fair opportunity for a broad cross-section of society to participate in the jury process. A fair opportunity will be provided when the state makes reasonable efforts to: (1) compile the jury roll using random selection from lists that draw from a

Mary Eberts, pour les intervenantes l'Association des femmes autochtones du Canada et l'Association canadienne des Sociétés Elizabeth Fry.

Christa Big Canoe et *Jonathan Rudin*, pour l'intervenante Aboriginal Legal Services of Toronto Inc.

Version française du jugement des juges Rothstein, Moldaver, Wagner et Gascon rendu par

LE JUGE MOLDAVER —

I. Introduction

[1] Le droit d'être jugé par un jury formé de ses pairs est l'une des pierres angulaires de notre système de justice pénale. Il est consacré par deux dispositions de la *Charte canadienne des droits et libertés* : le droit, prévu par l'al. 11*d*), à un procès équitable devant un tribunal impartial et le droit, prévu par l'al. 11*f*), à un procès devant jury. Pourtant, malgré l'importance de ce droit, c'est la première fois que la Cour est appelée à se prononcer sur les efforts que l'État doit déployer pour faire en sorte qu'un jury soit « représentatif » de la collectivité. Cet examen soulève à son tour les questions connexes de la définition que devrait recevoir la représentativité et du rôle qu'elle devrait jouer dans les droits garantis par les al. 11*d*) et 11*f*) de la *Charte*. Pour répondre à ces questions, il faut se rappeler que le droit à un jury représentatif est un droit de l'accusé qui favorise l'équité de son procès en apparence et dans les faits. Il ne s'agit pas d'un moyen de réparer la relation mise à mal entre certains groupes de la société et notre système de justice pénale en général, et ce droit ne devrait pas servir à cette fin.

[2] À mon avis, la représentativité met l'accent sur la procédure utilisée pour dresser la liste des jurés, et non sur sa composition finale. L'État respecte donc le droit de l'accusé à un jury représentatif en donnant à un large échantillon de la société une possibilité honnête de participer au processus de sélection des jurés. Une telle possibilité est fournie lorsque l'État déploie des efforts raisonnables pour : (1) dresser la liste des jurés en sélectionnant

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broad cross-section of society, and (2) deliver jury notices to those who have been randomly selected. When this process is followed, the jury roll will be representative and the accused's *Charter* right to a representative jury will be respected.

[3] I am satisfied that there were no *Charter* violations in this case. I would accordingly allow the appeal.

II. Background

[4] Clifford Kokopenace is an Aboriginal man from the Grassy Narrows First Nation reserve in the District of Kenora. He was charged with second degree murder for stabbing his friend to death during a fight. After a trial by judge and jury in 2008, he was acquitted of murder but convicted of the lesser included offence of manslaughter. Prior to sentencing, his trial counsel learned that there may have been problems with the inclusion of Aboriginal on-reserve residents on the jury roll for the District of Kenora, which raised questions about the representativeness of the jury in Mr. Kokopenace's case. The trial judge, Stach J., refused to adjourn the proceedings to hear a mistrial application, as he considered himself to be *functus officio*. The representativeness issue was therefore raised for the first time on appeal to the Ontario Court of Appeal.

[5] Before the Court of Appeal, Mr. Kokopenace alleged that his jury was derived from a jury roll that did not adequately ensure the inclusion of Aboriginal on-reserve residents. Because of the allegedly inadequate process used to prepare the jury roll, he argued that his rights under ss. 11(*d*), 11(*f*), and 15 of the *Charter* were violated. Voluminous fresh evidence was introduced regarding the efforts Ontario had made, over a period of several years, in preparing the jury rolls for the District of Kenora.

ceux-ci au hasard à partir de listes brutes issues d'un large échantillon de la société et (2) envoyer des avis de sélection de juré aux personnes choisies au hasard. Quand cette procédure est suivie, la liste des jurés est représentative et le droit à un jury représentatif que la *Charte* garantit à l'accusé est respecté.

[3] Je suis convaincu qu'il n'y a pas eu de violations de la *Charte* en l'espèce. Par conséquent, je suis d'avis d'accueillir le pourvoi.

II. Contexte

[4] Clifford Kokopenace est un Autochtone de la Première Nation de Grassy Narrows dans le district de Kenora. Il a été accusé de meurtre au deuxième degré pour avoir poignardé son ami à mort durant une altercation. Au terme d'un procès devant juge et jury en 2008, il a été acquitté de l'accusation de meurtre, mais déclaré coupable de l'infraction moindre et incluse d'homicide involontaire coupable. Avant le prononcé de la sentence, l'avocat qui le représentait au procès a appris qu'il y avait peut-être eu des irrégularités concernant les mesures prises pour inscrire les résidents autochtones des réserves sur la liste des jurés du district de Kenora, ce qui suscitait des interrogations au sujet de la représentativité du jury dans le cas de M. Kokopenace. Le juge du procès, le juge Stach, a refusé d'ajourner l'instance pour instruire une demande d'annulation du procès puisqu'il se considérait dessaisi de l'affaire. La question de la représentativité a donc été soulevée pour la première fois en appel devant la Cour d'appel de l'Ontario.

[5] En Cour d'appel, M. Kokopenace a prétendu que son jury avait été constitué à partir d'une liste de jurés qui n'assurait pas adéquatement la participation des résidents autochtones des réserves. Comme la liste des jurés serait le fruit d'une procédure inadéquate, il a soutenu que ses droits garantis aux al. 11*d*) et 11*f*) et à l'art. 15 de la *Charte* avaient été violés. De nouveaux éléments de preuve volumineux ont été présentés relativement aux mesures que l'Ontario avait prises durant plusieurs années pour dresser les listes de jurés du district de Kenora.

2015 SCC 28 (CanLII)

Cheatle v R [1993] HCA 44; (1993) 177 CLR 541 (26 August 1993)

Found at **Tab 36, Volume 5** of Google's BOA.

HIGH COURT OF AUSTRALIA

CHEATLE AND ANOTHER v. THE QUEEN [1993] HCA 44; (1993) 177 CLR 541

F.C. 93/034

Number of pages - 14

Constitutional Law (Cth)

HIGH COURT OF AUSTRALIA

MASON CJ, BRENNAN, DEANE, DAWSON, TOOHEY, GAUDRON AND McHUGH JJ ***Per curiam***

CATCHWORDS

Constitutional Law (Cth) - Law of Commonwealth - Offence - Trial by jury - Verdict of guilty - Need for unanimity - State law providing for majority verdicts - Validity - The Constitution (63 and 64 Vict. c. 12), s. 80 - Judiciary Act 1903 (Cth), ss. 68(2)*, 79* - Acts Interpretation Act 1915 (SA), s. 22a(1)+ - Juries Act 1927 (SA), s. 57(1).

* Section 68(2) of the Judiciary Act 1903 (Cth) provided in part that "The several Courts of a State exercising jurisdiction with respect to -- ... (c) the trial and conviction on indictment ... of offenders or persons charged with offences against the laws of the State ... shall have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth committed within the State ...". Section 79 provided that "The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts

and Fernau Ltd. and Bardsley [1926] HCA 8; (1926) 37 CLR 393, at pp 411-412; R. v. Snow (1915) 20 CLR , at p 323; Smith v. Alabama [1888] USSC 54; (1888) 124 US 465, at pp 478-479; and see, also, Dixon, Jesting Pilate, (1965), pp 174, 198-202, 203-213.). In the context of the history of criminal trial by jury, one would assume that s.80's directive that the trial to which it refers must be by jury was intended to encompass that requirement of unanimity.

THE REQUIREMENT OF UNANIMITY: PRINCIPLE

7. Considerations of principle also support the conclusion that the requirement of unanimity is an essential feature of the trial by jury guaranteed by s.80. Regardless of the origins of the requirement that the verdict of a criminal jury be unanimous, the common law's unwavering insistence upon the requirement since the fourteenth century has endowed it with the authority of settled doctrine. Indeed, the requirement constitutes one of the hallmarks of the common law institution of criminal trial by jury in that there is a significant difference in nature between a deliberative process in which a verdict can be returned only if consensus or agreement is reached by all jurors and a process in which a specified number of jurors can override any dissent and return a majority verdict. The requirement of a unanimous verdict ensures that the representative character and the collective nature of the jury are carried forward into any ultimate verdict ((24) "On Instructing Deadlocked Juries", (1968) 78 The Yale Law Journal 100, at p.128; see also Downie, op cit, at p.491.). A majority verdict, on the other hand, is analogous to an electoral process in that jurors cast their votes relying on their individual convictions ((25) See "On Instructing Deadlocked Juries", op cit, at p 107, and Reg. v. Bain (1992) 1 SCR 91, at p 128 where Gonthier, McLachlin and Iacobucci JJ observed, in the course of a dissent directed to a quite different point, that one of the "fundamental characteristics of criminal jury trials" is that "the verdict of the jury must be unanimous ... In our criminal law, the jury only exists as a collectivity, and not as a group of individuals."). The necessity of a consensus of all jurors, which flows from the requirement of unanimity, promotes deliberation and provides some insurance that the opinions of each of the jurors will be heard and discussed ((26) See Johnson v. Louisiana (1972) 406 US, per Brennan J, dissenting, at p 396.). Thereby, it reduces the danger of "hasty and unjust verdicts" ((27) Wellman, Gentlemen

of the Jury, (1931), p.283.). In contrast, and though a minimum time might be required to have elapsed before a majority verdict may be returned, such a verdict dispenses with consensus and involves the overriding of the views of the dissenting minority.

8. Moreover, the common law's insistence upon unanimity reflects a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt ((28) See Reg. v. Thatcher (1987) 1 SCR, at p 698.). It is true that there is no logical inconsistency involved in the co-existence in the law of the criminal onus of proof and majority verdicts of guilt ((29) See, e.g., Johnson v. Louisiana (1972) 406 US, per Douglas J, dissenting, at p 392; Ryan, op cit, at p 215.). Nonetheless, assuming that all jurors are acting reasonably, a verdict returned by a majority of the jurors, over the dissent of others, objectively suggests the existence of reasonable doubt and carries a greater risk of conviction of the innocent than does a unanimous verdict. As Sir James Stephen wrote in 1883 ((30) op cit, pp.304-305.) :

"The justification of the rule, now that the character

of the jury has changed from that of witnesses to that of

judges of fact, seems to me to be that it is a direct

consequence of the principle that no one is to be convicted

of a crime unless his guilt is proved beyond all reasonable

doubt. How can it be alleged that this condition has been

fulfilled so long as some of the judges by whom the matter

is to be determined do in fact doubt?"

1991 CarswellMan 201
Supreme Court of Canada

Found at **Tab 55, Volume 10** of Google's BOA.

Pearlman v. Law Society (Manitoba)

1991 CarswellMan 201, 1991 CarswellMan 284, [1991] 2 S.C.R. 869, [1991] 6 W.W.R. 289, [1991] S.C.J. No. 66, 130 N.R. 121, 29 A.C.W.S. (3d) 406, 2 Admin. L.R. (2d) 185, 6 C.R.R. (2d) 259, 6 W.A.C. 81, 75 Man. R. (2d) 81, 84 D.L.R. (4th) 105, J.E. 91-1507, EYB 1991-67159

DAVID MORLEY PEARLMAN v. MANITOBA LAW SOCIETY JUDICIAL COMMITTEE, ATTORNEY GENERAL FOR ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA and ATTORNEY GENERAL FOR SASKATCHEWAN

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

Heard: May 7, 1991
Judgment: September 26, 1991
Docket: Doc. 21671

Counsel: *Sidney Green, Q.C.*, for appellant.
Jannine LeMere, for respondent.
Lori R. Sterling, for intervenor the Attorney General for Ontario.
Monique Rousseau, for intervenor the Attorney General of Quebec.
Donna J. Miller, for intervenor the Attorney General of Manitoba.
George H. Copley, for intervenor the Attorney General of British Columbia.
Graeme G. Mitchell, for intervenor the Attorney General for Saskatchewan.

Subject: Public; Civil Practice and Procedure

Headnote

Barristers and Solicitors --- Organization and regulation of profession — Disciplinary proceedings — What constituting misconduct

Barristers and Solicitors --- Organization and regulation of profession — Disciplinary proceedings — Disciplinary proceedings before Law Society — Jurisdiction of Law Society

Barristers and Solicitors --- Organization and regulation of profession — Disciplinary proceedings — Disciplinary proceedings before Law Society — Procedure — Bias

Administrative law — Natural justice — Bias — Reasonable apprehension of bias — Section 52(4) of Law Society Act providing that costs may be awarded against lawyer found guilty of professional misconduct — Test of "reasonable apprehension of bias" being whether reasonably

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Principles of Fundamental Justice

(i) Introduction: Fundamental Justice Requires Impartial Decision-Makers

31 By way of general comment, there are some basic notions which are absolutely central to the principles of fundamental justice. However, it is neither desirable nor necessary for the purposes of this appeal to attempt an exhaustive enumeration of these. Nor is it clear that that would even be possible without reference to any given judicial or administrative context. As has been often said by this court, the principles of fundamental justice reflect the fundamental tenets on which our legal system is based. Those tenets include, but are not limited to, the rules of natural justice and the duty to act fairly that have been developed over the years in the administrative law context: see J.M. Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991), 29 Osgoode Hall L.J. 51, at p. 55. It seems to me then that when deciding whether a law contravenes s. 7, one must examine the impugned legislation to ascertain whether it, viewed in a purposive manner, meets the fundamental precepts reflected in our system of justice.

32 More specifically, it is well accepted that included in these fundamental principles is the concept of a *procedurally fair hearing* before an *impartial decision-maker*. Indeed, Wilson J. said in *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177 at 212-13, 12 Admin. L.R. 137, 14 C.R.R. 13, 17 D.L.R. (4th) 422, 58 N.R. 1, that:

> ... at a minimum the concept of "fundamental justice" as it appears in s. 7 of the *Charter* includes the notion of procedural fairness articulated by Fauteux C.J. in *Duke v. The Queen*, [1972] S.C.R. 917. At page 923 he said:
>
> > Under s. 2(*e*) of the *Bill of Rights* no law of Canada shall be construed or applied so as to deprive him of 'a fair hearing in accordance with the principles of fundamental justice'. *Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case*.
>
> [emphasis added]

33 Thus, in the administrative law context, principles of fundamental justice include natural justice rules which in turn require that the members of the tribunal be impartial and disinterested: see de Smith's *Judicial Review of Administrative Action*, 4th ed. (1980), at p. 248. Impartiality of the decision-making body is a critical feature of natural justice which is captured by the Latin maxim, nemo judex in causa sua debet esse — no one should be the judge in his own cause. There are many different factual settings which could place the impartiality of a decision-making body in question. Among such contexts are situations where the decision-makers have or are perceived

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Malmo-Levine per Gonthier and Binnie JJ.
Found at Tab 85, Volume 17 of Google's BOA.

in a manner which yields an understandable result. They must also, in my view, be legal principles.

. . .

While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are "fundamental" in the sense that they would have general acceptance among reasonable people. [Emphasis added.]

113 The requirement of "general acceptance among reasonable people" enhances the legitimacy of judicial review of state action, and ensures that the values against which state action is measured are not just fundamental "in the eye of the beholder only": *Rodriguez*, at pp. 607 and 590 (emphasis in original). In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

a. *Is the Harm Principle a Legal Principle?*

114 In our view, the "harm principle" is better characterized as a description of an important state interest rather than a normative "legal" principle. Be that as it may, even if the harm principle could be characterized as a legal principle, we do not think that it meets the other requirements, as explained below.

b. *There Is No Sufficient Consensus that the Harm Principle Is Vital or Fundamental to Our Societal Notion of Criminal Justice*

115 Contrary to the appellants' assertion, we do not think there is a consensus that the harm principle is the sole justification for criminal prohibition. There

une certaine précision et appliqués à diverses situations d'une manière qui engendre un résultat compréhensible. Ils doivent également, à mon avis, être des principes juridiques.

. . .

Si les principes de justice fondamentale ne s'appliquent pas seulement au processus, il faut se référer aux principes qui sont « fondamentaux » en ce sens qu'ils seraient généralement acceptés parmi des personnes raisonnables. [Nous soulignons.]

La condition requérant que les principes soient « généralement acceptés parmi des personnes raisonnables » accroît la légitimité du contrôle judiciaire d'une mesure de l'État et fait en sorte que les valeurs au regard desquelles la mesure de l'État est appréciée ne sont pas fondamentales « aux yeux de l'intéressé seulement » : *Rodriguez*, p. 607 et 590 (souligné dans l'original). En résumé, pour qu'une règle ou un principe constitue un principe de justice fondamentale au sens de l'art. 7, il doit s'agir d'un principe juridique à l'égard duquel il existe un consensus substantiel dans la société sur le fait qu'il est essentiel au bon fonctionnement du système de justice, et ce principe doit être défini avec suffisamment de précision pour constituer une norme fonctionnelle permettant d'évaluer l'atteinte à la vie, à la liberté ou à la sécurité de la personne.

a. *Le principe du préjudice est-il un principe juridique?*

À notre avis, le « principe du préjudice » est moins un principe « juridique » normatif qu'un critère permettant de définir un intérêt important de l'État. Quoi qu'il en soit, même si le principe du préjudice pouvait être qualifié de principe juridique, nous ne croyons pas qu'il satisferait aux autres conditions, comme nous l'expliquons ci-après.

b. *Absence d'un consensus suffisant quant au caractère primordial ou fondamental du principe du préjudice dans la notion de justice pénale au sein de notre société*

Contrairement à ce que prétendent les appelants, nous ne pensons pas qu'il y a consensus sur le fait que le principe du préjudice est la seule

2003 SCC 74 (CanLII)

Organization of Work

Sittings of Tribunal

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

Judicial member to preside at hearings

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

Prohibition where financial interest

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

Hearing of applications

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

Administrative remedies

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

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

Proceedings

Questions of law, fact, mixed law and fact

12 (1) In any proceedings before the Tribunal,

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

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

Where there are differing opinions

(2) In any proceedings before the Tribunal,

Organisation du Tribunal

Séances du Tribunal

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

Président de séance

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

Interdiction : intérêt financier

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

Demandes

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

Recours administratifs

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

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

Procédures devant le Tribunal

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

12 (1) Dans toute procédure devant le Tribunal :

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

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

Opinions divergentes

(2) Dans toute procédure devant le Tribunal :

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

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

Where member unable to take part in judgment

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

Appeal

Appeal

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

Questions of fact

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

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

Administration of Tribunal

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

Sittings

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

Rules

Rules

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

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

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

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

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

Membre incapable de participer à un jugement

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

Appel

Appel

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

Questions de fait

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

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

Administration du Tribunal

14 [Abrogé, 2014, ch. 20, art. 447]

Séances

15 Le Tribunal tient ses réunions au Canada, aux date, heure et lieu qu'il estime indiqués pour la bonne exécution de ses travaux.

Règles

Règles

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

a) afin de régir la pratique et la procédure devant lui;

b) concernant l'accomplissement de ses travaux et la gestion de ses affaires internes.

2012 CarswellOnt 17498
Ontario Superior Court of Justice

R. v. Domfoam Inc.

2012 CarswellOnt 17498

Found at **Tab 73, Volume 14** of Google's BOA.

Please see in particular paras. 3 and 7

Her Majesty the Queen v. Domfoam Inc. and Vallefoam Inc.

L. Ratushny J.

Heard: January 5, 2012
Judgment: January 5, 2012
Docket: Ottawa 12-30002

Counsel: Mr. R. Morin, for Crown
Mr. B. Heller, for Accused

Subject: Corporate and Commercial; Criminal

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Conspiracy — Limiting competition unduly

Two corporations charged with four counts of conspiracy under s. 45.1 and s. 45.2 of Competition Act — Corporations pleaded guilty — Sentencing hearing held — Corporations fined $12.5 million, payable in equal amounts by each corporation except for fine relating to fourth count, which was to be paid $750,000 by one corporation and $1.25 million by other corporation — Corporations accepted responsibility and had been cooperative — Corporations pleaded guilty, had no criminal record and had not attempted to shield assets — General deterrence and denunciation were main principles — Eleven year length of activity and that it was carefully planned were aggravating factors, along with scope of activity, amount of money involved and attempts to conceal wrongdoing.

Table of Authorities

Statutes considered:

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

Generally — referred to

s. 45 — considered

s. 45(1)(a) — referred to

s. 45(1)(c) — referred to

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3 *EXHIBIT NUMBER TWO*: Authorization from Vallefoam Industries 1995 Incorporated - produced and marked

MR. HELLER: Thank you. Now if I may, Your Honour, and I'm in your hands - but recognizing that we haven't appeared yet in front of any court...

THE COURT: Yes.

MR. HELLER: ...in this matter, my friend has an Information and we weren't sure procedurally how you wanted to proceed. But I was prepared, if we put the Information before you, bearing in mind that you're, of course, I'm not telling you things with respect that you already know, but you're also *ex officio* a Justice of the Peace...

THE COURT: Oh...

MR. HELLER: ...so according the Justices of the Peace Act - so with your permission wondering whether or not it would be appropriate to have the election put to me, whereupon I would elect to be tried by a judge without the benefit of her preliminary inquiry, and my friend would then have the Indictment before the Court and the Court could then proceed on that Indictment.

THE COURT: I think that is appropriate and thank you for raising that.

MR. HELLER: Thank you.

THE COURT: Please go ahead.

MR. HELLER: And with your permission again, I'm sorry to keep on interrupting...

THE COURT: Yes.

MR. HELLER: ... I'm prepared to dispense with the reading, if that's your view of things.

THE COURT: Yes, thank you.

MR. HELLER: So with respect to - assuming that it has been read and would be put to our election, the defendants elect to be tried by a judge without a jury and without the benefit of a preliminary inquiry.

THE COURT: Thank you. And on that basis, there would have been a committal on those counts and the matter would have, and is before me now, in valid form. And I think, however, that there should be an arraignment...

MR. HELLER: Thank you.

THE COURT: ...on the Indictment. Is there anything else procedurally that...

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MR. HELLER: No, I don't think so. Thank you.

THE COURT: ... that we have missed?

MR. HELLER: Thank you very much, Your Honour.

THE COURT: Thank you. Go ahead, Madam Registrar.

REGISTRAR: Domfoam International Incorporated and Vallefoam Industries 1995 Incorporated, you are charged that between the 1st day of January in the year 1999 and the 11th day of March in the year 2010, at the city of Toronto in the said region of Toronto and at the city of Montréal, the District of Montréal, Province of Québec and elsewhere in Canada did, unlawfully conspire, combine, agree, or arrange with Carpenter Canada Company, Vitafoam Canada Incorporated and other companies and individuals known and unknown to prevent or lessen unduly competition in the sale or supply of carpet cushion foam in Canada, thereby committing an indictable offence contrary to Section 45,1 paragraph (c) of the Competition Act;

4 And further that between the 1st day of January in the year 1999 and the 11th day of March in the year 2010 at the City of Ottawa, in the said Region of Toronto, at the city of Montréal District of Montréal, Province of Québec and elsewhere in Canada did, unlawfully conspire, combine, agree, or arrange with Foamex Canada Incorporated, Carpenter Canada Company, Vitafoam Canada Incorporated and other companies and individuals known and unknown, to prevent or lessen unduly competition in the sale or supply of slab foam in Canada, thereby committing an indictable offence contrary to section 45.1, paragraph (c) of the Competition Act;

5 And further that between the 12th day of March in the year 2010 and the 27th day of July in the year 2010 in the city of Toronto in the said Region of Toronto, at the City of Montréal, District of Montréal, Province of Québec and elsewhere in Canada, did unlawfully conspire, agree, or arrange with Carpenter Canada Company, Vitafoam Canada Incorporated and other companies and individuals known and unknown, to fix the price for the supply of carpet cushion foam in Canada, contrary to Section 45.1, paragraph (a) of the Competition Act, and did thereby commit an indictable offence pursuant to Section 45.2 of the Competition Act;

6 And further that between the 12th day of March in the year 2010 and the 27th day of July in the year 2010, at the City of Toronto in the said Region of Toronto, at the City of Montréal, District of Montréal, Province of Québec and elsewhere in Canada, did unlawfully conspire, agree or arrange with Foamex Canada Incorporated, Carpenter Canada Company, Vitafoam Canada Incorporated and other companies and individuals known and unknown, to fix the price for the supply of slab foam in Canada, contrary to Section 45.1, paragraph (a) of the Competition Act, and did thereby commit an indictable offence pursuant to Section 45.2 of the Competition Act.

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7 They are all straight indictable offences, and on today's date the accused elected trial by Superior Court of Justice, Judge alone, and they waived a preliminary hearing. Plea to these four charges?

MR. HELLER: I'm authorized by the defendants to enter a plea of guilty to all counts.

THE COURT: Thank you, Mr. Heller.

MR. HELLER: Thank you very much.

THE COURT: Mr. Morin? You have filed a Statement of Admissions in advance for my perusal. Do you wish to have it filed formally now in the court file?

MR. MORIN: Yes, please. Mr. Heller, and I have both signed the Statement of Admissions...

THE COURT: Thank you.

MR. MORIN: ...on the last page, so with your permission, if I may file this as an exhibit?

THE COURT: Yes.

MR. MORIN: Thank you.

THE COURT: It will be Exhibit Three.

8 *EXHIBIT NUMBER THREE*: Agreed Statement of Facts -produced and marked

THE COURT: This is in the same form as forwarded to me?

MR. MORIN: Correct - yes, there are no changes to this. Would you like me to briefly go over some of the main points...

THE COURT: If there is something...

MR. MORIN: ...in the Statement of Admissions?

THE COURT: ...you feel you need to, I understood it. It's well organized. I don't think you need to...

MR. MORIN: Okay.

THE COURT: ...unless you feel there is something that you want to bring to my attention.

MR. MORIN: No, not with respect to the Statement of Admissions, Your Honour. However, I would like to file a signed copy of the sentencing submissions.

THE COURT: Yes.

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2013 CarswellOnt 18740
Ontario Superior Court of Justice

Found at **Tab 69, Volume 13** of Google's BOA.

R. v. Cathay Pacific Airways Ltd.

2013 CarswellOnt 18740, 112 W.C.B. (2d) 737

Her Majesty the Queen v. Cathay Pacific Airways Limited

J. Parfett J.

Heard: June 20, 2013
Judgment: June 20, 2013
Docket: Ottawa 13-13097

Counsel: Ms E. Beauchamp, for Crown
Ms M. Renaud, for Cathay Pacific Airways Limited

Subject: Corporate and Commercial; Criminal; Public

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Price maintenance — Principles of sentencing

Accused was airline charged with violation of competition laws — Airline worked with other airlines to fix surcharges in air cargo transportation — Airline pleaded guilty to offences — Joint submission was determined for sentencing — Airline was to pay fine of $1.5 million — Sentencing submissions made — Airline ordered to pay fine of $1.5 million — Court was not to deviate from joint submission unless there was good reason to do so — Airline admitted wrongdoing and cooperated with investigation — Amount of fine met sentencing objectives of general and specific deterrence.

Table of Authorities

Statutes considered:

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

s. 45(1)(c) — referred to

SENTENCING of accused airline, for violation of competition law.

***J. Parfett J.*:**

1

THE COURT: So good morning, Counsel.

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MS. BEAUCHAMP: Good morning, Your Honour.

MS. RENAUD: Good morning.

THE COURT: So Ms. Beauchamp?

MS. BEAUCHAMP: Yes.

THE COURT: You are Ms. Beauchamp?

MS. BEAUCHAMP: I am Ms. Beauchamp.

THE COURT: Okay, and you must be then Ms. Renaud.

MS. RENAUD: I am, yes. Good morning.

THE COURT: Good morning. Do we have someone to arraign?

MS. RENAUD: Ms. Beauchamp.

MS. BEAUCHAMP: Just me.

THE COURT: Just you. Well, let's go for it then. We're going to file the indictment in a moment.

THE REGISTRAR: This is a copy of the indictment?

THE COURT: That's a copy of the indictment.

THE REGISTRAR: I'll arraign from that. Are you ready to proceed?

MS. BEAUCHAMP: Yes, we are ready to proceed.

THE REGISTRAR: Cathy Pacific Airways Limited stands charged that it between April 13, 1999 and August 14, 2003 in Canada did unlawfully conspire, combine, agree or arrange with other air carriers known and unknown, the one with the other or others of them, to prevent or lessen unduly competition in Canada by agreeing to fix navigation surcharges on the sale of and supply of international air cargo transportation services for cargo imported to and exported from Canada contrary to former paragraph 45(1)(c) of the *Competition Act* R.S.C.1985, chapter C-34, and did thereby commit an indictable offence contrary to that paragraph of the Competition *Act.* What is your plea to this charge, guilty or not guilty?

MS. RENAUD: Cathy Pacific Airways pleads guilty as charged.

THE REGISTRAR: Thank you, please be seated.

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THE COURT: And I have to put the election to the accused, so I will read the following and get the election.

You have the option to elect to be tried by a Provincial Court Judge without a jury, and without having had a preliminary inquiry, or you may elect to be tried by a judge without a jury or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury, or by a court composed of a judge and jury, or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?

MS. RENAUD: To be tried by a judge alone.

THE COURT: Right, thank you very much.

MS. BEAUCHAMP: I believe my friend would also like to waive the preliminary inquiry in this matter.

THE COURT: Is that correct?

MS. RENAUD: It is correct, my lady.

THE COURT: Thank you.

MS. BEAUCHAMP: In that case, I will prefer the indictment.

THE COURT: Thank you.

2 ...THE COURT SPEAKS TO THE REGISTRAR.

THE COURT: All right, go ahead Ms. Beauchamp?

MS. BEAUCHAMP: So at this time, I would like to tender as a first exhibit the Statement of Admissions of which a draft was submitted to Your Honour two days ago.

THE COURT: And is that on consent, Ms. Renaud?

MS. RENAUD: Yes, it is, Your Honour.

THE COURT: All right. You can file this as Exhibit 1 on the hearing, Madam Registrar.

THE REGISTRAR: Yes.

THE COURT: I have a copy already.

THE REGISTRAR: The agreed Statement of Facts?

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Big M Drug Mart per Dickson J.
Found at **Tab 64, Volume 12** of Google's BOA.

1982. The Attorney General submitted that only a court of superior jurisdiction has the prerogative powers to make a declaratory order under s. 52.

37 Standing and jurisdiction to challenge the validity of a law pursuant to which one is being prosecuted is the same regardless of whether that challenge is with respect to ss. 91 and 92 of the Constitution Act, 1867, or with respect to the limits imposed on the legislatures by the Constitution Act, 1982.

38 Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the Charter have been infringed. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.

39 Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such "public interest litigation" it would have had to fulfil the status requirements laid down by this court in the trilogy of "standing" cases (*Thorson v. A.G. Can.*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, 1 N.R. 225 ; *N.S. Bd. of Censors v. McNeil*, [1976] 2 S.C.R. 265, 32 C.R.N.S. 376, 55 D.L.R. (3d) 632, 12 N.S.R. (2d) 85, 5 N.R. 43 ; and *Min. of Justice of Can. v. Borowski*, [1981] 2 S.C.R. 575, [1982] 1 W.W.R. 97, 24 C.R. (3d) 352, 24 C.P.C. 62, 64 C.C.C. (2d) 97, 130 D.L.R. (3d) 588, 12 Sask. R. 420, 39 N.R. 331) but that was not the reason for its appearance in court.

40 Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is urging that the law under which it has been charged is inconsistent with s. 2(*a*) of the Charter and by reason of s. 52 of the Constitution Act, 1982, it is of no force or effect.

41 Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant. The respondent is arguing that the legislation is constitutionally invalid because it impairs freedom of religion — if the law impairs freedom of religion it does not matter whether the company can possess religious belief. An accused atheist would be equally entitled to resist a charge under the Act. The only way this question might be relevant would be if s. 2(*a*) were interpreted as limited to protecting only those persons who could prove a genuinely held religious belief. I can see no basis to so limit the breadth of s. 2(*a*) in this case.

42 The argument that the respondent, by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights under s. 2(*a*) of the Charter, confuses the nature of this appeal. A law which itself infringes religious freedom is, by that reason alone,

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1990 CarswellNS 60
Supreme Court of Canada

Found at **Tab 43, Volume 8** of Google's BOA.

Dywidag Systems International Canada Ltd. v. Zutphen Brothers Construction Ltd.

1990 CarswellNS 60, 1990 CarswellNS 259, [1990] 1 S.C.R. 705, [1990] S.C.J. No. 27,
106 N.R. 11, 20 A.C.W.S. (3d) 353, 258 A.P.R. 181, 40 C.L.R. 1, 41 C.P.C. (2d) 18,
46 C.R.R. 259, 68 D.L.R. (4th) 147, 97 N.S.R. (2d) 181, J.E. 90-615, EYB 1990-67376

THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF PUBLIC WORKS v. DYWIDAG SYSTEMS INTERNATIONAL CANADA LTD. et al.; ATTORNEY GENERAL FOR ONTARIO et al. (intervenors)

Dickson C.J.C., Wilson, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

Heard: January 24, 1990
Judgment: March 29, 1990
Docket: Doc. No. 20333

Counsel: *T.B. Smith*, Q.C., *A.R. Pringle*, and *Joseph de Pencier*, for appellant.
No one appearing for respondent Dywidag.
Elwin MacNeil, Q.C., *A. Wayne MacKay*, and *Edmond W. Chiasson*, for respondent Zutphen.
Robert E. Charney, for Attorney General for Ontario.
Jean Bouchard and *Madeleine Aubé*, for Attorney General of Québec.
Richard Taylor, for Attorney General for Alberta.

Subject: Civil Practice and Procedure; Contracts; Constitutional; Public

Headnote

Constitutional Law --- Charter of Rights and Freedoms — Scope of application — Who having rights under Charter — Corporations

Constitutional Law --- Charter of Rights and Freedoms — Nature of rights and freedom — Equality rights — Who constituting individual — Crown

Crown --- Practice and procedure involving Crown in right of Canada — Forum for proceedings — In proceedings against Crown — General jurisdiction of Federal Court

Crown --- Practice and procedure involving Crown in right of Canada — Forum for proceedings — In proceedings against Crown — Effect of Charter of Rights and Freedoms

Judges and Courts --- Jurisdiction — Jurisdiction of superior courts — General jurisdiction

Judges and Courts --- Exchequer and Federal Courts — Jurisdiction — Proceedings involving third parties or multiple defendants — Third party claims

Constitutional law — Constitution Act, 1982 — Charter of Rights and Freedoms — Equality rights — Exclusive jurisdiction of Federal Court to hear claims against Crown not violating s. 15 of

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4 To avoid a multiplicity of actions, Zutphen brought an action to the Supreme Court of Nova Scotia, Trial Division, to add the Crown as a third party to the action commenced against it by Dywidag. Zutphen argued that ss. 17(1) and 17(2) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, as amended (now R.S.C. 1985, c. F-7), and s. 7(1) of the *Crown Liability Act*, R.S.C. 1970, c. C-38, as amended (now R.S.C., 1985, c. C-50, s. 15(1)) violate ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Richard J., sitting in Chambers, dismissed the application. Zutphen appealed to the Supreme Court of Nova Scotia, Appeal Division. The appeal was allowed and leave was granted to add the Crown as a third party.

5 Jones J.A., writing for the Appeal Division, rejected Zutphen's argument based on s. 7 of the *Charter*, but held that the impugned legislative provisions infringed s. 15 of the *Charter*. Citing *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, 58 N.R. 81, 13 C.R.R. 64, 18 C.C.C. (3d) 385, 60 A.R. 161, 18 D.L.R. (4th) 321, 85 C.L.L.C. 14,023, he held that a corporation was entitled to challenge the constitutionality of the *Federal Court Act* and the *Crown Liability Act* on the grounds that they contravened s. 15 of the *Charter*. He held that the impugned provisions of these Acts violated s. 15(1) because they placed the Crown in a preferred position compared to the other parties. Finally, he held that this violation could not be justified under s. 1 of the *Charter* since the Crown had not proven that exclusive Federal Court jurisdiction was either necessary in this case or that it was related to concerns that were pressing and substantial.

Applicability of Section 7 of the Charter

6 There can now be no doubt that a corporation cannot avail itself of the protection offered by s. 7 of the *Charter*. In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 94 N.R. 167, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, the majority of this Court held that a corporation cannot be deprived of life, liberty and security of the person and cannot therefore avail itself of the protection offered by s. 7 of the *Charter*. At p. 1004 [S.C.R.] it was stated:

> it appears to us that [s. 7] was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase 'Everyone has the right to life, liberty and security of the person' serves to underline the human element involved; only human beings can enjoy these rights. 'Everyone' then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.

7 It is true that there is an exception to this general principle that was established in *Big M Drug Mart*, supra, where it was held that "[a]ny accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally

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invalid." ([1985] 1 S.C.R. pp. 313-314). Here no penal proceedings are pending and the exception is obviously not applicable.

Section 15 of the Charter

8 With regard to s. 15(1) of the *Charter*, for the reasons expressed in *Wolff*, supra, the impugned provisions of the legislation do not constitute discrimination.

Disposition

9 I would allow the appeal but, in the circumstances, without costs. The constitutional questions should be answered as follows:

> 1. are ss. 17(1) and 17(2) of the *Federal Court Act*, as amended, and s. 7(1) of the *Crown Liability Act*, as amended, consistent with ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* insofar as they confer exclusive jurisdiction in the Federal Court in relation to all claims against the Crown?
>
> *Answer*: yes.
>
> 2. if ss. 17(1) and 17(2) of the *Federal Court Act*, as amended, and s. 7(1) of the *Crown Liability Act*, as amended, are not rendered void by virtue of their inconsistency with the *Canadian Charter of Rights and Freedoms*, are they none the less inoperative in the particular facts of this case insofar as they confer exclusive jurisdiction on the Federal Court in relation to all claims against the Crown?
>
> *Answer*: this question need not be answered.
>
> 3. if ss. 17(1) and 17(2) of the *Federal Court Act*, as amended, and s. 7(1) of the *Crown Liability Act*, as amended, or both, are inconsistent either with s. 7 or s. 15 of the *Canadian Charter of Rights and Freedoms*, are they a reasonable limit within the meaning of s. 1 of the *Charter*?
>
> *Answer*: this question need not be answered.
>
> *Appeal allowed.*

End of Document

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Found at **Tab 106, Volume 20** of Google's BOA.

1985 CarswellNat 152
Supreme Court of Canada

Singh v. Canada (Minister of Employment & Immigration)

1985 CarswellNat 663, 1985 CarswellNat 152, [1985] 1 S.C.R. 177, [1985] S.C.J. No. 11, 12 Admin. L.R. 137, 14 C.R.R. 13, 17 D.L.R. (4th) 422, 30 A.C.W.S. (2d) 369, 58 N.R. 1, J.E. 85-393

SINGH v. MINISTER OF EMPLOYMENT & IMMIGRATION

Dickson C.J.C., Ritchie, * Beetz, Estey, McIntyre, Lamer and Wilson JJ.

Heard: April 30, 1984; May 1, 1984
Judgment: April 4, 1985
Docket: Nos. 18209, 17997, 17952, 17898, 18207, 18235, 17904

Counsel: *Ian Scott, Q.C.*, for appellants.
C.D. Coveney for appellant Satnam Singh.
E.A. Bowie, Q.C., and *Roslyn Levine*, for respondent.
Mendel Green, Q.C., *Barbara Jackman*, and *Donald Chiasson*, for intervenants.

Subject: Public; Constitutional; Immigration; Human Rights

Headnote

Immigration and citizenship --- Constitutional issues — Charter of Rights and Freedoms — Visitors and immigrants — Convention refugees

Procedure under Act depriving aliens applying for Convention refugee status of right to life, liberty and security of person guaranteed by s. 7 of Charter — Failure of system of adjudication to accord with principles of fundamental justice not being demonstrably justified in free and democratic society — Administrative convenience not overriding need to adhere to principles of fundamental justice and procedural fairness — Cost of compliance not shown to be so prohibitive as to constitute justification within meaning of s. 1 of Charter Constitution Act, 1982, s 1; Constitution Act, 1982, s 7.

Immigration and citizenship --- Refugee protection — Appeal or redetermination of claim — Procedure

Right to oral hearing before Immigration Appeal Board for redetermination of claim to Convention refugee status — Charter protection extending to refugees and claimants to refugee status whether in Canada or merely seeking entry — Three Judges basing right on s. 2(e) of Bill of Rights, three Judges basing right on s. 7 of Charter — Canadian Charter of Rights and Freedoms, s. 7 Constitution Act, 1982, s 7.

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> 10. It is submitted that because Convention refugees enjoy these rights under Canadian law, a person who applies for refugee status under section 45 or 70 of the Act meets the first requirement for claiming the protection of 'fundamental justice' under section 2(e) of the Bill of Rights, namely, that a law of Canada provides a procedure 'for the determination of his rights'.

13 In his written submissions, Mr. Bowie, of counsel for the Attorney General of Canada, makes a concession in the following terms:

> 2. The Attorney General of Canada does not dispute that the process of determining and redetermining refugee claims involves the determination of rights and obligations of the refugee claimants. It is only in that respect that his submissions with respect to section 2(e) of the Bill of Rights differ from his submissions with respect to section 7 of the Canadian Charter of Rights and Freedoms. It was submitted upon the hearing of these appeals that a denial of a claim to refugee status by the operation of Canadian law does not deprive the claimant of 'the right to life, liberty and security of the person' guaranteed by section 7 of the Charter.

14 In his reply, Mr. Scott refers to the Attorney General's acknowledgment that the process of adjudicating refugee claims under the Immigration Act, 1976 involves the determination of "rights and obligations". Mr. Scott then concludes:

> The remaining issue, therefore, is whether the procedures provided by the Act conform to the dictates of 'fundamental justice'.

15 In view of the last sentence in the Attorney General's acknowledgment quoted above, I am not absolutely clear whether or not it was conceded by the Attorney General that the "rights" referred to in s. 2(e) of the Canadian Bill of Rights are not the same rights or rights of the same nature as those which are enumerated in s. 1, including "the right of the individual to life, liberty, security of the person ... and the right not to be deprived thereof except by due process of law".

16 Be that as it may, it seems clear to me that the ambit of s. 2(e) is broader than the list of rights enumerated in s. 1 which are designated as "human rights and fundamental freedoms" whereas in s. 2(e), what is protected by the right to a fair hearing is the determination of one's "rights and obligations", whatever they are and whenever the determination process is one which comes under the legislative authority of the Parliament of Canada. It is true that the first part of s. 2 refers to "the rights or freedoms herein recognized and declared", but s. 2(e) does protect a right which is fundamental, namely "the right to a fair hearing in accordance with the principles of fundamental justice" for the determination of one's rights and obligations, fundamental or not. It is my view that, as was submitted by Mr. Coveney, it is possible to apply s. 2(e) without making reference to s. 1 and that the right guaranteed by s. 2(e) is in no way qualified by the "due process" concept mentioned in s. 1(a).

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was not uncommon in Commonwealth and Western European countries for refugee claims to be adjudicated administratively without a right to appeal. He further argued that the Immigration Appeal Board was already subjected to a considerable strain in terms of the volume of cases which it was required to hear and that a requirement of an oral hearing in every case where an application for redetermination of a refugee claim has been made would constitute an unreasonable burden on the board's resources.

115 One or two comments are in order respecting this approach to s. 1. It seems to me that it is important to bear in mind that the rights and freedoms set out in the Charter are fundamental to the political structure of Canada and are guaranteed by the Charter as part of the supreme law of our nation. I think that in determining whether a particular limitation is a reasonable limit prescribed by law which can be "demonstrably justified in a free and democratic society" it is important to remember that the Courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter. The issue in the present case is not simply whether the procedures set out in the Immigration Act for the adjudication of refugee claims are reasonable; it is whether it is reasonable to deprive the appellants of the right to life, liberty and security of the person by adopting a system for the adjudication of refugee status claims which does not accord with the principles of fundamental justice.

116 Seen in this light I have considerable doubt that the type of utilitarian consideration brought forward by Mr. Bowie can constitute a justification for a limitation on the rights set out in the Charter. Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our Courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. Whatever standard of review eventually emerges under s. 1, it seems to me that the basis of the justification for the limitation of rights under s. 7 must be more compelling than any advanced in these appeals.

117 Moreover, I am not convinced in light of the submissions made by the appellants that the limitations on the rights of refugee claimants which are imposed by the adjudication procedures of the Immigration Act are reasonable even on the respondent's own terms. It is obvious that there is a considerable degree of dissatisfaction with the present system even on the part of those who administer it. In an address given in Toronto on October 25, 1980, Janet Scott, Q.C., the chairman of the Immigration Appeal Board made the following remarks:

> There is no blinking at the fact that the sections dealing with the Board's jurisdiction in refugee redetermination are highly unsatisfactory. Leaving aside any consideration of natural justice,

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> the system is extremely cumbersome and when we enter into the sphere of natural justice, open to criticism as unjust.

118 In September 1980 the Minister of Employment and Immigration established a Task Force on Immigration Practices and Procedures and in November 1981 the Task Force issued a report entitled The Refugee Status Determination Process. The Task Force recommended wholesale changes in the procedures employed in the determination of refugee claims, including a recommendation that "A refugee claimant should be entitled to a hearing in every case where the [Refugee Status Advisory Committee] is not prepared to make a positive recommendation on the basis of the transcript." (Report p. xvi) In its conclusion, the Task Force discussed the impact of its recommendation that an oral hearing be given in each case. At p. 103 the Report states:

> In the end, then, the question is one of resources. Would the additional expenditures be warranted? How does one do a cost-benefit analysis where the 'benefit' is to be found in vague concepts, such as 'fairness' and 'justice'? One approach may be to canvass other forms of adjudication by federal tribunals and compare the significance of their decisions and the kinds of hearings which they offer with those of the refugee determination process. Without referring to specific bodies or in any way denigrating the importance of their work, the impact of their decisions often pales in comparison to refugee determination. Yet they generally offer far more in the way of procedural fairness.

119 Even if the cost of compliance with fundamental justice is a factor to which the Courts would give considerable weight, I am not satisfied that the Minister has demonstrated that this cost would be so prohibitive as to constitute a justification within the meaning of s. 1. Though it is tempting to make observations about what factors might give rise to justification under s. 1, and on the standards of review which should be applied with respect to s. 1, I think it would be unwise to do so. I therefore confine my observations on the application of section 1 to those necessary for the disposition of the appeals.

120 To recapitulate, I am persuaded that the appellants are entitled to assert the protection of s. 7 of the Charter in the determination of their claims to Convention refugee status under the Immigration Act. I am further persuaded that the procedures under the Act as they were applied in these cases do not meet the requirements of fundamental justice under s. 7 and that accordingly the appellants rights under s. 7 were violated. Finally, I believe that the respondent has failed to demonstrate that the procedures set out in the Act constitute a reasonable limit on the appellants rights within the meaning of s. 1 of the Charter. I would accordingly allow the appeals. In so doing I should, however, observe that the acceptance of certain submissions, particularly concerning the scope of s. 7 of the Charter in the context of these appeals, is not intended to be definitive of the scope of the section in other contexts. I do not by any means foreclose the possibility that s. 7 protects a wider range of interests than those involved in these appeals.

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2003 CarswellQue 14915
Court of Appeal of Quebec

Found at **Tab 23, Volume 2** of Google's BOA.

Air Canada c. Canada (Commissaire de la concurrence)

2003 CarswellQue 14915, 2003 CarswellQue 25, [2003] R.J.Q. 322, [2003] Q.J. No. 21, 119 A.C.W.S. (3d) 924, 222 D.L.R. (4th) 385, 23 C.P.R. (4th) 129, 46 Admin. L.R. (3d) 283, J.E. 2003-219, REJB 2003-36762

Air Canada v. Attorney General of Canada; Commissioner of Competition, mis en cause *

Delisle J.C.A., Rochon J.C.A., Rothman J.C.A.

Heard: October 1, 2002
Judgment: January 16, 2003
Docket: C.A. Montréal 500-09-011298-015

Proceedings: Reversed, 2001 CarswellQue 1755, (sub nom. Air Canada c. Canada (Procureure générale)) [2001] R.J.Q. 1851, REJB 2001-25365 (Que. S.C.); Leave to appeal allowed, 321 N.R. 190 (note), 26 C.P.R. (4th) vi, 2003 CarswellQue 3471, 2003 CarswellQue 3472 (S.C.C.)

Counsel: Michel Décary and Patrick Girard, for appellant
Yves Demontigny, Jacques Savary and Carole Johnson, for respondent and mis en cause

Subject: Public; Property; Constitutional; Corporate and Commercial

Headnote
Constitutional law
Trade and commerce

Per curiam:

[TRANSLATION]

1 THE COURT, ruling on the appellant's appeal of a judgment rendered on July 12, 2001 by Kevin Downs J. of the Superior Court, District of Montreal, dismissing the motion for declaratory judgment;

2 After review of the court record, hearing of the parties and deliberations;

3 Upon the grounds set forth by Rochon J.A., Rothman and Delisle JJ.A. concurring;

ALLOWS the appeal with costs;

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directly affected by the interim order with a full opportunity to present evidence and make representations before the Tribunal makes an order under that subsection.
(10) Notwithstanding section 13 of the *Competition Tribunal Act*, an interim order shall not be appealed or reviewed in any court except as provided for by subsection (7).
(11) When an interim order is in effect, the Commissioner shall proceed as expeditiously as possible to complete the inquiry arising out of the conduct in respect of which the order was made.

The Canadian Bill of Rights

39 Section 2(*e*) of the *Canadian Bill of Rights* provides as follows:

> 2. Every law of Canada shall, unless it is expressly declared by an act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe, or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> . . . . .
>
> (*e*) *deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations*. [My emphasis.]

40 From the outset, the Attorney General of Canada (respondent) argues that Air Canada cannot rely on the *Canadian Bill of Rights*. The Attorney General argues that this law is outdated, and that generally the courts refuse to use it to strike down laws subsequently enacted. The respondent adds that it is impossible to determine what right of Air Canada has been infringed and it is far from uniform or accepted law that s. 2(*e*) of the *Canadian Bill of Rights* protects rights of a purely economic nature.

41 I do not share this restrictive approach argued by the respondent, which for all intents and purposes would have the effect of sterilizing the *Canadian Bill of Rights*. Any such approach relies on a school of thought which prevailed during the heyday of the principle of parliamentary sovereignty. It is directly contrary, however, to the law consistently applied by the Supreme Court of Canada since *R. v. Drybones*. [12]

42 From a formal standpoint, the *Canadian Bill of Rights* is an ordinary statute. Its purpose is nevertheless special. The Supreme Court of Canada characterized it as a "quasi-constitutional instrument".

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> The *Canadian Bill of Rights* is a half-way house between a purely common law regime and a constitutional one; it may aptly be described as a quasiconstitutional instrument. [13]

43 Since *Drybones*, and even more so since the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, the courts have not hesitated to invoke the *Canadian Bill of Rights* to declare inoperative any contrary legislative provisions enacted by the Canadian Parliament. [14] More recently, [15] our courts of appeal have declared legislative provisions inoperative which infringe any provision of the *Canadian Bill of Rights*.

44 It is true that the *Canadian Bill of Rights* does not expressly grant the power to declare contrary laws invalid. However, in *Drybones*, the majority opinion stated as follows:

> It seems to me that a more realistic meaning must be given to the words in question and they afford, in my view, the clearest indication that s. 2 is intended to mean and does mean that if a law of Canada cannot be "sensibly construed and applied" so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is *inoperative* "unless it is expressly declared by an an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*".
>
> I think a declaration by the courts that a section or portion of a section of a statute is inoperative is to be distinguished from the repeal of such a section and is to be confined to the particular circumstances of the case in which the declaration is made. The situation appears to me to be somewhat analogous to a case where valid provincial legislation in an otherwise unoccupied field ceases to be operative by reason of conflicting federal legislation. [16]
>
> [My emphasis.]

45 One can no longer argue that the *Canadian Bill of Rights* has lost all its relevance since the adoption of the *Canadian Charter of Rights and Freedoms* (Canadian Charter). [17] This is absolutely not the case.

46 Firstly, the Canadian Charter does not claim to have exclusive application. On the contrary, its s. 26 states as follows:

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

47 Furthermore, the *Canadian Bill of Rights* protects two rights which are not protected by the Canadian Charter: (1) the right to enjoyment of one's property (s. 1(*a*)); and the right to a fair hearing where one's rights and obligations are being determined during a civil or administrative

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hearing (s. 2(*e*)). Professor Hogg correctly sets forth the complementary role of the *Canadian Bill of Rights* in this regard:

> Acivil proceeding before a court or administrative tribunal is not subject to the requirement of a "fair hearing" or of the application of "fundamental justice". This is a gap in the Charter, and is therefore an area where the continued existence of the Bill is important: an adjudication authorized by federal law of a person's rights and obligations will continue to be subject to the requirement of "a fair hearing in accordance with the principles of fundamental justice". [18]

48 The ambit of protection afforded by s. 2(*e*) of the *Canadian Bill of Rights* is much broader than the rights specifically listed at s. 1. In this regard, Beetz J. stated:

> Be that as it may, it seems clear to me that the ambit of s. 2(*e*) is broader than the list of rights enumerated in s. 1 which are designated as "human rights and fundamental freedoms" whereas in s. 2(*e*), what is protected by the right to a fair hearing is the determination of one's "rights and obligations", whatever they are and whenever the determination process is one which comes under the legislative authority of the Parliament of Canada. It is true that the first part of s. 2 refers to "the rights or freedoms herein recognized and declared", but s. 2(*e*) does protect a right which is fundamental, namely "the right to a fair hearing in accordance with the principles of fundamental justice" for the determination of one's rights and obligations, fundamental or not. It is my view that, as was submitted by Mr. Coveney, it is possible to apply s. 2(*e*) without making reference to s. 1 and that the right guaranteed by s. 2(*e*) is in no way qualified by the "due process" concept mentioned in s. 1(*a*). [19]

49 To be entitled to the protection of s. 2(*e*), a party is not required to allege infringement of a fundamental right. Once it is established that the complainant's rights or obligations are affected in the broadest sense, he or she is entitled to a fair hearing of his or her case.

50 To summarize, as a preliminary finding, I rule that in the event that s. 104.1 deprives Air Canada of a right guaranteed by the *Canadian Bill of Rights*, it should be declared inoperative unless the infringement can be justified.

Principles of Fundamental Justice

51 In order to determine whether Parliament, by adopting s. 104.1, complied with the *Canadian Bill of Rights*, it is necessary to determine whether the norms contained in this provision comply with those contained in s. 2(*e*) of the *Canadian Bill of Rights*.

52 Prior to conducting this analysis, several preliminary observations should be made.

53 In *Pearlman*, Iacobucci J. defined the notion of fundamental justice:

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> As has been often said by this Court, the principles of fundamental justice reflect the fundamental tenets on which our legal system is based. Those tenets include, but are not limited to, the rules of natural justice and the duty to act fairly that have been developed over the years in the administrative law context. [20]

54 Air Canada submits that s. 104.1 of the Act infringes the rules of natural justice (*nemo judex in sua causa* and *audi alteram partem*) since the provision authorizes the Commissioner to issue temporary orders *ex officio* without any requirement to seek the prior consent of an independent court, nor allowing persons affected by the order to make any representations whatsoever.

55 The respondent replies that rules of natural justice are based on the common law. Consequently, Parliament is perfectly entitled to amend them and if necessary to set them aside.

56 It is true that Parliament may expressly amend the principles of procedural fairness. But, any such amendments must comply with the Constitution and quasi-constitutional instruments. Thus, to the extent that Parliament amends these principles and that the Act is not attacked constitutionally, Parliament remains sovereign within its field. [21]

57 Air Canada attacked the validity of the Act as infringing a quasi-constitutional document. Thus, Air Canada does not claim that the legislator can amend or set aside principles of procedural fairness, but it argues that it must do so in compliance with the *Canadian Bill of Rights*. In *Ocean Port Hotel*, the Supreme Court of Canada wrote:

> [28] Part of the problem in this case may be attributable to the Board's apparent concession before the Court of Appeal (at para. 9) that "the court must be guided in its consideration of this appeal by the discussion of the applicable principles" in *Régie*. The Court of Appeal, on this basis, appears to have treated the standards of independence articulated in *Régie* as binding. This overlooks the fact that the requirements of independence in *Régie* emanated from the Quebec *Charter of Human Rights and Freedoms*, a quasi-constitutional statute. Section 23 of the Quebec Charter entrenches the right to a "full and equal, public and fair hearing by an *independent and impartial* tribunal" (emphasis added). No equivalent guarantee of independence constrains the legislature of British Columbia. The Court of Appeal consequently erred in treating the standard articulated in *Régie* — rather than the will of the legislature — as determinative of the degree of independence required of Board members. [22]
>
> [Underlined emphasis added.]

58 As we are dealing with a constitutional issue, it is not sufficient to merely refer to the intent of Parliament concerning procedural fairness. It is necessary to determine whether the legislative provisions at issue comply with s. 2(*e*) of the *Canadian Bill of Rights*, since in the present matter

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circumstances which justify such a violation of rights. In such a case, a separate analysis of justification would be appropriate.

97 The *Canadian Bill of Rights* does not contain any provision which corresponds to s. 1 of the Canadian Charter. To avoid conferring an absolute character to the protective rights, Professor Hogg writes:

> The *Canadian Bill of Rights* contains no limitation clause comparable to section one of the *Charter*. Most of the freedoms, and in particular the guarantees of "equality before the law" (s. 1(*b*)), "freedom of religion" (s. 1(*c*)), "freedom of speech" (s. 1(*d*)), "freedom of assembly and association" (s. 1(*e*)) and "freedom of the press" (s. 1(*f*)), are expressed in unqualified terms. This follows the pattern of the *American Bill of Rights* which also lacks an explicit limitation clause. But the courts have not interpreted the guarantees of the *Canadian Bill of Rights* and the *American Bill of Rights* as absolutes; they have recognized the necessity to limit them in pursuit of other widely shared values. Thus a guarantee of "equality before the law" or "equal protection of the laws" must be qualified to accommodate laws which treat special groups in a special way for legitimate reasons, and a guarantee of "freedom of speech" must be qualified to accommodate laws against sedition, obscenity, fraud, official secrecy, defamation, deceptive advertising and the like. The position without a limitation clause is therefore not very different from the position with a limitation clause. However, an explicit limitation clause does instruct the courts, albeit vaguely, as to the standards to be employed in determining whether a law transgresses a guaranteed civil liberty. In the absence of a limitation clause, the courts have to invent the applicable standards, a task that Canadian courts, in interpreting the *Canadian Bill of Rights*, did not perform very successfully. [37]

98 For comparison purposes, it is interesting to note that in *R. v. Sparrow*, [38] the Supreme Court of Canada adopted a similar approach in a case where s. 1 of the Canadian Charter did not apply. In that case, s. 35(1) of the *Constitution Act, 1982*, which protects the ancestral rights of First Nations peoples of Canada, was considered by the court. Within that special context, the Supreme Court of Canada proposed a justification test which could safeguard the challenged provision in the event of infringement. Initially, it examined the existence of a "valid legislative objective". It then examined the means adopted to attain the objective in order to ensure whether "there has been as little infringement as possible".

99 This approach is similar to the principles laid down in *R. v. Oakes*. [39]

100 Based on these principles, I am of the view that the first requirement to justify infringement has been fulfilled: competition legislation addresses a pressing and very real social concern for Canadian society. This is particularly true in the area of domestic air transport in a vast country which is comprised of remote regions, whose development and survival is based in large part on transportation methods.

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101 The legislative objective is to ensure healthy competition in the area of domestic air travel. An air carrier which enjoys a dominant position can inflict a fatal blow to competition in very little time. Thus, energetic legislative measures were appropriate under the circumstances.

102 However, the legislative enactment does not satisfy the criterion of proportionality which must be analyzed in the light of the three elements laid down by *Oakes*.

103 Firstly, the respondent has not demonstrated: (1) the necessity of granting this extraordinary power to the investigator and prosecutor under this Act, and (2) in what manner are the ordinary courts or specialized tribunals (such as the Competition Tribunal) incapable of adequately carrying out this function? To say the least, it is curious that after adopting s. 104.1, Parliament granted a very similar power to the Competition Tribunal (s. 103.3). This demonstrates that, even in the opinion of Parliament, a specialized tribunal can adequately carry out these duties under emergency circumstances.

104 The courts examine these pressing issues on a daily basis and, where necessary, in a timely manner. That being said, there is no reason to believe that a tribunal specialized in such matters, provided it acts in a judicial matter, could not properly fulfill this function. It is perhaps more convenient to allow the Commissioner acting alone to hand down temporary *ex parte* orders in matters which are the subject of his inquiries. One cannot however rely on mere convenience, particularly where other means are available which "infringe as little as possible" guaranteed rights. Although discussed within the context of the Canadian Charter, the comments of Wilson J. in *Singh* are relevant:

> Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. [40]

105 I come to a similar conclusion for the rule "*audi alteram partem*". Despite the common complaint concerning procedural delays in the judicial system, the regular courts regularly hand down interim orders *ex parte* where circumstances, including urgency, so justify. These orders remain in force for a maximum period of 10 days. [41] They are renewable. However, after 10 days, the parties are entitled to be heard, even if in a summary manner.

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Final Judgment

120 Upon the aforementioned grounds, I would allow the appeal, quash the judgment under appeal, allow the motion for declaratory judgment with costs and declare s. 104.1 of the *Competition Act* inoperative on the grounds that it is incompatible with s. 2(*e*) of the *Canadian Bill of Rights*.

Footnotes

* An application for leave to appeal to the Supreme Court of Canada was filed by the Attorney General of Canada and the Commissioner of Competition on March 17, 2003 (Court File No. 29660).

1 Since its acquisition of Canadian Airlines International Ltd. during the summer of 2000.

2 *Competition Act*, R.S.C. 1985, c. C-34, s. 104.1 was enacted by the *Act to amend the Canada Transportation Act, the Competition Act, the Competition Tribunal Act and the Air Canada Public Participation Act and to amend another Act in consequence*, S.C. 2000, c. 15, and came into force on July 5, 2000 (*per* SI/2000-59, *Canada Gazette, Part II*, vol. 134, no. 15, p. 1845). The Act was again amended in June 2002, by the *Act to amend the Competition Act and the Competition Tribunal Act*, S.C. 2002, c. 16, which came into force on June 21, 2002 (*per* SI/2002-100, *Canada Gazette, Part II*, vol. 136, no. 14, p. 1641). I will return to this during my review of the *Competition Act*.

3 These orders can be renewed for two further 30-day periods.

4 *Canadian Bill of Rights*, S.C. 1960, c. 44.

5 Motion for leave to appeal refused in the matter *Air Canada v. Commissioner of Competition*, December 19, 2002, Court File No. 29202 [noted 21 C.P.R. (4th) vi].

6 Our detailed study will examine these provisions, as they form the grounds in support of the complaint filed by the Commissioner against Air Canada.

7 *Act to amend the Competition Act and the Competition Tribunal Act*, S.C. 2002, c. 16, which came into force on June 21, 2002 (*per* SI/2002-100, *Canada Gazette, Part II*, vol. 136, no. 14, p. 1641).

8 I have intentionally refrained from mentioning any accessory duties of the Commissioner concerning notices and reports of the Commission filed with federal agencies or the Minister of Industry.

9 Unless otherwise specified, the 2002 legislative amendments have not been included (see note 7).

10 *Canada Transportation Act*, S.C. 1996, c. 10.

11 *Regulations respecting Anti-Competitive Acts of Persons Operating a Domestic Service*, SOR/2000-324, in force August 23, 2000 (*Canada Gazette, Part II*, vol. 134, no. 18, p. 2049).

12 *R. v. Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473.

13 *R. v. Hogan*, [1975] 2 S.C.R. 574 at p. 597, 48 D.L.R. (3d) 427.

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Section 1

involve an accusation of moral wrongdoing because such conduct shows disrespect "for the role and authority of the courts" (*Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065, at p. 1075).

[89] Similar logic applies to inmate disciplinary proceedings. While such proceedings seek to achieve private, disciplinary objectives, they also serve a public function by signalling moral and social disapproval of certain behaviours while encouraging an inmate's rehabilitation and preparation for re-entry into society. As the Queen's Prison Law Clinic explains, the moral nature of inmate disciplinary regimes has "obvious parallels" with the criminal justice system (I.F., at para. 9).

[90] In sum, major disciplinary offence proceedings involve an accusation of moral wrongdoing and the potential imposition of severe liberty-depriving consequences. As a result, s. 7's protection of the presumption of innocence requires these offences to be proven beyond a reasonable doubt. Because s. 68 of the *Regulations* permits findings of guilt on a lesser standard, s. 7 of the *Charter* is infringed.

D. *The Infringements Are Not Justified Under Section 1 of the Charter*

[91] The AGS has the burden of showing on a balance of probabilities that the limit on ss. 7 and 11(d) of the *Charter* is reasonable and demonstrably justified under s. 1 (*Oakes*, at pp. 135 and 137). Under the *Oakes* test, s. 68's objective must be pressing and substantial and there must be proportionality between this objective and

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the chosen means. Proportionality has three requirements: (a) a rational connection between the means and the objective; (b) minimal impairment of the right; and (c) proportionality between the deleterious and salutary effects of the law (pp. 138-39).

[92] While JHS concedes that s. 68 of the *Regulations* has a pressing and substantial objective, there is some variation in how the parties articulate this objective. For example, JHS frames the purpose of using a balance of probabilities standard as being "'to maintain order in the prisons' by utilizing expeditious and informal hearings" (A.F., at para. 106). In contrast, the AGS articulates the provision's objective in different ways: ". . . creating operational efficiencies and improving security in provincial correctional centres"; and "further ensur[ing] a procedurally fair disciplinary review system" (R.F., at paras. 169-70).

[93] To be of value in the *Oakes* test, the purpose of the infringing measure must be characterized appropriately (see *Brown*, at para. 116; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 46). The purpose should not be stated too broadly, nor should it be described too narrowly by simply reiterating the means chosen to achieve it.

[94] In my view, the objective of using a standard of proof on a balance of probabilities is to promote the expeditious resolution of inmate disciplinary proceedings. I agree that this constitutes a pressing and substantial objective. This Court has recognized the importance of preserving efficiency in the administration of

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inmate discipline so as to maintain order and promote safety in correctional institutions (*Cardinal*, at pp. 654-55).

[95] A measure will be minimally impairing if there are not any less harmful means of achieving its objective "in a real and substantial manner" (*Brown*, at para. 135, quoting *K.R.J.*, at para. 70, and *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 55). Legislatures have a margin of appreciation in selecting the means to achieve the objective, but only insofar as the means chosen impair rights as little as reasonably possible (*Brown*, at para. 135; see also *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679, at para. 179, per Kasirer J., concurring).

[96] In this case, there is an obvious *Charter*-compliant alternative, which is to use the standard of proof beyond a reasonable doubt. This heightened standard of proof has been used in federal penitentiaries' inmate disciplinary proceedings for decades and is now required by s. 43(3) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (see also *Martineau v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118, at p. 128). The AGS has presented no evidence to suggest that this standard has undermined the federal government's capacity to administer prison discipline in an expeditious manner. In fact, s. 28 of the *Corrections and Conditional Release Regulations*, SOR/92-620, requires inmate disciplinary proceedings to take place "as soon as practicable" and, according to *Commissioner's Directive 580: Discipline of Inmates* (June 28, 2021 (online)), these proceedings "will normally take

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place within 10 working days of laying of the charge" (s. 30). This suggests that inmate discipline in federal penitentiaries has not become unduly burdened by the use of a standard of proof beyond a reasonable doubt.

[97] As a result, s. 68 of the *Regulations* fails the minimal impairment test and is not saved by s. 1 of the *Charter*.

V. Conclusion

[98] When a person is charged with an offence punishable by disciplinary segregation or loss of earned remission, ss. 7 and 11(d) of the *Charter* require that the offence be proven beyond a reasonable doubt. To the extent that s. 68 of the *Regulations* permits the imposition of these penalties for an inmate disciplinary offence on a lower standard of proof, it is inconsistent with the Constitution and must therefore be declared to be of no force or effect. This declaration must be effective immediately, given that the AGS has not demonstrated that "an immediately effective declaration would endanger a compelling public interest" (*Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 139).

[99] I would allow the appeal, set aside the judgments below, and declare s. 68 of the *Regulations* to be of no force or effect under s. 52 of the *Constitution Act, 1982*, with costs throughout. JHS seeks special costs, but such costs are exceptional and the circumstances do not, in my view, warrant exercising the Court's discretion to award them.

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This passage was cited with approval in *Hanes v. Wawanesa Mut. Ins. Co.*, [1963] S.C.R. 154 at 161, [1963] 1 C.C.C. 321, 36 D.L.R. (2d) 718 [Ont.]. A similar approach was put forward by Cartwright J. in *Smith v. Smith*, [1952] 2 S.C.R. 312 at 331-32, [1952] 3 D.L.R. 449 [B.C.]:

> I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences ...

72 Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Denning L.J., "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit: see *L.S.U.C. v. Skapinker*, supra, at p. 384; *Singh v. Min. of Employment & Immigration*, supra, at p. 217. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

73 To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

74 Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. Third, there

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Found at Tab 56, Volume 11 of Google's BOA.

RJR-MacDonald Inc. *Appellant*

v.

The Attorney General of Canada *Respondent*

and

Imperial Tobacco Ltd. *Appellant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Attorney General for Ontario, the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, the Canadian Medical Association, and the Canadian Lung Association *Interveners*

INDEXED AS: RJR-MACDONALD INC. *v.* CANADA (ATTORNEY GENERAL)

File Nos.: 23460, 23490.

1994: November 29, 30; 1995: September 21.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Division of powers — Charter of Rights — Freedom of expression — Commercial advertising — Cigarette advertising banned — Whether or not legislation validly enacted under criminal law

RJR-MacDonald Inc. *Appelante*

c.

Le procureur général du Canada *Intimé*

et

Imperial Tobacco Ltd. *Appelante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

Le procureur général de l'Ontario, la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, l'Association médicale canadienne et l'Association pulmonaire du Canada *Intervenants*

RÉPERTORIÉ: RJR-MACDONALD INC. *c.* CANADA (PROCUREUR GÉNÉRAL)

Nos du greffe: 23460, 23490.

1994: 29, 30 novembre; 1995: 21 septembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Partage des compétences — Charte des droits — Liberté d'expression — Publicité commerciale — Publicité de la cigarette interdite — Les dispositions législatives ont-elles été validement adop-

1995 CanLII 64 (SCC)

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ment of the right to free expression guaranteed by s. 2(*b*) of the *Charter*.

The only remaining question is whether these infringements of the right of free expression are saved under s. 1 of the *Charter*, as being reasonable and "demonstrably justified in a free and democratic society". Acknowledging that the evidence of justification is problematic, La Forest J. concludes that it nevertheless suffices to justify the infringement of the right of free expression, given the importance of the legislative goal, the context of the law and the need to defer to Parliament on such an important and difficult issue. With respect, I cannot agree. I share the trial judge's view that the Attorney General of Canada has failed to establish justification under s. 1 for ss. 4, 8 and 9 of the Act, those provisions which impose a total advertising ban, prohibit trade mark usage on articles other than tobacco products and mandate the use of unattributed health warnings on tobacco packaging. Because I do not believe that these provisions are severable from ss. 5 and 6 of the Act, which pertain to restrictions on promotion and trade mark usage, I find ss. 4, 5, 6, 8, and 9 to be invalid, leaving the remainder of the Act intact except in so far as it relates to the invalid provisions.

1. The Test for Justification under Section 1 of the *Charter*

(a) *The Wording of Section 1*

I agree with La Forest J. that "[t]he appropriate 'test' . . . in a s. 1 analysis is that found in s. 1 itself" (para. 62). The ultimate issue is whether the infringement is reasonable and "demonstrably justified in a free and democratic society". The jurisprudence laying down the dual considerations of importance of objective and proportionality between the good which may be achieved by the

une loi. Les mises en garde non attribuées, conjuguées à l'interdiction d'apposer tout autre renseignement qui permettrait aux fabricants de tabac d'exprimer leurs points de vue, constituent une violation de la liberté d'expression garantie par l'al. 2*b*) de la *Charte*.

125 La dernière question est de savoir si ces violations du droit à la liberté d'expression sont sauvegardées en vertu de l'article premier de la *Charte*, comme étant des limites raisonnables «dont la justification [peut] se démontrer dans le cadre d'une société libre et démocratique». Reconnaissant que la preuve de la justification présente des problèmes, le juge La Forest conclut qu'elle suffit néanmoins à justifier la violation du droit à la liberté d'expression compte tenu de l'importance de l'objectif législatif, du contexte de la loi et de la nécessité d'avoir de l'égard pour le Parlement relativement à une question si importante et difficile. En toute déférence, je ne suis pas de cet avis. Tout comme le juge de première instance, j'estime que le procureur général du Canada n'a pas réussi à établir une justification en vertu de l'article premier pour les art. 4, 8 et 9 de la Loi, dispositions qui interdisent totalement la publicité, proscrivent l'utilisation de marques sur des articles autres que les produits du tabac et exigent l'apposition sur les emballages de mises en garde non attribuées. Puisque ces dispositions ne sont pas, à mon avis, dissociables des art. 5 et 6 de la Loi, qui portent sur les restrictions en matière de promotion et d'usage de marques, je conclus que les art. 4, 5, 6, 8 et 9 ne sont pas valides et que le reste de la Loi demeure inchangé, sauf dans la mesure où il se rapporte aux dispositions invalidées.

1. Le critère de la justification en vertu de l'article premier de la *Charte*

a) *Le libellé de l'article premier*

126 Je suis d'accord avec le juge La Forest pour dire que: «[l]e «critère» approprié applicable à une analyse fondée sur l'article premier se trouve dans la disposition même» (par. 62). Il s'agit en fin de compte de savoir si la violation se situe à l'intérieur de limites raisonnables «dont la justification [peut] se démontrer dans le cadre d'une société libre et démocratique». Dans la jurisprudence por-

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law and the infringement of rights it works, may be seen as articulating the factors which must be considered in determining whether a law that violates constitutional rights is nevertheless "reasonable" and "demonstrably justified". If the objective of a law which limits constitutional rights lacks sufficient importance, the infringement cannot be reasonable or justified. Similarly, if the good which may be achieved by the law pales beside the seriousness of the infringement of rights which it works, that law cannot be considered reasonable or justified. While sharing La Forest J.'s view that an overtechnical approach to s. 1 is to be eschewed, I find no conflict between the words of s. 1 and the jurisprudence founded upon *R. v. Oakes*, [1986] 1 S.C.R. 103. The latter complements the former.

127 This said, there is merit in reminding ourselves of the words chosen by those who framed and agreed upon s. 1 of the *Charter*. First, to be saved under s. 1 the party defending the law (here the Attorney General of Canada) must show that the law which violates the right or freedom guaranteed by the *Charter* is "reasonable". In other words, the infringing measure must be justifiable by the processes of reason and rationality. The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility.

128 Second, to meet its burden under s. 1 of the *Charter*, the state must show that the violative law

tant sur la double considération que sont l'importance de l'objectif et le critère de la proportionnalité entre le bien que vise la loi et la violation des droits à laquelle elle donne lieu, les tribunaux formulent les facteurs dont il faut tenir compte pour déterminer si l'atteinte qu'une loi porte aux droits garantis par la Constitution se situe néanmoins à l'intérieur de limites «raisonnables» «dont la justification [peut] se démontrer». Si l'objectif d'une loi qui restreint les droits garantis par la Constitution n'est pas suffisamment important, l'atteinte ne peut être ni raisonnable ni justifiée. De même, si le bien visé par la loi perd de son importance par rapport à la gravité de l'atteinte aux droits qui s'ensuit, on ne peut considérer que cette loi soit raisonnable ou justifiée. Je conviens avec le juge La Forest qu'il faut s'abstenir de faire une analyse trop technique fondée sur l'article premier; cependant, il n'existe pas, à mon avis, d'incompatibilité entre le libellé de l'article premier et la jurisprudence fondée sur l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, celle-ci venant compléter l'article premier.

Cela dit, il importe de se remémorer les termes mêmes choisis par ceux qui ont rédigé et approuvé l'article premier de la *Charte*. Premièrement, pour qu'une disposition puisse être sauvegardée en vertu de l'article premier, la partie qui défend la loi (en l'espèce le procureur général du Canada) doit établir que la loi qui porte atteinte au droit ou à la liberté garantis par la *Charte* est «raisonnable». En d'autres termes, la mesure attentatoire doit être justifiable par application de la raison et de la rationalité. La question n'est pas de savoir si la mesure est populaire ou compatible avec les sondages d'opinion publique. Elle est plutôt de savoir si cette mesure peut être justifiée par l'application du processus de la raison. Dans le contexte juridique, la raison comporte la notion d'inférence à partir de la preuve ou des faits établis. Il ne s'agit pas d'éliminer le rôle de l'intuition, ni d'exiger chaque fois une preuve répondant aux normes scientifiques, mais bien d'insister sur une défense rationnelle et raisonnée.

Deuxièmement, pour s'acquitter du fardeau que lui impose l'article premier de la *Charte*, l'État

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is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.

The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.

(b) *The Factors to be Considered under Section 1*

The factors generally relevant to determining whether a violative law is reasonable and demonstrably justified in a free and democratic society remain those set out in *Oakes*. The first requirement is that the objective of the law limiting the *Charter* right or freedom must be of sufficient importance to warrant overriding it. The second is that the means chosen to achieve the objective must be proportional to the objective and the effect of the law — proportionate, in short, to the good which it may produce. Three matters are considered in determining proportionality: the measures chosen must be rationally connected to the objective; they must impair the guaranteed right or free-

doit établir que la violation comprise dans une loi se situe à l'intérieur de limites «dont la justification puisse se démontrer». Le choix de l'expression «puisse se démontrer» est important. Il ne s'agit pas de procéder par simple intuition, ou d'affirmer qu'il faut avoir de l'égard pour le choix du Parlement. Il s'agit d'un processus de démonstration. Cela renforce la notion propre au terme «raisonnable» selon laquelle il faut tirer une inférence rationnelle de la preuve ou des faits établis.

La démarche fondamentale est la suivante. Bien qu'ils doivent demeurer conscients du contexte socio-politique de la loi attaquée et reconnaître les difficultés qui y sont propres en matière de preuve, les tribunaux doivent néanmoins insister pour que, avant qu'il ne supprime un droit protégé par la Constitution, l'État fasse une démonstration raisonnée du bien visé par la loi par rapport à la gravité de la violation. Les tribunaux doivent respecter cette démarche fondamentale pour que les droits garantis par notre constitution soient opérants. Ce n'est pas une tâche facile, et les tribunaux devront peut-être affronter le courant d'opinion publique. Cependant, c'est depuis toujours le prix du maintien des droits constitutionnels. Si important que puisse sembler l'objectif du Parlement, si l'État n'a pas démontré que les moyens qu'il utilise pour atteindre son objectif sont raisonnables et proportionnels à la violation des droits, la loi doit alors par nécessité être déclarée non valide.

b) *Les facteurs à examiner sous le régime de l'article premier*

Les facteurs énoncés dans l'arrêt *Oakes* demeurent les facteurs généralement pertinents pour déterminer si une limite prévue dans une loi est une limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique. Premièrement, l'objectif de la loi qui restreint un droit ou une liberté garantis par la *Charte* doit être suffisamment important pour justifier sa suppression. Deuxièmement, les moyens choisis pour atteindre cet objectif doivent être proportionnels à l'objectif et à l'effet de la loi — en bref, proportionnels au bien qu'elle vise. Dans la détermination de la proportionnalité, il faut tenir compte de trois points: les mesures choisies doi-

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dom as little as reasonably possible (minimal impairment); and there must be overall proportionality between the deleterious effects of the measures and the salutary effects of the law.

(c) *Applying the Oakes Factors — Context, Deference to Parliament, Standard of Proof and the Trial Judge's Findings*

131 Having set out the criteria determinative of whether a law that infringes a guaranteed right or freedom is justified under s. 1, La Forest J. offers observations on the approach the courts should use in applying them.

132 His first point is that the *Oakes* test must be applied flexibly, having regard to the factual and social context of each case. I agree. The need to consider the context of the case has been accepted since Wilson J. propounded it in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. This "sensitive, case-oriented approach" was affirmed in *Rocket, supra*, which also concerned a law limiting advertising. There I wrote at pp. 246-47:

> While the Canadian approach does not apply special tests to restrictions on commercial expression, our method of analysis does permit a sensitive, case-oriented approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to special features of the expression in question. As Wilson J. notes in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.

133 That the s. 1 analysis takes into account the context in which the particular law is situate should

vent avoir un lien rationnel avec l'objectif; elles doivent restreindre aussi peu que cela est raisonnablement possible le droit ou la liberté garantis (atteinte minimale), et il doit exister une proportionnalité globale entre les effets préjudiciables des mesures et les effets salutaires de la loi.

c) *Application des facteurs de l'arrêt Oakes — Contexte, égard envers le Parlement, norme de preuve et conclusions du juge de première instance*

Après avoir formulé les critères qui servent à déterminer si une loi qui porte atteinte à un droit ou à une liberté garantis se justifie en vertu de l'article premier, le juge La Forest fait des observations sur la méthode que les tribunaux devraient utiliser lorsqu'ils les appliquent.

Il fait tout d'abord remarquer que le critère formulé dans l'arrêt *Oakes* doit être appliqué avec souplesse, compte tenu du contexte factuel et social de chaque cas particulier. Je suis d'accord. La nécessité de tenir compte du contexte de chaque cas particulier est acceptée depuis que le juge Wilson l'a proposée dans l'arrêt *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326. Cette «méthode d'analyse [. . .] avec sensibilité et en fonction de chaque cas particulier» a été confirmée dans l'arrêt *Rocket*, précité, qui portait également sur une loi restreignant la publicité. Dans cet arrêt, j'affirme, aux pp. 246 et 247:

> Bien que la méthode canadienne ne consiste pas à appliquer des critères spéciaux aux restrictions imposées à l'expression commerciale, notre méthode d'analyse permet d'aborder la détermination de leur constitutionnalité avec sensibilité et en fonction de chaque cas particulier. En situant les valeurs contradictoires dans leur contexte factuel et social au moment de procéder à l'analyse fondée sur l'article premier, les tribunaux ont la possibilité de tenir compte des caractéristiques spéciales de l'expression en question. Comme le juge Wilson le fait remarquer dans *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, ce ne sont pas toutes les expressions qui méritent la même protection. Toutes les violations de la liberté d'expression ne sont pas également graves.

Il n'est pas vraiment étonnant que l'analyse fondée sur l'article premier tienne compte du contexte

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hardly surprise us. The s. 1 inquiry is by its very nature a fact-specific inquiry. In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the actual objective of the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.

dans lequel se situe la loi en question. L'examen fondé sur l'article premier est, de par sa nature même, un examen spécifique des faits. Pour déterminer si l'objectif de la loi est suffisamment important pour justifier la suppression d'un droit garanti, le tribunal doit examiner le véritable objectif de la loi. Dans l'examen de la proportionnalité, le tribunal doit déterminer quel est le lien qui existe entre l'objectif de la loi et ce que cette loi réussira effectivement à accomplir, dans quelle mesure la loi restreint le droit en question et, enfin, si l'avantage que la loi vise l'emporte sur la gravité de la restriction du droit. Bref, l'évaluation en vertu de l'article premier est un exercice fondé sur les faits de la loi en cause et sur la preuve de sa justification, et non sur des abstractions.

However, while the impugned law must be considered in its social and economic context, nothing in the jurisprudence suggests that the contextual approach reduces the obligation on the state to meet the burden of demonstrating that the limitation on rights imposed by the law is reasonable and justified. Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge. This would be to undercut the obligation on Parliament to justify limitations which it places on *Charter* rights and would be to substitute *ad hoc* judicial discretion for the reasoned demonstration contemplated by the *Charter*.

Cependant, bien que la loi contestée doive être examinée dans son contexte social et économique, la jurisprudence n'indique aucunement que l'analyse contextuelle diminue l'obligation qu'a l'État de démontrer que la restriction des droits est raisonnable et justifiée. Le contexte est essentiel dans la détermination de l'objectif législatif et de la proportionnalité, mais on ne peut pousser son importance à l'extrême et considérer ainsi la loi contestée comme un phénomène socio-économique unique, dont le Parlement est réputé le meilleur juge. On se trouverait ainsi à atténuer l'obligation imposée au Parlement de justifier les restrictions qu'il apporte aux droits garantis par la *Charte*, et à remplacer la démonstration raisonnée envisagée par la *Charte* par l'exercice du pouvoir discrétionnaire ad hoc d'un tribunal.

Related to context is the degree of deference which the courts should accord to Parliament. It is established that the deference accorded to Parliament or the legislatures may vary with the social context in which the limitation on rights is imposed. For example, it has been suggested that greater deference to Parliament or the Legislature may be appropriate if the law is concerned with the competing rights between different sectors of society than if it is a contest between the individual and the state: *Irwin Toy*, *supra*, at pp. 993-94; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, at p. 521. However, such distinctions

Relié au contexte, il y a le degré de respect dont les tribunaux doivent faire preuve envers le Parlement. Il est bien établi que le respect accordé au Parlement ou aux législatures peut varier en fonction du contexte social dans lequel est imposée la restriction aux droits. Par exemple, on a affirmé qu'il y aurait lieu de faire preuve d'un plus grand respect pour le législateur fédéral ou provincial dans le cas où une loi vise les droits contradictoires de divers secteurs de la société, que dans le cas où il s'agit d'une contestation entre le particulier et l'État: *Irwin Toy*, précité, aux pp. 993 et 994; *Stoffman c. Vancouver General Hospital*, [1990] 3

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Ontario v. G per Karakatsanis J.
Found at **Tab 54, Volume 10** of
Google's BOA.

(1) Minimal Impairment

[74] I agree with the Court of Appeal that *Christopher's Law* is not minimally impairing of the s. 15(1) rights of those who were found NCRMD of a sexual offence and discharged. *Christopher's Law* itself includes mechanisms by which, after some form of individualized assessment of their circumstances, offenders who were not found NCRMD can be removed from the registry (free pardon), relieved of the obligation to report (free pardon and record suspension), or exempted from reporting in the first place (discharge under s. 730 of the *Criminal Code*). The inclusion of *any* method of exempting and removing those found NCRMD from the registry based on individualized assessment would be less impairing of their s. 15(1) rights and could actually increase the registry's effectiveness by narrowing its application to individuals who pose a greater risk to the community.

[75] I would reject the Attorney General's submission that risk assessments can never be certain, and therefore the object of the legislation can only be achieved by a mandatory and permanent registry for all those found NCRMD. First, the same could be said for all those found guilty of sexual offences: the individualized assessments that occur when an absolute discharge, a free pardon, or a record suspension is granted can equally never predict risk with certainty. Second, the minimal impairment requirement requires only that the objective be *substantially* achieved (*Hutterian Brethren*, at paras. 53-55). Individual assessment does not need to perfectly predict risk — certainty cannot be the standard. There was no evidence that providing persons found NCRMD with the opportunity to be exempted or removed from the registry based on an individualized assessment of their circumstances would significantly lessen the usefulness of the registry to law enforcement. Indeed, as Doherty J.A.

(1) Atteinte minimale

[74] Je suis d'accord avec la Cour d'appel pour dire que la *Loi Christopher* ne porte pas atteinte de façon minimale aux droits garantis par le par. 15(1) aux personnes déclarées non responsables criminellement pour cause de troubles mentaux à l'égard d'une infraction sexuelle qui ont obtenu une libération. La *Loi Christopher* elle-même prévoit des mécanismes qui, après une évaluation individuelle de la situation des délinquants, permettent aux délinquants qui n'ont pas reçu de verdict de non-responsabilité criminelle pour cause de troubles mentaux d'être retirés du registre (pardon absolu), d'être dispensés de l'obligation de se présenter devant les autorités (pardon absolu et suspension du casier judiciaire), ou d'être dispensés au départ de l'obligation de se présenter devant les autorités (absolution au sens du par. 730 du *Code criminel*). L'inclusion de *toute* méthode permettant aux personnes déclarées non responsables criminellement pour cause de troubles mentaux d'être dispensées des obligations qui leur incombent et d'être retirées du registre à la suite d'une évaluation individuelle porterait moins atteinte aux droits que leur garantit le par. 15(1) et permettrait en fait d'améliorer l'efficacité du registre en restreignant son application aux personnes qui présentent un risque élevé pour la société.

[75] Je suis d'avis de rejeter l'argument du procureur général selon lequel les évaluations du risque ne peuvent jamais être certaines et que l'objectif de la *Loi* ne peut donc être réalisé qu'en imposant à toutes les personnes déclarées non responsables criminellement pour cause de troubles mentaux l'obligation de s'inscrire au registre et d'y être inscrites de façon permanente. Tout d'abord, on pourrait en dire autant de toutes les personnes déclarées coupables d'infractions sexuelles : les évaluations individuelles qui sont menées lorsqu'une absolution inconditionnelle, un pardon absolu ou une suspension du casier judiciaire est accordé ne peuvent également jamais être certaines. De plus, selon l'exigence de l'atteinte minimale, l'objectif doit être réalisé de façon *substantielle* (*Hutterian Brethren*, par. 53-55). Les évaluations individuelles n'ont pas besoin de prédire le risque avec une exactitude parfaite — la certitude ne saurait servir de norme. Rien ne prouve que le fait d'offrir aux personnes déclarées non responsables

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noted, there is "no evidence that, while the objective of the legislation is consistent with exceptions and exemptions for persons found guilty, it is somehow undermined by comparable exceptions and exemptions for persons found NCRMD" (C.A. reasons, at para. 145).

[76] I accordingly conclude that the Attorney General has not met his burden under s. 1 to demonstrate that the infringing measure is not minimally impairing of the right and therefore has not justified the s. 15(1) infringement.

C. *Does Christopher's Law Infringe the Right to Life, Liberty and Security of the Person?*

[77] Given that I have concluded that *Christopher's Law* violates s. 15(1) in its application to persons found NCRMD and that G's s. 7 claim does not extend beyond those persons, it is not necessary to address whether *Christopher's Law* also violates s. 7. As I will explain, because the privacy and liberty interests of those found NCRMD are the very interests that are unequally burdened by *Christopher's Law*, they inform the remedy for the breach of s. 15(1). It is therefore not necessary to determine whether there is also a breach of s. 7 in order to inform the appropriate remedy. Further, addressing some of the s. 7 arguments would have an impact on the broader issue of the nature of the registry's effects on all registrants and whether the entire scheme complies with s. 7; such determinations are best left for another case.

criminellement pour cause de troubles mentaux la possibilité d'être dispensées des obligations qui leur incombent ou d'être retirées du registre à la suite d'une évaluation individuelle de leur situation réduirait considérablement l'utilité du registre pour les forces de l'ordre. En effet, comme l'a fait remarquer le juge Doherty, [TRADUCTION] « rien ne prouve que même si l'objectif de la loi est conforme aux exceptions et aux dispenses qui s'appliquent aux personnes déclarées coupables, il est en quelque sorte compromis par les exceptions et les dispenses comparables qui s'appliquent aux personnes déclarées non responsables criminellement pour cause de troubles mentaux » (motifs de la C.A., par. 145).

[76] Par conséquent, je conclus que le procureur général ne s'est pas acquitté du fardeau que lui impose l'article premier de démontrer que la mesure attentatoire ne porte pas atteinte de façon minimale au droit et qu'il n'a donc pas justifié la violation du par. 15(1).

C. *La Loi Christopher porte-t-elle atteinte au droit à la vie, à la liberté et à la sécurité de la personne?*

[77] Comme j'ai conclu que la *Loi Christopher* viole le par. 15(1) du fait qu'elle s'applique aux personnes déclarées non responsables criminellement pour cause de troubles mentaux et que la réclamation de G concernant l'art. 7 ne vaut que pour ces personnes, point n'est besoin d'examiner la question de savoir si la *Loi Christopher* viole également l'art. 7. Comme je vais l'expliquer, étant donné que les droits à la vie privée et à la liberté des personnes déclarées non responsables criminellement pour cause de troubles mentaux sont précisément ceux qui sont touchés de façon inégale par la *Loi Christopher*, ils guident la réparation à accorder en cas de contravention au par. 15(1). Il n'est donc pas nécessaire de chercher à savoir s'il y a également violation de l'art. 7 pour déterminer la réparation appropriée. Qui plus est, l'analyse de certains des arguments concernant l'art. 7 aurait une incidence sur la question plus générale de la nature des effets qu'a le registre sur tous les délinquants inscrits et la question de savoir si le régime dans son ensemble est conforme à l'art. 7; il est préférable d'attendre une autre occasion pour trancher ces questions.

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Annual Report of the Commissioner for the year ending March 31, 2014.
Found at **Tab H(90), Volume 21** Google's Motion Record.

THE YEAR IN NUMBERS

$572,100,000
Estimated dollar savings to consumers in 2013–2014 from Bureau actions that stop anti-competitive activity

$55,720,000
Fines imposed by the Courts

$500,000
Administrative monetary penalties imposed by the Courts or Tribunal

40
Leniency markers granted

82
Immunity markers granted

5
Convictions without guilty pleas

11
Guilty pleas

35
Search warrants executed

233
Merger examinations concluded

21
Publications

598
Media enquiries received

14,515
Requests received by the Bureau Information Centre

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7159

AT A GLANCE

THE YEAR IN NUMBERS

Annual Report of the Commissioner for the year ending March 31, 2017.
Found at **Tab H(97), Volume 21** Google's Motion Record.

$44.85 MILLION

IN FINES, ADMINISTRATIVE MONETARY PENALTIES[2] IMPOSED AND CONSUMER RESTITUTION

- **$13.73 MILLION** TOTAL FINES IMPOSED
- **$19.3 MILLION** ADMINISTRATIVE MONETARY PENALTIES
- **UP TO $11.82 MILLION** CUSTOMER RESTITUTIONS

222 MERGER REVIEWS COMPLETED

61 INVESTIGATIONS (NON-MERGER) CONCLUDED

5 GUILTY PLEAS IN CARTEL CASES[3]

4 COMPANIES SENTENCED FOR CRIMINAL CONDUCT UNDER THE *COMPETITION ACT*

160 SPEECHES AND PRESENTATIONS TO STAKEHOLDERS

35 ADVOCACY INITIATIVES

10,589 COMPLAINTS AND INFORMATION REQUESTS RECEIVED BY THE BUREAU INFORMATION CENTRE[4]

Enforcement

74 NEW INVESTIGATIONS COMMENCED

61 INVESTIGATIONS CONCLUDED

138 ONGOING INVESTIGATIONS

11 SEARCH WARRANTS ISSUED

33 ALTERNATIVE CASE RESOLUTIONS REACHED

10 CONSENT AGREEMENTS IN NON-MERGER CASES

8 CONSENT AGREEMENTS IN MERGER CASES

Advocacy and outreach

62 PUBLICATIONS

696,517 VISITS TO THE BUREAU'S WEBSITE

44,736 VIEWS OF THE BUREAU'S VIDEOS

301 MEDIA REQUESTS

35 ADVOCACY INITIATIVES

- **4** REPRESENTATIONS TO REGULATORY BODIES
- **29** OTHER ADVOCACY INITIATIVES
- **2** ISSUES OF THE *COMPETITION ADVOCATE* PUBLISHED

Partnerships

2 NEW INTERNATIONAL COOPERATION AGREEMENTS

3 NEW DOMESTIC PARTNERSHIP AGREEMENTS

43 FORMAL BILATERAL MEETINGS WITH FOREIGN LAW ENFORCEMENT AND COMPETITION AGENCIES

35 MEETINGS AND WORKSHOPS WITH INTERNATIONAL FORA

2 Administrative monetary penalties (AMPs) are different from fines in that they are used to promote and encourage compliance with the *Competition Act*. Failure to pay an AMP may be enforced civilly as a debt due to the Crown. A fine, by contrast, is a punishment imposed by a court upon conviction of a criminal offence and failure to pay it may lead to imprisonment.

3 The Bureau also secured one guilty plea in a contested proceeding.

4 Number of complaints and information requests which relate to the Bureau's four statutes: the *Competition Act*, *Consumer Packaging and Labelling Act*, *Textile Labelling Act* and the *Precious Metals Marking Act*.

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Found at **Tab H(89), Volume 21** Google's Motion Record.

Lower Prices More Choice

ANNUAL REPORT OF THE COMMISSIONER OF COMPETITION FOR THE YEAR ENDING MARCH 31, 2013

Canada

KEY STATISTICS FOR THE YEAR

TABLE 2: Competition Bureau Statistics

Law Enforcement Activity	FBPB	Civil	Criminal	Mergers
Examinations in progress (Number of examinations in progress on April 1, 2012 – Examinations are complaints and information requests that have been assigned for further assessment as well as orders being reviewed)	47	23	33	27
Examinations commenced (Number of examinations commenced between April 1, 2012 and March 31, 2013)	13	15	25	226
Examinations concluded (Number of examinations concluded between April 1, 2012 and March 31, 2013)	22	12	20	232
Inquiries commenced (Number of formal inquiries commenced between April 1, 2012 and March 31, 2013)	6	7	7	2
Inquiries in progress (Number of formal inquiries in progress on April 1, 2012)	30	13	22	2
Inquiries discontinued (Number of formal inquiries discontinued between April 1, 2012 and March 31, 2013)	8	1	3	3
Matters where charges were laid (Number of matters where charges were laid between April 1, 2012 and March 31, 2013)	2	n/a	3	n/a
Matters where applications were filed (Number of matters where applications were filed between April 1, 2012 and March 31, 2013)	1	2	n/a	0
Matters with criminal orders (Number of matters where there were orders between April 1, 2012 and March 31, 2013)	0	n/a	6	n/a
Convictions	0	n/a	6	n/a
Prohibition Orders without convictions	0	n/a	0	n/a
Interim injunctions (criminal)	0	n/a	0	n/a
Matters with civil orders (Number of matters where there were orders between April 1, 2012 and March 31, 2013)	0	0	n/a	3
Registered Consent Agreements	0	0	n/a	3
Final Order in contested proceedings	0	0	n/a	0
Interim injunctions (civil)	0	0	n/a	0
Alternative Case Resolutions (Examinations that raised an issue under the Act but were resolved without resort to the Court or Tribunal; these include agreements and voluntary compliance)	1	0	7	0

continued on next page

Law Enforcement Activity	FBPB	Civil	Criminal	Mergers
Information Bulletins and Enforcement Guidelines published (All guidelines published between April 1, 2012 and March 31, 2013 including those for consultation, new publication and those that have been revised)	0	1	0	1
Total Fines Imposed	$0	n/a	$ 7,865,000	n/a
Administrative Monetary Penalties	$0	$0	n/a	n/a

TABLE 3: Regulatory Interventions

Regulatory Interventions under Sections 125 and 126 of the Act: *Submission before the CRTC on the Wireless Code of Conduct Working Paper (Telecom Notice of Consultation CRTC 2012-557-3)*	1

TABLE 4: Speeches and Outreach

	FBPB	Civil	Criminal	Mergers	Commissioner
Speeches (Number of times Bureau staff spoke to stakeholders. This includes information sessions and outreach activities, not the number of participants)	39	13	17	10	10
Recruitment Initiatives (Number of presentations made to potential Bureau recruits; this includes seminars)	0	2	0	11	0

2012–2013 was very productive and successful for the Bureau where mergers are concerned. Despite an increased workload, including an exceptionally busy third quarter, the Bureau improved the percentage of reviews where the service standard was met over the previous fiscal year.

The Bureau is currently meeting the service standard in more than 92% of its merger reviews (both complex and non-complex) and in over 95% of its non-complex reviews.

Additionally, despite an overall decrease in the percentage of reviews designated as complex, 2012-2013 contained a relatively higher proportion of "very complex" transactions requiring in-depth analysis. This is evidenced by the fact that Supplementary Information Requests (SIRs) were issued in 10 reviews—a slight increase over the previous year. Several other reviews were also closely considered for a SIR due to their complex nature.

R v. K.R.G. per Karakatsanis J.
Found at Tab 82, Volume 16
Google's BOA.

other digital network for any purpose (not just for the purpose of contacting children). Accordingly, the retrospective operation of these provisions limits the s. 11(*i*) right as it deprives the appellant of the benefit of the less restrictive community supervision measures captured in the previous version of s. 161 — that is, the "lesser punishment".

et le nouvel al. 161(1)d) confère au juge le pouvoir d'interdire au contrevenant d'utiliser Internet ou tout autre réseau numérique à quelque fin (pas seulement pour entrer en contact avec des enfants). Par conséquent, l'application rétrospective des dispositions qui prévoient ces interdictions restreint le droit garanti par l'al. 11*i*) puisqu'elle empêche l'appelant de faire l'objet des mesures de surveillance dans la collectivité moins restrictives qui figuraient dans la version antérieure de l'art. 161, c'est-à-dire de la « peine la moins sévère ».

B. *Is the Limitation of Section 11(i) Justified Under Section 1 of the Charter?*

B. *La restriction du droit garanti par l'al. 11i) se justifie-t-elle au regard de l'article premier de la Charte?*

[58] Section 1 of the *Charter* provides as follows:

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

[58] L'article premier de la *Charte* est libellé comme suit :

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

To establish that the limitation on the appellant's s. 11(*i*) right is reasonable and demonstrably justified, the government must show that the 2012 amendments have a sufficiently important objective "and that the means chosen are proportional to that object[ive]" (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 94). A law is proportionate if (1) there is a rational connection between the means adopted and the objective; (2) it is minimally impairing in that there are no alternative means that may achieve the same objective with a lesser degree of rights limitation; and (3) there is proportionality between the deleterious and salutary effects of the law (*R. v. Oakes*, [1986] 1 S.C.R. 103; *Carter*, at para. 94). The proportionality inquiry is a normative and contextual one, which requires courts to examine the broader picture by "balanc[ing] the interests of society with those of individuals and groups" (*Oakes*, at p. 139).

Pour établir que la restriction du droit de l'appelant garanti par l'al. 11*i*) est raisonnable et que sa justification peut se démontrer, l'État doit montrer que les modifications de 2012 ont un objectif suffisamment important « et que les moyens choisis sont proportionnels à cet obje[ctif] » (*Carter c. Canada (Procureur général)*, 2015 CSC 5, [2015] 1 R.C.S. 331, par. 94). Une règle de droit est proportionnée à son objectif lorsque (1) le moyen retenu est rationnellement lié à cet objectif, (2) qu'elle est minimalement attentatoire en ce qu'il n'existe aucun autre moyen d'atteindre le même objectif en restreignant moins le droit en cause et (3) qu'il y a proportionnalité entre ses effets préjudiciables et ses effets bénéfiques (*R. c. Oakes*, [1986] 1 R.C.S. 103; *Carter*, par. 94). L'examen de la proportionnalité se veut à la fois normatif et contextuel et exige du tribunal qu'il considère le tableau tout entier en « soupes[ant] les intérêts de la société et ceux de particuliers et de groupes » (*Oakes*, p. 139).

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[59] Unfortunately, s. 1 was not dealt with in the courts below. This means we do not have the benefit of a full record, including expert testimony. But the parties urged us to consider s. 1 on the record before us. This Court therefore deals with this issue, on consent, as a court of first instance.

[60] The Crown adduced fresh evidence attached to two affidavits, consisting of statistics and social science articles relating to the issue of the recidivism of sexual offenders. The appellant did not oppose the admission of this evidence and I am satisfied it would be appropriate to receive it. Accordingly, in assessing whether the Crown has discharged its justificatory burden, I will consider the Crown's fresh evidence as "supplemented by common sense and inferential reasoning", in addition to the jurisprudence and legislative debates proffered by the parties (*R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 78).

(1) Do the 2012 Amendments Have a Sufficiently Important Objective?

[61] A law that limits a constitutional right must do so in pursuit of a sufficiently important objective that is consistent with the values of a free and democratic society. This examination is a threshold requirement that is undertaken without considering the scope of the right infringement, the means employed, or the relationship between the positive and negative effects of the law.

[62] The appellant correctly submits that the relevant objective is that of the infringing measure: see *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721, at para. 20. Here, the infringing measure is the *retrospective operation* of the impugned law. However, the more general purpose behind the enactment of the 2012 amendments informs the specific rationale for applying the amendments retrospectively.

[59] Malheureusement, les juridictions inférieures ne se penchent pas en l'espèce sur l'application de l'article premier. Nous ne disposons donc pas d'un dossier complet constitué notamment de témoignages d'experts. Les parties nous exhortent néanmoins à nous prononcer sur l'application de l'article premier à partir du dossier existant. La Cour le fait donc sur consentement, comme le ferait un tribunal de première instance.

[60] Le ministère public a produit une preuve nouvelle jointe en annexe à deux affidavits. Il s'agit de statistiques et d'articles relevant des sciences sociales et portant sur la récidive en matière d'infractions sexuelles. L'appelant ne s'est pas opposé à l'admission de ces éléments de preuve, et je suis convaincue qu'il convient de les recevoir. Par conséquent, pour décider si le ministère public s'est acquitté de son obligation de justification, j'examinerai la preuve nouvelle de l'intimée en la « complét[ant] par le bon sens et le raisonnement par déduction », ce à quoi s'ajouteront la jurisprudence et le compte rendu des débats législatifs soumis par les parties (*R. c. Sharpe*, 2001 CSC 2, [2001] 1 R.C.S. 45, par. 78).

(1) Les dispositions issues des modifications de 2012 ont-elles un objectif suffisamment important?

[61] La règle de droit qui restreint un droit constitutionnel doit le faire conformément à un objectif suffisamment important qui se concilie avec les valeurs d'une société libre et démocratique. L'examen du respect de cette condition s'effectue sans tenir compte de la portée de l'atteinte au droit, du moyen retenu ou du lien entre les répercussions positives et négatives de la règle de droit.

[62] L'appelant soutient à bon droit que l'objectif à considérer est celui de la mesure attentatoire (voir *Toronto Star Newspapers Ltd. c. Canada*, 2010 CSC 21, [2010] 1 R.C.S. 721, par. 20). En l'espèce, la mesure attentatoire réside dans l'*application rétrospective* de la règle de droit en cause. Toutefois, l'objectif général des dispositions issues des modifications de 2012 joue dans la raison d'être particulière de leur application rétrospective.

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sentencing judges the discretionary power to limit those offenders who pose a continuing risk to children in contacting children in person or online, and in engaging with online child pornography (the means chosen). Although the Crown's fresh evidence, which I discuss below, assists in solidifying this causal link, at this stage, I am satisfied that reason and logic suffice to establish that Parliament proceeded rationally in opting to give s. 161(1)(c) and (d) retrospective effect in order to better protect children from recidivism risks posed by offenders who committed their offences before the 2012 amendments came into force.

(b) *Minimal Impairment*

[70] The question at this second stage is whether the 2012 amendments are minimally impairing, in the sense that "the limit on the right is reasonably tailored to the objective" (*Carter*, at para. 102). It is only when there are alternative, less harmful means of achieving the government's objective "in a real and substantial manner" that a law should fail the minimal impairment test (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 55).

[71] I am satisfied that the retrospective operation of the prohibitions contained in the 2012 amendments is minimally impairing of s. 11(*i*).

[72] The amendments were enacted within the context of a highly discretionary provision that is tailored to its objective. Prohibitions listed in s. 161(1) are to be imposed only when a judge is satisfied that the specific offender poses a continued risk to children upon his release into the community *and* that the specific terms of the order are a reasonable attempt to minimize the risk. The law is therefore not "drafted in a way that unnecessarily catches

(l'objectif) et l'octroi rétrospectif au tribunal qui détermine la peine d'un pouvoir discrétionnaire lui permettant de soumettre à des contraintes le contrevenant qui représente toujours un risque pour les enfants du fait qu'il peut communiquer en personne ou en ligne avec eux et accéder à de la pornographie juvénile en ligne (le moyen choisi). Bien que la preuve nouvelle du ministère public — sur laquelle je reviens plus loin — étoffe ce lien causal, je suis convaincue à ce stade que la raison et la logique suffisent pour établir que le législateur a agi de manière rationnelle en conférant aux al. 161(1)c) et d) un effet rétrospectif afin de mieux protéger les enfants contre le risque de récidive chez le délinquant sexuel dont les actes criminels sont antérieurs à l'entrée en vigueur des nouvelles dispositions en 2012.

b) *Atteinte minimale*

[70] La question à trancher à cette deuxième étape est celle de savoir si les nouvelles dispositions portent atteinte le moins possible au droit constitutionnel, c'est-à-dire si « la restriction du droit est raisonnablement adaptée à l'objectif » (*Carter*, par. 102). Ce n'est que lorsqu'il existe d'autres moyens moins préjudiciables de réaliser l'objectif de l'État « de façon réelle et substantielle » qu'une loi ne satisfait pas à l'exigence de l'atteinte minimale (*Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, par. 55).

[71] Je suis convaincue que l'application rétrospective des interdictions issues des modifications de 2012 porte atteinte le moins possible à l'al. 11*i*).

[72] Les modifications ont été apportées à une disposition qui confère un pouvoir hautement discrétionnaire et qui est adaptée à son objectif. Les interdictions du par. 161(1) ne doivent être prononcées que si le tribunal est convaincu que le contrevenant exposera toujours les enfants à un risque une fois libéré et rendu à la collectivité *et* que les conditions dont est assortie l'ordonnance visent raisonnablement à réduire le risque. La disposition

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(c) *Proportionality of Effects*

[77] At this final stage of the proportionality analysis, the Court must "weig[h] the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good" (*Carter*, at para. 122).[6] This final stage is an important one because it performs a fundamentally distinct role. As a majority of this Court observed in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877:

The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. . . . The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*. [para. 125]

[78] It is for this reason that Aharon Barak, former President of the Supreme Court of Israel, has described this final step as "the very heart of proportionality" ("Proportional Effect: The Israeli Experience" (2007), 57 *U.T.L.J.* 369, at p. 380). And in *Hutterian Brethren*, Abella J. wrote: ". . . most of the heavy conceptual lifting and balancing ought to be done at the final step — proportionality. Proportionality is, after all, what s. 1 is about" (para. 149).

[79] I agree. While the minimal impairment test has come to dominate much of the s. 1 discourse in Canada, this final step permits courts to address the essence of the proportionality enquiry at the

[6] In *Oakes*, this final stage of the proportionality analysis was initially conceived as a comparison between the deleterious effects of the limiting measure and the law's objective. However, in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, Lamer C.J. reformulated the test to account for the "proportionality between the deleterious and the salutary effects of the measur[e]" because characterizing the final step "as being concerned solely with the balance between the objective and the deleterious effects of a measure rests on too narrow a conception of proportionality" (p. 889 (emphasis deleted)).

c) *Proportionnalité des effets*

[77] À cette dernière étape de l'examen de la proportionnalité, la Cour doit « mettre en balance l'incidence de la loi sur les droits protégés et l'effet bénéfique de la loi au plan de l'intérêt supérieur du public » (*Carter*, par. 122)[6]. Il s'agit d'une étape importante, car son rôle est fondamentalement distinct. Comme le font observer les juges majoritaires de la Cour dans *Thomson Newspapers Co. c. Canada (Procureur général)*, [1998] 1 R.C.S. 877 :

Les première et deuxième étapes de l'analyse de la proportionnalité ne portent pas sur le rapport entre les mesures et le droit en question garanti par la *Charte*, mais plutôt sur le rapport entre les objectifs de la loi et les moyens employés. [. . .] La troisième étape de l'analyse de la proportionnalité donne l'occasion d'apprécier, à la lumière des détails d'ordre pratique et contextuel qui ont été dégagés aux première et deuxième étapes, si les avantages découlant de la limitation sont proportionnels aux effets préjudiciables, mesurés au regard des valeurs consacrées par la *Charte*. [par. 125]

[78] C'est la raison pour laquelle l'ancien président de la Cour suprême d'Israël, Aharon Barak, voit dans cette dernière étape [TRADUCTION] « le cœur même de la proportionnalité » (« Proportional Effect : The Israeli Experience » (2007), 57 *U.T.L.J.* 369, p. 380). Et, dans l'arrêt *Hutterian Brethren*, la juge Abella écrit que « la majeure partie de l'analyse conceptuelle doit être faite à l'étape finale — celle de la proportionnalité. Après tout, c'est de la proportionnalité dont il est censé être question à l'article premier » (par. 149).

[79] Je suis d'accord. Bien que, de nos jours, au Canada, l'atteinte minimale occupe la place la plus grande dans le discours sur l'article premier, le tribunal peut, à cette dernière étape, se pencher sur

[6] Initialement, dans l'arrêt *Oakes*, cette dernière étape visait à comparer les effets préjudiciables de la mesure restrictive et l'objectif de la loi. Toutefois, dans *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, le juge en chef Lamer a reformulé le critère afin de tenir compte de la « proportionnalité entre les effets préjudiciables des mesures et leurs effets bénéfiques » parce que la qualification de la dernière étape « comme concernant uniquement l'équilibre entre l'objectif et les effets préjudiciables d'une mesure repose sur une conception trop étroite de la proportionnalité » (p. 889 (soulignement omis)).

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schoolgrounds, playgrounds, and community centres, or from seeking employment or volunteer opportunities involving children. The new s. 161(1)(c) potentially goes much further and prohibits "any contact — including communicating by any means — with a person who is under the age of 16 years" in a public or private space. For example, offenders might be prohibited from conversing with younger members of their family, or from freely moving about certain private and public spaces where children are present. This expanded prohibition, relative to the more limited prohibitions that existed previously, constitutes a substantial intrusion on the liberty and security of certain offenders.

garderie, le terrain d'une école, un terrain de jeu ou un centre communautaire, ou de rechercher un emploi ou d'offrir ses services comme bénévole dans un domaine lié aux enfants. Le nouvel al. 161(1)c) pourrait permettre au tribunal d'aller beaucoup plus loin et de lui interdire d'avoir « des contacts — notamment communiquer par quelque moyen que ce soit — avec une personne âgée de moins de seize ans » dans un lieu public ou privé. Par exemple, le tribunal pourrait interdire au contrevenant de parler avec les jeunes membres de sa famille ou de se trouver dans un endroit privé ou public où il y a des enfants. Par rapport aux interdictions de portée plus restreinte qui existaient auparavant, il s'agit d'un empiétement substantiel sur le droit à la liberté et à la sécurité de certains contrevenants.

[82] The deleterious effects experienced by specific offenders translate into broader societal harms. By impacting people like the appellant with a punishment of which they had no notice, the retrospective operation of s. 161(1)(c) undermines fairness in criminal proceedings and compromises the rule of law. These are core tenets of our justice system.

[82] Les effets préjudiciables subis par les contrevenants individuels se traduisent par un préjudice plus large infligé à la société. En condamnant un contrevenant comme l'appelant à une peine dont il ne se savait pas passible, l'application rétrospective de l'al. 161(1)c) compromet l'équité des procédures criminelles et la primauté du droit, deux préceptes fondamentaux de notre système de justice.

[83] The adverse impact the retrospective operation of s. 161(1)(c) has on fairness and the rule of law is particularly acute because, in broadening the scope of prohibited conduct, Parliament does not appear to have been responding to an emerging threat, or an evolving social context. Unfortunately, sexual offences against children have persisted for centuries. Setting aside for the moment the use of technology to contact young people, which is captured by s. 161(1)(d), why was additional protection required in 2012? In terms of sexual offences resulting from physical proximity, on this record, there appears to have been little change in the nature and degree of risk facing children since the last time s. 161(1) was amended. The dearth of a compelling temporal justification for imposing s. 161(1)(c) retrospectively enhances the damage the provision does to fairness and the rule of law, and thus

[83] L'incidence préjudiciable de l'application rétrospective de l'al. 161(1)c) sur l'équité des procédures criminelles et la primauté du droit est particulièrement grave, car en élargissant la portée de l'interdiction, le législateur ne paraît pas donner ainsi suite à une menace nouvelle ou à quelque évolution du contexte social. Les enfants sont malheureusement victimes d'infractions sexuelles depuis des siècles. On peut se demander, en faisant momentanément abstraction de l'utilisation de la technologie pour entrer en contact avec de jeunes personnes, laquelle fait l'objet de l'al. 161(1)d), pour quelle raison une protection supplémentaire s'imposait en 2012. En ce qui concerne les infractions sexuelles résultant d'une proximité physique, au vu du dossier, la nature et le degré du risque auquel sont exposés les enfants semblaient avoir peu changé depuis la modification précédente du

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undermines public confidence in the criminal justice system.

par. 161(1). L'inexistence d'une justification d'ordre temporel convaincante de l'application rétrospective de l'al. 161(1)c) accroît l'atteinte à l'équité des procédures criminelles et à la primauté du droit et mine par conséquent la confiance du public dans le système de justice criminelle.

[84] The Crown submits that the benefit of retrospectively applying s. 161(1)(c) is that more children will be protected from sexual violence. In advancing this claim, the Crown chiefly relies on social science articles and statistics relating to recidivism of sexual offenders in order to clarify the risk children face when sexual offenders are released into the community.

[84] Le ministère public soutient que l'application rétrospective de l'al. 161(1)c) permet de protéger plus d'enfants contre la violence sexuelle. Il invoque principalement à l'appui de sa prétention des articles et des statistiques relevant des sciences sociales et portant sur la récidive sexuelle afin de préciser le risque que courent les enfants lorsqu'un délinquant sexuel est libéré et rendu à la collectivité.

[85] The Crown's social science articles endeavour to quantify rates of recidivism of sexual offenders. One article pegged the recidivism rates for "child molesters" at 13% 5 years following the commission of the offence, 18% after 10 years, and 23% after 15 years.[8] The authors found that the recidivism rate for sexual offenders who victimize extra familial young boys (35% after 15 years) is significantly higher than the average recidivism rate for all sexual offenders (24% after 15 years) (p. 8). These recidivism rates were confirmed by another article adduced by the Crown, which asserts that "[s]exual interest in children was a significant predictor of sexual recidivism".[9] That is, "[t]hose individuals with identifiable interests in deviant sexual activities were among those most likely to continue sexual offending. The evidence was strongest for sexual interest in children" (p. 15). The authors further observed that these figures "should be considered to underestimate the real recidivism rates"

[85] Les auteurs des articles en question tentent de déterminer le taux de récidive en matière d'infractions sexuelles. Dans le cas des « agresseurs d'enfants », l'un d'eux fixe ce taux à 13 p. 100 cinq ans après la perpétration de l'infraction, à 18 p. 100 dix ans après et à 23 p. 100 quinze ans après[8]. Les auteurs concluent que le taux de récidive des délinquants sexuels qui s'en prennent à de jeunes garçons qui ne font pas partie de leur famille (35 p. 100 quinze ans après l'infraction) est de beaucoup supérieur à la moyenne pour l'ensemble des délinquants sexuels (24 p. 100 quinze ans après) (p. 10). Un autre article confirme ces données, et son auteur ajoute que « [l'existence chez ces délinquants d']intérêts sexuels à l'égard des enfants constitu[e] un prédicateur significatif de la récidive sexuelle »[9]. Autrement dit, « [l]es délinquants qui manifest[ent] des intérêts identifiables à l'égard d'activités sexuelles déviantes [sont] parmi les plus susceptibles de continuer à commettre des

[8] Public Safety and Emergency Preparedness Canada, "Sex Offender Recidivism: A Simple Question", by A. J. R. Harris and R. K. Hanson, March 2004 (online), at p. 7. This study used data from 10 follow-up studies of adult male sexual offenders with a combined sample of 4,724 offenders.

[9] Public Safety and Emergency Preparedness Canada, "Predictors of Sexual Recidivism: An Updated Meta-Analysis", by R. K. Hanson and K. Morton-Bourgon, February 2004 (online), at p. 9. This article examined the research evidence of 95 different studies, involving more than 31,000 sexual offenders.

[8] Sécurité publique et Protection civile Canada, « La récidive sexuelle : d'une simplicité trompeuse », par A. J. R. Harris et R. K. Hanson, mars 2004 (en ligne), p. 9. Cette étude s'appuie sur les données de 10 études de suivi visant des délinquants sexuels adultes de sexe masculin et comportant un échantillon combiné de 4 724 contrevenants.

[9] Sécurité publique et Protection civile Canada, « Les prédicteurs de la récidive sexuelle : une méta-analyse à jour », par R. K. Hanson et K. Morton Bourgon, février 2004 (en ligne), p. 11. L'article examine les éléments de preuve issus de 95 études visant plus de 31 000 délinquants sexuels.

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[89] However, the appellant correctly points out that the Crown has failed to lead much, if any, evidence to establish the *degree* of *enhanced* protection s. 161(1)(c) provides in comparison to the previous version of the prohibition. It is therefore unclear what effect the *retrospective* operation of s. 161(1)(c) would have on the recidivism rates identified by the Crown. And there is no evidence demonstrating that the risks s. 161(1)(c) are directed at have changed quantitatively or qualitatively, such that the fundamental fairness and rule of law concerns would be mitigated. Even in the passages of the legislative record that the Crown put before this Court, it is striking that there was almost no discussion of why the amendments to s. 161(1)(c) were required to better protect children.

[90] Put simply, the precise benefits of the *retrospective* operation of s. 161(1)(c) remain unclear. It can be difficult to prove a negative, which is why reason and logic are important complements to tangible evidence. And, to some extent, these evidentiary difficulties may be unavoidable. After all:

> Public policy is often based on approximations and extrapolations from the available evidence, inferences from comparative data, and, on occasion, even educated guesses. Absent a large-scale policy experiment, this is all the evidence that is likely to be available. Justice La Forest offered an observation in *McKinney* which rings true: "[d]ecisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society".
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> (S. Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006), 34 *S.C.L.R.* (2d) 501, at p. 524, quoting *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 304.)

[89] Or, l'appelant souligne à juste titre que le ministère public n'a présenté que peu d'éléments ou n'en a pas présenté du tout pour établir le *degré* de protection *accrue* offert par le nouvel al. 161(1)c) comparativement au libellé antérieur de l'interdiction. L'effet de l'application *rétrospective* de l'al. 161(1)c) sur les taux de récidive avancés par le ministère public demeure donc indéterminé. Et aucune preuve ne démontre que le risque auquel cet alinéa est censé s'attaquer a changé sur les plans quantitatif ou qualitatif de manière à atténuer les craintes liées à l'équité fondamentale et à la primauté du droit. Même les extraits du dossier législatif déposés devant la Cour par le ministère public montrent de manière frappante que l'opportunité de modifier l'al. 161(1)c) afin de mieux protéger les enfants n'a pratiquement fait l'objet d'aucun débat.

[90] Dit simplement, les effets bénéfiques précis de l'application *rétrospective* de l'al. 161(1)c) demeurent indéterminés. Il peut se révéler difficile de prouver l'inexistence de quelque chose. C'est pourquoi la raison et la logique constituent des compléments importants à la preuve matérielle. Et jusqu'à un certain point, ces difficultés de preuve peuvent être inéluctables. Après tout :

> [TRADUCTION] Les politiques gouvernementales sont souvent élaborées à partir d'approximations et d'extrapolations découlant de la preuve disponible, d'inférences tirées de données comparatives et même, à l'occasion, d'hypothèses émises en connaissance de cause. En l'absence de recherches politiques de grande envergure, cette preuve est vraisemblablement la seule dont on peut disposer. Dans *McKinney*, le juge La Forest a fait une observation très juste : « [d]ans ces domaines, les décisions découlent inévitablement de la combinaison d'hypothèses, de connaissances fragmentaires, de l'expérience générale et de la connaissance des besoins, des aspirations et des ressources de la société ».
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> (S. Choudhry, « So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1 » (2006), 34 *S.C.L.R.* (2d) 501, p. 524, citant *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229, p. 304-305.)

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[91] Nonetheless, s. 1 mandates that the limitation on the right be *demonstrably* justified. As Dickson C.J. wrote in *Oakes*, this is a "stringent standard of justification" (p. 136). The retrospective operation of the impugned measure adversely impacts the liberty and security of offenders (relative to the previous version of s. 161), and, importantly, the fairness of criminal proceedings and the rule of law. Although this adverse impact will be experienced only when a judge concludes it is necessary to alleviate the risk the offender poses to children, it remains the case that the deleterious effects of the impugned measure are significant and tangible.

[92] In comparison, the benefits society stands to gain are marginal and speculative. While the Crown's evidence regarding recidivism of sexual offenders begins to paint the picture (particularly since it shows that sex offenders who victimize children are more likely to reoffend), the rendering remains largely incomplete. In particular, the Crown has provided no temporal justification for the retrospective limitation, nor much evidence to establish the degree of enhanced protection s. 161(1)(c) provides. For example, the record suggests that many sexual assaults committed against children are perpetrated by family members or acquaintances. But surely this reality did not just recently come to Parliament's attention. In the context of a s. 11(*i*) infringement, one expects the Crown to better explain why *retrospective* penal laws were required.

[93] Temporal considerations are relevant in this content because, at its root, s. 11(*i*) is about the *timing* of changes to penal laws. In this case, it is not Parliament's decision to increase the punishment for sexual offenders that has, by itself, triggered *Charter* scrutiny — rather, it is Parliament's decision to reach back in time to impose these enhanced

[91] Néanmoins, l'article premier exige que la justification de la restriction du droit *puisse se démontrer*. Comme le dit le juge en chef Dickson dans *Oakes*, il s'agit d'une « norme sévère en matière de justification » (p. 136). L'application rétrospective de la mesure en cause a une incidence préjudiciable sur le droit à la liberté et à la sécurité du contrevenant (comparativement au libellé antérieur de l'art. 161) et, fait important, sur l'équité des procédures criminelles et la primauté du droit. Certes, cette incidence préjudiciable n'existe que lorsqu'un juge conclut à la nécessité d'atténuer le risque que le contrevenant représente pour les enfants, mais il demeure que les effets préjudiciables de la mesure en cause sont importants et tangibles.

[92] En comparaison, les effets bénéfiques éventuels pour la société sont négligeables et hypothétiques. Bien que la preuve du ministère public concernant la récidive chez les délinquants sexuels esquisse le tableau de la situation (surtout en montrant que les délinquants sexuels qui s'en prennent à des enfants sont plus susceptibles de récidiver que les autres délinquants sexuels), le tableau demeure largement incomplet. En particulier, le ministère public n'a pas fait valoir l'existence d'une justification d'ordre temporel de la restriction rétrospective du droit et a avancé bien peu d'éléments pour établir le degré de protection accrue offert par l'al. 161(1)c). À titre d'exemple, le dossier indique que de nombreuses agressions sexuelles d'enfants sont perpétrées par des membres de la famille ou par des connaissances. Or, le législateur ne vient assurément pas tout juste de l'apprendre. Face à une allégation d'atteinte au droit que garantit l'al. 11*i*), on s'attendrait à ce que le ministère public en fasse davantage pour convaincre le tribunal de la nécessité qu'une disposition pénale s'applique *rétrospectivement*.

[93] Les considérations d'ordre temporel importent dans ce contexte, car l'al. 11*i*) s'intéresse foncièrement au *moment où intervient* la modification d'une disposition à caractère punitif. Dans la présente affaire, ce qui porte atteinte au droit garanti par l'al. 11*i*), ce n'est pas le choix du législateur d'accroître la peine infligée au délinquant sexuel

2016 SCC 31 (CanLII)

I. Remedies

Southam per Prowse J.
Found at **Tab 108(B), Volume 20** of Google's the BOA.

41 To read ss.10(1) and 10(3) as simply *allowing* the authorizing party to satisfy himself on these questions, without requiring him to do so, would in my view be clearly inadequate. Such an amorphous standard cannot provide a meaningful criterion for securing the right guaranteed by s.8. The location of the constitutional balance between a justifiable expectation of privacy and the legitimate needs of the state cannot depend on the subjective appreciation of individual adjudicators. Some objective standard must be established.

42 Requiring the authorizing party to satisfy himself as to the legality of the inquiry and the reasonableness of the Director's belief in the possible existence of relevant evidence, would have the advantage of substituting an objective standard for an amorphous one, but would, in my view, still be inadequate. The problem is with the stipulation of a reasonable belief that evidence *may* be uncovered in the search. Here again it is useful, in my view, to adopt a purposive approach. The purpose of an objective criterion for granting prior authorization to conduct a search or seizure is to provide a consistent standard for identifying the point at which the interests of the state in such intrusions come to prevail over the interests of the individual in resisting them. To associate it with an applicant's reasonable belief that relevant evidence *may* be uncovered by the search, would be to define the proper standard as the *possibility* of finding evidence. This is a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude. It would tip the balance strongly in favour of the state and limit the right of the individual to resist, to only the most egregious intrusions. I do not believe that this is a proper standard for securing the right to be free from unreasonable search and seizure.

43 Anglo-Canadian legal and political traditions point to a higher standard. The common law required evidence on oath which gave "strong reason to believe" that stolen goods were concealed in the place to be searched before a warrant would issue. Section 443 of the *Criminal Code* authorizes a warrant only where there has been information upon oath that there is "reasonable ground to believe" that there is evidence of an offence in the place to be searched. The American *Bill of Rights* provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation..." The phrasing is slightly different but the standard in each of these formulations is identical. The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshhold for subordinating the expectation of privacy to the needs of law enforcement. Where the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one. That is not the situation in the present case. In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s.8 of the *Charter*, for

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authorizing search and seizure. Insofar as ss. 10(1) and 10(3) of the *Combines Investigation Act* do not embody such a requirement, I would hold them to be further inconsistent with s.8.

Reading In and Reading Down

44 The appellants submit that even if ss.10(1) and 10(3) do not specify a standard consistent with s.8 for authorizing entry, search and seizure, they should not be struck down as inconsistent with the *Charter*, but rather that the appropriate standard should be read into these provisions. An analogy is drawn to the case of *MacKay v. The Queen*, [1965] S.C.R. 798 in which this Court held that a local ordinance regulating the use of property by prohibiting the erection of unauthorized signs, though apparently without limits, could not have been intended unconstitutionally to encroach on federal competence over elections, and should therefore be "read down" so as not to apply to election signs. In the present case, the overt inconsistency with s.8 manifested by the lack of a neutral and detached arbiter renders the appellants' submissions on reading in appropriate standards for issuing a warrant purely academic. Even if this were not the case, however, I would be disinclined to give effect to these submissions. While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. Without appropriate safeguards legislation authorizing search and seizure is inconsistent with s.8 of the *Charter*. As I have said, any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. I would hold ss.10(1) and 10(3) of the *Combines Investigation Act* to be inconsistent with the *Charter* and of no force and effect, as much for their failure to specify an appropriate standard for the issuance of warrants as for their designation of an improper arbiter to issue them.

Section 1

45 Section 1 of the *Charter* provides:

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

46 The phrase "demonstrably justified" puts the onus of justifying a limitation on a right or freedom set out in the *Charter* on the party seeking to limit. In the present case the appellants have made no submissions capable of supporting a claim that even if searches under ss.10(1) and 10(3) are "unreasonable" within the meaning of s.8, they are nevertheless a reasonable limit, demonstrably justified in a free and democratic society, on the right set out in s.8. It is, therefore, not necessary in this case to consider the relationship between s. 8 and s. 1. I leave to another day the difficult question of the relationship between those two sections and, more particularly, what further balancing of interests, if any, may be contemplated by s.1, beyond that envisaged by s.8.

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Found at **Tab 50, Volume 9** of Google's BOA.

1985 CarswellNat 161
Federal Court of Canada — Appeal Division

MacBain v. Canada (Canadian Human Rights Commission)

1985 CarswellNat 161, 1985 CarswellNat 628, [1985] 1 F.C. 856, [1985] F.C.J. No. 907, 16 Admin. L.R. 109, 18 C.R.R. 165, 22 D.L.R. (4th) 119, 33 A.C.W.S. (2d) 481, 62 N.R. 117, 6 C.H.R.R. D/3064, 85 C.L.L.C. 17,023

MacBAIN v. CANADIAN HUMAN RIGHTS COMMISSION; MacBAIN v. LEDERMAN et al.

Heald, Mahoney and Stone JJ.

Heard: September 12 and 13, 1985
Judgment: October 7, 1985
Docket: Nos. A-703-84; A-704-84; A-996-84

Counsel: *P. Genest, Q.C.*, and *J. Page*, for Alistair MacBain.
R. Rueter, for Sydney N. Lederman, Wendy Robson, Peter Cumming. R. Jurianz, and J. Hendry, for Canadian Human Rights Commission.
Mary Cornish, for Kristina Potapczyk.
J.J. Carthy, Q.C., and *R.E. Hawkins*, for Attorney General of Canada.

Subject: Public; Employment; Constitutional; Civil Practice and Procedure
Headnote
Human Rights --- Practice and procedure — Judicial review — Grounds — Apprehension of bias
Procedural fairness — Bias — Canadian Human Rights Commission appointing tribunal and prosecuting case after finding that complaint substantiated — Reasonable apprehension of bias created in minds of right-thinking people properly informed — Procedure contrary to Canadian Bill of Rights, s. 2(e) granting entitlement to "fair hearing in accordance with principles of fundamental justice" where obligations being determined.
Constitutional law — Canadian Bill of Rights — Entitlement to fair hearing in accordance with principles of fundamental justice where obligations being determined — Accusation of discrimination contrary to Canadian Human Rights Act involving obligations of person complained against — Canadian Human Rights Commission appointing tribunal and prosecuting case after finding that complaint substantiated — Procedure creating reasonable apprehension of bias in minds of right-thinking people properly informed.
M was the subject of a complaint of sexual harassment made to the CHRC by one of his former employees. The CHRC assigned an investigator to the complaint and upon receipt of the

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. . . . .

. . . the apprehension of bias also exists in this case because there is a direct connection between the prosecutor of the complaint (the Commission) and the decision-maker (the Tribunal). That connection easily gives rise . . . to a suspicion of influence or dependency.

APPEAL from decision of Federal Court, Trial Division, reported (1984), 7 Admin. L.R. 233, [1984] 1 F.C. 696, 5 C.H.R.R. D/2214, 84 C.L.L.C. 17,013, 11 C.R.R. 319, 11 D.L.R. (4th) 202, dismissing both a motion for prohibition and an action for a declaration. Application to review and set aside a decision of a Trubunal appointed under the Canadian Human Rights Act.

The judgment of the Court was delivered by *Heald J.*:

1 These reasons apply to three different proceedings in this Court which, by order of the court, and on the consent of all parties, were argued together.

2 The proceeding in File No. A-703-84 is an appeal from a judgment of the Trial Division which dismissed, without costs, the appellant's application for a writ of prohibition. The proceeding in File No. A-704-84 is an appeal from a judgment of the Trial Division which dismissed, with costs, the appellant's claim for declaratory relief as specified in the appellant's amended statement of claim filed in that action. The proceeding in File No. A-996-84 is a s. 28 application which attacks a decision made by the respondents Lederman, Robson and Cumming, acting as a Human Rights Tribunal (the Tribunal) appointed under s. 39 of the Canadian Human Rights Act, S.C. 1976-77, c. 33 (the Act).

3 All three proceedings arise from a complaint filed with the Canadian Human Rights Commission (the Commission) by the respondent Potapczyk. That complaint alleged that the appellant/applicant Alistair MacBain (MacBain) engaged in a discriminatory practice against her on the basis of her sex during the course of her employment with him in contravention of ss. 7(a), 7(b) and 10(a) of the Act. After the filing of the complaint, the Commission appointed an investigator pursuant to s. 35 of the Act who completed an investigation into that complaint, thereafter reporting her findings to the Commission pursuant to s. 36 of the Act. The relevant portions of ss. 35 and 36 read as follows:

> **Investigation**
>
> 35.(1) The Commission may designate a person (hereinafter referred to as an "investigator") to investigate a complaint.
>
> 36.(1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

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> I do not see any reason not to apply the principle in the Drybones case to a provision enacted after the Canadian Bill of Rights. Section 5(2) provides:
>
> (2) The expression 'law of Canada' in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

The Canadian Charter of Rights and Freedoms

30 On the hearing of the appeal, the principal thrust of the argument by counsel for MacBain pertained to subs. 2(e) of the Bill of Rights. It was his position that if the Court agreed with his submissions on subs. 2(e), there would be no need to consider whether s. 7 or subs. 11(d) of the Charter have any application to this case. Nevertheless, in his submissions in chief and in his memorandum of fact and law he did make submissions with respect to s. 7 and subs. 11(d) of the Charter. However, during the course of the submissions being made to us by counsel for the Attorney General of Canada, counsel for MacBain advised us that he was not asking the Court to make a finding on the applicability of any section of the Charter. On this basis, the Court did not hear further argument from counsel for the respondents on this issue. Accordingly, I do not propose to deal with the applicability of the Charter in this case.

Remedies

31 Since I have concluded that the adjudicative structure of the Canadian Human Rights Act contains an inherent bias, thereby offending subs. 2(e) of the Bill, it becomes necessary to consider the appropriate form of remedy in all the circumstances of these proceedings. Like its American counterpart, the Canadian Bill of Rights does not expressly address the issue of the consequences of failure to comply with its provisions. This circumstance is in marked contrast to the Charter which deals with this matter with clarity and unprecedented scope. I refer to subs. 52(1) of the Charter which provides that any law inconsistent with the provisions of the Charter "... is, to the extent of the inconsistency, of no force and effect". Likewise, reference should be made to subs. 24(1) of the Charter which empowers "a court of competent jurisdiction" to grant such remedy as it considers "appropriate and just in the circumstances". However, the Bill's silence in this regard does not, in my view, imply unenforceability for it is trite law that there can be no right without a remedy. Furthermore, the relevant jurisprudence supports that view of the matter. In R. v. Drybones, [1970] S.C.R. 282 at 294, 71 W.W.R. 161, 10 C.R.N.S. 334, [1970] 3 C.C.C. 355, 9 D.L.R. (3d) 473, Ritchie J. writing for the majority of the Supreme Court of Canada quoted the opening words of s. 2 of the Bill which read:

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> Every law of Canada shall, *unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights*, be so construed and applied as not to abrogate ...

[The emphasis is that of Ritchie J.] Thereafter, Mr. Justice Ritchie went on to state:

> It seems to me that a more realistic meaning must be given to the words in question and they afford, in my view, the clearest indication that s. 2 is intended to mean and does mean that if a law of Canada cannot be 'sensibly construed and applied' so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is inoperative 'unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights.'
>
> I think a declaration by the courts that a section or portion of a section of a statute is inoperative is to be distinguished from the repeal of such a section and is to be confined to the particular circumstances of the case in which the declaration is made. The situation appears to me to be somewhat analogous to a case where valid provincial legislation in an otherwise unoccupied field ceases to be operative by reason of conflicting federal legislation.

32 While the Supreme Court of Canada did not, to my knowledge, after Drybones supra, declare any other laws inoperative pursuant to the Bill until the Singh case, the Court nevertheless consistently affirmed the principle of Drybones insofar as the remedy for failure to comply with the provisions of the Bill is concerned.[4] The following quotation from the decision of Laskin J. in Curr v. R., [1972] S.C.R. 889 at 899, 18 C.R.N.S. 281, 7 C.C.C. (2d) 181, 26 D.L.R. (3d) 603, is yet another example of the perspective of the Supreme Court of Canada on the effect of non-compliance with the Bill:

> Compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny *operative* effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so ...

(Emphasis added) In addition to the Singh case, there is at least one other recent decision in Canadian Courts rendering inoperative federal legislation which abrogated rights protected by the Bill. I refer to the Manitoba Court of Appeal decision in R. v. Hayden, [1983] 6 W.W.R. 655, 23 Man. R. (2d) 315, 36 C.R. (3d) 187, 8 C.C.C. (3d) 33, 7 C.R.R. 325, [1984] 1 C.N.L.R. 148, 5 C.H.R.R. D/2121, 3 D.L.R. (4th) 361, where Hall J.A. speaking for the Court, found a section of the Indian Act, R.S.C. 1970, c. I-6, concerning intoxication on a reserve to be inoperative because it offended subs. 1(b) of the Bill. In the Singh case the relief proposed by Beetz J. was stated at pp. 239 to 240 as follows:

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> For the purposes of these seven cases, I would declare *inoperative* all of the words of s. 71(1) of the Immigration Act, 1976, following the word: 'Where ...'

(Emphasis added) It is to be noted that notwithstanding the above statement by Mr. Justice Beetz, the word "inoperative" did not appear in the judgment as distinct from the reasons for judgment pronounced by the Supreme Court of Canada. This matter will be discussed later herein.

33 As stated by Ritchie J. in Drybones supra, another characteristic of the relief to be granted under the Bill is that there must be a degree of particularity introduced into a finding that statutory provisions are inoperative. In the second revised edition of Tarnopolsky's The Canadian Bill of Rights (1975), s. 2 and the Drybones case are referred to as follows (pp. 140 and 141):

> It would seem then, that by the opening paragraph of s. 2 Parliament intended what the majority of the Supreme Court said it intended, and that is that courts are to declare 'inoperative' any laws which contravene the Canadian Bill of Rights.
>
> The specific choice of the term 'inoperative' as an alternative, to 'void' or 'Invalid' must have been intended to restrict the effect of these decisions to the particular fact circumstances.

This view of the matter was adhered to by Mr. Justice Beetz in Singh, because his declaration was specifically restricted to the "... seven cases at Bar where Convention refugee claims have been adjudicated upon the merits without the holding of an oral hearing at any stage." (Reasons of Beetz J. at p. 237.)

34 The strictures of the remedies for violations of the Bill as outlined supra, require comparison with the emerging trends respecting remedies under the Charter. In Hunter, Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc., [1984] 2 S.C.R. 145 at 710, [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, 41 C.R. (3d) 97, 55 A.R. 291, 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 9 C.R.R. 355 (sub nom. Hunter v. Southam Inc.), 11 D.L.R. (4th) 641, 84 D.T.C. 6467, 55 N.R. 241, the Supreme Court of Canada held that certain subsections of the Combines Investigation Act were inconsistent with the provisions of s. 8 of the Charter and "... therefore of no force and effect". In Singh supra, Madame Justice Wilson, in considering the application of the Charter found that subs. 52(1) thereof required "a declaration that s. 71(1) of the Immigration Act is of no force and effect to the extent it is inconsistent with s. 7". (Reasons p. 221) Additionally and pursuant to the broader provisions of s. 24 of the Charter, she ordered that the decision of this Court and the Immigration Appeal Board be set aside and remanded all seven cases "... for a hearing on the merits by the Board in accordance with the principles of fundamental justice articulated above". (Reasons p. 222)

35 It is interesting in the light of the above discussion to consider the formal pronouncement of the Supreme Court of Canada in the Singh case. After allowing the appeals, setting aside the

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decisions of the Court and the Immigration Appeal Board, and remanding the refugee claims to the Board for a hearing on the merits in accordance with the principles of natural justice, the Court further ordered, inter alia:

> The appellants are entitled to a declaration that s. 71(1) of the Immigration Act, 1976 in its present form *has no application* to them.

(Emphasis added) It would be presumptuous of me to attempt to explain or to account for the differences in the terms used ("inoperative"; "of no force and effect"; and "has no application") and, in any event, quite unnecessary in the view I take of this matter. Since it has been consistently stated, as observed supra, that non-compliance with the Bill requires a declaration that the impugned provisions in legislation are inoperative, I propose to follow that approach in prescribing the appropriate remedy in the case at Bar.

The Appropriate Remedy in the Instant Case

36 In my view, the appropriate remedy here is a declaration in favour of MacBain that the provisions of subss. (1) and (5) of s. 39 of the Act are inoperative insofar as the complaint filed against him by the complainant Kristina Potapczyk is concerned. In his action for declaratory relief, MacBain also asked for a declaration that all of Pt. III of the Act is inoperative. Part III contains ss. 31 to 48 inclusive. I am not persuaded that it is necessary or proper to frame this declaration so broadly, having regard to the view expressed by Beetz J. in Singh, at pp. 235 and 236 that:

> There is probably more than one way to remedy the constitutional shortcomings of the Immigration Act, 1976. But is is not the function of this Court to re-write the Act. Nor is it within its power. If the Constitution requires, this and other courts can do some relatively crude surgery on deficient legislative provisions, but not plastic or re-constructive surgery.

37 For the reasons given supra, my conclusion is that the offensive portion of the statutory scheme on these facts, is the appointment of the Tribunal by the Commission since the Commission is also the prosecutor. This undesirable situation is exacerbated by the addition circumstance in this case that the Commission made the appointment of the Tribunal after it had concluded, pursuant to subs. 36(3) that the complaint in issue had been substantiated. As noted earlier, the Commission's original finding that Potapczyk's complaint against MacBain was substantiated, is not properly in question in these proceedings and therefore remains unimpeached. A declaration that subss. (1) and (5) of s. 39 are inoperative insofar as the complaint at Bar is concerned will, in my view, remedy the constitutional shortcomings of the statute *in the circumstances of this case.*

38 It was submitted by counsel for the complainant that a finding of breach of the provisions of subs. 2(e) of the Bill may result in the complainant being deprived of any remedy whatsoever, thereby jeopardizing her right to have the complaint adjudicated upon. The remedy which I propose does not produce such a result. It leaves the complainant with a finding of "substantiation" by

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Found at Tab 53, Volume 10 of Google's BOA.

PUBLIC

11292118

A-13-00
2001 FCA 162

Government of the Northwest Territories (*Appellant*)

v.

Public Service Alliance of Canada and **Canadian Human Rights Commission** (*Respondents*)

INDEXED AS: NORTHWEST TERRITORIES v. PUBLIC SERVICE ALLIANCE OF CANADA (C.A.)

Court of Appeal, Stone, Létourneau and Rothstein JJ.A.—Ottawa, April 3, 4, 5 and May 24, 2001.

Administrative law — Judicial review — Quo Warranto — Complaint by PSAC of discrimination by N.W.T. Government in classification, pay of female employees — CHRC appointing Human Rights Tribunal to inquire into complaint under Canadian Human Rights Act, ss. 7, 11 — Act amended to remedy institutional independence problems — N.W.T. Government nevertheless challenging institutional independence, impartiality of Tribunal — Seeking quo warranto as appointment terms of Tribunal members expired — Members whose jurisdiction challenged not appointed to new Tribunal — Holding statutory authority to complete hearing of complaint under transitional provision, s. 33(3) — Not institutionally, individually biased in conduct of hearing — Binding nature of guidelines under Act, s. 27(3) not compromising institutional independence, impartiality of members.

Human Rights — PSAC alleging pay discrimination against female dominated groups by N.W.T. Government — CHRC appointing Tribunal to inquire into complaint under CHRA, ss. 7, 11 — Act amended to remedy institutional independence problems — N.W.T. Government nevertheless challenging institutional independence, impartiality of Tribunal — Members whose jurisdiction challenged not appointed to new Tribunal — Holding statutory authority to complete hearing of complaint against appellant under transitional provision, s. 33(3) — N.W.T. Government having standing to argue rules of natural justice applicable herein.

A-13-00
2001 CAF 162

Le gouvernement des Territoires du Nord-Ouest (*appelant*)

c.

L'Alliance de la fonction publique du Canada et **la Commission canadienne des droits de la personne** (*intimées*)

RÉPERTORIÉ: TERRITOIRES DU NORD-OUEST c. ALLIANCE DE LA FONCTION PUBLIQUE DU CANADA (C.A.)

Cour d'appel, juges Stone, Létourneau et Rothstein, J.C.A.—Ottawa, 3, 4, 5 avril et 24 mai 2001.

Droit administratif — Contrôle judiciaire — Quo warranto — L'AFPC a déposé une plainte dans laquelle elle alléguait que le gouvernement des T.N.-O. pratiquait de la discrimination dans la classification et la rémunération de ses employés féminins — La CCDP a constitué un Tribunal des droits de la personne pour qu'il fasse enquête sur les aspects des plaintes liés aux art. 7 et 11 de la Loi canadienne sur les droits de la personne — La Loi a été modifiée afin de corriger les problèmes relatifs à l'indépendance institutionnelle — Le gouvernement des T.N.-O. a néanmoins contesté l'indépendance institutionnelle et l'impartialité du Tribunal — Il a demandé un bref de quo warranto car le mandat des membres du Tribunal était terminé — Les membres dont la compétence était contestée n'ont pas été nommés membres du nouveau Tribunal — Ils possédaient le pouvoir légal d'achever l'audition de la plainte conformément à l'art. 33(3) de la disposition transitoire — Ils n'ont pas fait preuve de partialité institutionnelle ou personnelle dans la conduite des audiences — Le caractère impératif des directives émises en vertu de l'art. 27(3) de la Loi ne compromet pas l'indépendance institutionnelle et l'impartialité des membres.

Droits de la personne — L'AFPC a allégué que le gouvernement des T.N.-O. pratiquait de la discrimination dans la rémunération de groupes principalement composés de femmes — La CCDP a constitué un Tribunal pour qu'il fasse enquête sur les aspects des plaintes liés aux art. 7 et 11 de la LCDP — La Loi a été modifiée afin de corriger les problèmes relatifs à l'indépendance institutionnelle — Le gouvernement des T.N.-O. a néanmoins contesté l'indépendance institutionnelle et l'impartialité du Tribunal — Les membres dont la compétence était contestée n'ont pas été nommés membres du nouveau Tribunal — Ils possédaient le pouvoir légal d'achever l'audition de la plainte contre l'appelant conformément à l'art. 33(3) de la disposition transitoire — Le gouvernement des T.N.-O. avait la qualité

2001 FCA 162 (CanLII)

conclusion that the appellant is entitled to a fair hearing under paragraph 2(*e*) of the *Canadian Bill of Rights*. Having so concluded, and assuming as I did for the sake of argument that subsection 27(3) of the Act compromises the independence and impartiality of the members of the panel hearing the complaint, what, then, would be the appropriate sanction or remedy?

The sanction or remedy under the *Canadian Bill of Rights*

[60] It is well established that, in case of incompatibility between a federal legislative provision and paragraph 2(*e*) of the *Canadian Bill of Rights*, a declaration of inoperability of that provision is the appropriate sanction or remedy: see *Singh et al. v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pages 238-239; *R. v. Drybones*, [1970] S.C.R. 282; *MacBain v. Lederman*, [1985] 1 F.C. 856 (C.A.); *In re Human Rights Tribunal and Atomic Energy of Canada Limited*, [1986] 1 F.C. 103 (C.A.), at pages 116-119. In addition, as stated by Heald J.A. in the *McBain* case, at page 882, quoting Ritchie J. in *Drybones*, *supra*: "another characteristic of the relief to be granted under the Bill is that there must be a degree of particularity introduced into a finding that statutory provisions are inoperative". This means that a finding of inoperability is restricted to the case at bar and its particular fact circumstances.

[61] If the appellant's contention that subsection 27(3) of the Act violates paragraph 2(*e*) of the *Canadian Bill of Rights* were successful, I would declare that subsection to be inoperative in the present instance. As a result, the proceedings relating to the complaint against the appellant could be resumed, but the guidelines would not be binding upon the three members of the panel hearing the complaint in this case.

Proposed Conclusion

[62] For these reasons, I would allow the appeal with costs, set aside the decision of the Motions

suis arrivé sans hésitation à la conclusion que l'appelant a le droit à une audition équitable aux termes de l'alinéa 2*e*) de la *Déclaration canadienne des droits*. Compte tenu de cette conclusion et en tenant pour acquis, aux fins de l'argument, que le paragraphe 27(3) de la Loi compromet l'indépendance et l'impartialité des membres de la formation chargée d'entendre la plainte, quelle est alors la sanction ou la réparation appropriée?

La sanction ou la réparation découlant de la *Déclaration canadienne des droits*

[60] Il est bien établi que, lorsqu'il y a incompatibilité entre une disposition législative fédérale et l'alinéa 2*e*) de la *Déclaration canadienne des droits*, un jugement déclarant inopérante la disposition en cause constitue la sanction ou la réparation appropriée: voir *Singh et autres c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 178, aux pages 238 et 239; *R. c. Drybones*, [1970] R.C.S. 282; *MacBain c. Lederman*, [1985] 1 C.F. 856 (C.A.); *Affaire intéressant le Tribunal des droits de la personne et Énergie Atomique du Canada Limitée*, [1986] 1 C.F. 103 (C.A.), aux pages 116 à 119. En outre, comme l'a déclaré le juge Heald dans l'arrêt *McBain*, à la page 882, citant le juge Ritchie dans *Drybones*, précité: «une autre caractéristique du redressement accordé en vertu de la Déclaration est qu'il faut particulariser, dans une certaine mesure, une conclusion décrétant que des dispositions législatives sont inopérantes». Cela veut dire que le jugement déclarant ces dispositions inopérantes n'a d'effet que pour l'espèce dont il s'agit et pour ses circonstances particulières.

[61] Si l'argument de l'appelant selon lequel le paragraphe 27(3) de la Loi viole l'alinéa 2*e*) de la *Déclaration canadienne des droits* devait être retenu, je serais d'avis de déclarer que ce paragraphe est inopérant en l'espèce. Par conséquent, l'instance relative à la plainte déposée contre l'appelant pourrait reprendre mais les directives ne lieraient pas les trois membres du comité chargé d'entendre cette plainte.

Dispositif proposé

[62] Pour ces motifs, j'accueille l'appel avec dépens, j'annule la décision du juge des requêtes, je déclare

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Ferguson per McLachlin CJ.
Found at **Tab 76, Volume 15** of
Google's BOA.

Fuller, Lon L. *The Morality of Law*, 2nd ed. New Haven: Yale University Press, 1969.
Rosenberg, Morris, and Stéphane Perrault. "Ifs and Buts in Charter Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada" (2002), 16 *S.C.L.R.* (2d) 375.
Sankoff, Peter. "Constitutional Exemptions: Myth or Reality?" (1999-2000), 11 *N.J.C.L.* 411.

APPEAL from a judgment of the Alberta Court of Appeal (Fruman, Paperny and O'Brien JJ.A.) (2006), 65 Alta. L.R. (4th) 44, 397 A.R. 1, 384 W.A.C. 1, 212 C.C.C. (3d) 161, 41 C.R. (6th) 97, 145 C.R.R. (2d) 309, [2006] 12 W.W.R. 1, [2006] A.J. No. 1150 (QL), 2006 CarswellAlta 1216, 2006 ABCA 261, varying the sentence imposed by Hawco J. (2004), 39 Alta. L.R. (4th) 166, 372 A.R. 309, [2005] 4 W.W.R. 737, [2004] A.J. No. 1535 (QL), 2004 CarswellAlta 1780, 2004 ABQB 928. Appeal dismissed.

Noel C. O'Brien, *Q.C.*, for the appellant.

Richard A. Saull and *Michael Conner*, for the respondent.

Robert J. Frater and *Nancy Dennison*, for the intervener the Attorney General of Canada.

David Finley and *Kimberley Crosbie*, for the intervener the Attorney General of Ontario.

Jean-Vincent Lacroix and *Gilles Laporte*, for the intervener the Attorney General of Quebec.

Andrew K. Lokan and *Caroline V. Jones*, for the intervener the Canadian Civil Liberties Association.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] This appeal raises two questions. First, does imposition of the four-year mandatory minimum sentence for manslaughter with a firearm constitute cruel and unusual punishment contrary to s. 12

Fuller, Lon L. *The Morality of Law*, 2nd ed. New Haven : Yale University Press, 1969.
Rosenberg, Morris, and Stéphane Perrault. « Ifs and Buts in Charter Adjudication : The Unruly Emergence of Constitutional Exemptions in Canada » (2002), 16 *S.C.L.R.* (2d) 375.
Sankoff, Peter. « Constitutional Exemptions : Myth or Reality? » (1999-2000), 11 *R.N.D.C.* 411.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Fruman, Paperny et O'Brien) (2006), 65 Alta. L.R. (4th) 44, 397 A.R. 1, 384 W.A.C. 1, 212 C.C.C. (3d) 161, 41 C.R. (6th) 97, 145 C.R.R. (2d) 309, [2006] 12 W.W.R. 1, [2006] A.J. No. 1150 (QL), 2006 CarswellAlta 1216, 2006 ABCA 261, modifiant la peine infligée par le juge Hawco (2004), 39 Alta. L.R. (4th) 166, 372 A.R. 309, [2005] 4 W.W.R. 737, [2004] A.J. No. 1535 (QL), 2004 CarswellAlta 1780, 2004 ABQB 928. Pourvoi rejeté.

Noel C. O'Brien, *c.r.*, pour l'appelant.

Richard A. Saull et *Michael Conner*, pour l'intimée.

Robert J. Frater et *Nancy Dennison*, pour l'intervenant le procureur général du Canada.

David Finley et *Kimberley Crosbie*, pour l'intervenant le procureur général de l'Ontario.

Jean-Vincent Lacroix et *Gilles Laporte*, pour l'intervenant le procureur général du Québec.

Andrew K. Lokan et *Caroline V. Jones*, pour l'intervenante l'Association canadienne des libertés civiles.

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

[1] Le pourvoi soulève deux questions. Premièrement, infliger la peine minimale obligatoire de quatre ans d'emprisonnement prévue pour un homicide involontaire coupable avec usage

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of the *Canadian Charter of Rights and Freedoms* in the circumstances of this case? Second, can an offender who demonstrates that a mandatory minimum sentence would constitute cruel and unusual punishment in his case obtain a stand-alone constitutional exemption from the application of that minimum sentence?

[2] I conclude that the answer to both questions is no. On the facts of this case, the minimum sentence imposed by s. 236(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46, is not grossly disproportionate and so does not constitute cruel and unusual punishment in violation of s. 12 of the *Charter*. In any event, a constitutional exemption is not an appropriate remedy for a s. 12 violation. If a minimum sentence is found to be unconstitutional on the facts of a particular case, the law imposing the sentence is inconsistent with the *Charter* and therefore falls under s. 52 of the *Constitution Act, 1982*.

II. Facts and Procedural History

[3] This case arises out of the fatal shooting of Darren Varley by an RCMP officer, in the small town of Pincher Creek in southwestern Alberta, while he was being held in a cell at the RCMP detachment. The RCMP officer who shot Mr. Varley, Michael Esty Ferguson, was charged with second-degree murder but convicted by a jury of the lesser offence of manslaughter. The judge imposed a conditional sentence of two years less a day, notwithstanding the mandatory minimum sentence of four years imposed by s. 236(*a*) of the *Criminal Code* for manslaughter with a firearm ((2004), 39 Alta. L.R. (4th) 166, 2004 ABQB 928). The majority of the Alberta Court of Appeal overturned that sentence, and held that the mandatory minimum must be imposed ((2006), 65 Alta. L.R. (4th) 44, 2006 ABCA 261). Constable Ferguson appeals to this Court, contending that a four-year sentence in the circumstances would constitute cruel and unusual punishment contrary to s. 12 of the *Charter*, and that the trial judge was right to grant him a

d'une arme à feu équivaut-il, dans les circonstances de l'espèce, à infliger une peine cruelle et inusitée interdite par l'art. 12 de la *Charte canadienne des droits et libertés*? Deuxièmement, le contrevenant qui démontre qu'une peine minimale obligatoire constituerait une peine cruelle et inusitée dans son cas peut-il obtenir une exemption constitutionnelle autonome écartant l'application de cette peine minimale?

[2] Je conclus que ces deux questions doivent recevoir une réponse négative. Eu égard aux faits de l'affaire, la peine minimale prévue à l'al. 236*a*) du *Code criminel*, L.R.C. 1985, ch. C-46, n'est pas exagérément disproportionnée et ne constitue pas une peine cruelle et inusitée interdite par l'art. 12 de la *Charte*. Quoi qu'il en soit, l'exemption constitutionnelle n'est pas une réparation convenable en cas de violation de l'art. 12. En effet, si une peine minimale est jugée inconstitutionnelle au regard des faits en cause, la disposition qui prescrit cette peine est incompatible avec la *Charte* et tombe, par conséquent, sous le coup de l'art. 52 de la *Loi constitutionnelle de 1982*.

II. Faits et historique des procédures judiciaires

[3] L'affaire découle de la mort de Darren Varley, qui a été abattu par un agent de la Gendarmerie royale du Canada, pendant qu'il était détenu dans une cellule au détachement de la GRC à Pincher Creek, une petite ville du sud-ouest de l'Alberta. Michael Esty Ferguson, l'agent qui a abattu M. Varley, a été accusé de meurtre au deuxième degré, mais un jury l'a reconnu coupable de l'infraction moindre et incluse d'homicide involontaire coupable. Le juge lui a infligé une peine d'emprisonnement avec sursis de deux ans moins un jour, malgré l'al. 236*a*) du *Code criminel* qui prévoit une peine minimale obligatoire de quatre ans d'emprisonnement en cas d'homicide involontaire coupable avec usage d'une arme à feu ((2004), 39 Alta. L.R. (4th) 166, 2004 ABQB 928). La Cour d'appel de l'Alberta, à la majorité, a annulé cette sentence et a statué que la peine minimale devait être infligée ((2006), 65 Alta. L.R. (4th) 44, 2006 ABCA 261). Le gendarme Ferguson se pourvoit devant notre Cour, faisant valoir que, dans les circonstances, une

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constitutional exemption from the four-year minimum sentence imposed by Parliament.

peine de quatre ans d'emprisonnement constituerait une peine cruelle et inusitée interdite par l'art. 12 de la *Charte,* et que c'est à juste titre que le juge du procès lui a accordé une exemption constitutionnelle écartant l'application de la peine minimale de quatre ans prescrite par le législateur.

[4] The events leading to the shooting of Mr. Varley may be briefly summarized. On the evening of October 2, 1999, Darren Varley went to Leo's bar in Pincher Creek to socialize with friends. He met up with his fiancée, Chandelle Bachand, and his sister, Alaine Varley. At some point, unnoticed by Mr. Varley, Ms. Bachand left the bar. Later in the evening, Mr. Varley and his friend Rod Tuckey became involved in a fight with a number of persons in the bar's parking lot, because he believed Ms. Bachand had gotten into a van with strangers. Mr. Tuckey required medical attention and was taken to hospital by Pat Bitango and Sarah Weatherill. Mr. Varley stayed behind to search for Ms. Bachand, with the help of his sister.

[4] Les événements ayant mené à la mort par balle de M. Varley peuvent être résumés brièvement. Pendant la soirée du 2 octobre 1999, Darren Varley s'est rendu au bar Leo's à Pincher Creek pour y rencontrer des amis. Il y a retrouvé sa fiancée, Chandelle Bachand, et sa sœur, Alaine Varley. À un certain moment, à l'insu de M. Varley, M^me^ Bachand a quitté le bar. Plus tard au cours de la soirée, M. Varley et son ami Rod Tuckey se sont battus avec plusieurs personnes dans le stationnement du bar, parce qu'il croyait que M^me^ Bachand était montée à bord d'une fourgonnette avec des inconnus. Son état requérant des soins médicaux, M. Tuckey a été emmené à l'hôpital par Pat Bitango et Sarah Weatherill. Monsieur Varley est resté sur place pour tenter de retrouver M^me^ Bachand avec l'aide de sa sœur.

[5] Around 3:30 in the morning of October 3, Darren Varley and Alaine Varley arrived at Pincher Creek Hospital to visit Mr. Tuckey. Mr. Varley remained concerned about the whereabouts of his fiancée. The security officer on duty, Earl Langille, called the RCMP and Mr. Varley spoke to the RCMP Telecoms Operator. As a result of this call, Constable Ferguson was dispatched to the hospital, where he met Darren Varley, Alaine Varley, Sarah Weatherill, Pat Bitango, and Earl Langille in the lobby. Mr. Varley, who was intoxicated, insistently demanded that Constable Ferguson take action to find his fiancée. Constable Ferguson grabbed Mr. Varley and, according to the testimony of witnesses, punched him in the jaw and forced him to the ground. Constable Ferguson handcuffed Mr. Varley and took him to the police cruiser. Alaine Varley repeatedly asked Constable Ferguson to release Mr. Varley into her custody, but he refused.

[5] Aux environs de 3 h 30 le 3 octobre, Darren et Alaine Varley sont arrivés à l'hôpital de Pincher Creek pour rendre visite à M. Tuckey. Monsieur Varley était encore inquiet, parce qu'il ne savait pas où se trouvait sa fiancée. Earl Langille, l'agent de sécurité de service à ce moment-là, a téléphoné à la GRC dont l'opérateur en télécommunication s'est entretenu avec M. Varley. Par suite de cet appel, le gendarme Ferguson a été envoyé à l'hôpital où il a rencontré Darren Varley, Alaine Varley, Sarah Weatherill, Pat Bitango et Earl Langille dans le hall. Monsieur Varley, qui était ivre, a demandé avec insistance au gendarme Ferguson de prendre des mesures pour trouver sa fiancée. Le gendarme Ferguson a empoigné M. Varley et, selon des témoins, lui a donné un coup de poing à la mâchoire et l'a plaqué au sol. Il lui a passé les menottes et l'a emmené à la voiture de patrouille. Alaine Varley a demandé plusieurs fois en vain au gendarme Ferguson de lui confier M. Varley.

[6] After placing Mr. Varley in the police cruiser, Constable Ferguson returned to the hospital. Left

[6] Après avoir fait monter M. Varley à bord de la voiture de patrouille, le gendarme Ferguson est

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alone, Mr. Varley kicked in the window of the police cruiser. On returning, Constable Ferguson drove Mr. Varley to the detachment. Constable Ferguson booked Mr. Varley and the two entered the cell area with the assistance of the booking officer. After opening Mr. Varley's cell, the booking officer walked back to his desk, a few feet away, and Constable Ferguson entered the cell with Mr. Varley. Within a few seconds, Mr. Varley was shot twice: first, non-fatally, in the stomach, and then, fatally, in the head. Up to three seconds elapsed between the first and second shot. Constable Ferguson emerged from the cell and telephoned an off-duty colleague. Mr. Varley died from the second shot after having been transported to Calgary Foothills Hospital by air ambulance. Constable Ferguson testified that Mr. Varley attacked him when he entered the cell, pulling his bulletproof vest over his head and face and grabbing his firearm from its holster. At trial, he testified that he and Mr. Varley were still struggling for the gun when the shots went off. However, in an earlier statement, supported by expert evidence and accepted by the trial judge for sentencing purposes, Constable Ferguson said that he had regained control of the gun when the shots were fired.

retourné à l'hôpital. Laissé seul, M. Varley a donné des coups de pied dans la vitre de la voiture de patrouille. À son retour, le gendarme Ferguson a emmené M. Varley au détachement, a procédé à sa mise en détention, puis est entré avec lui dans la section des cellules en compagnie de l'agent responsable des mises en détention. Après avoir ouvert la porte de la cellule de M. Varley, l'agent est retourné à son bureau, situé quelques pieds plus loin. Le gendarme Ferguson est alors entré dans la cellule avec M. Varley. En quelques secondes, M. Varley a été atteint de deux balles : la première lui a causé une blessure non mortelle à l'estomac, la seconde l'a blessé mortellement à la tête. Jusqu'à trois secondes se sont écoulées entre le premier et le deuxième coup de feu. Le gendarme Ferguson est sorti de la cellule et a téléphoné à un collègue qui n'était pas en service. Monsieur Varley est mort des suites de sa deuxième blessure après avoir été transporté au Foothills Hospital de Calgary par ambulance aérienne. Selon le gendarme Ferguson, au moment où il est entré dans la cellule, M. Varley l'a attaqué, lui a remonté son gilet pare-balles sur la tête et le visage et a saisi son arme qui était dans son étui. Au procès, il a déclaré qu'il luttait encore avec M. Varley pour récupérer l'arme lorsque les coups sont partis. Cependant, dans une déclaration antérieure, étayée par la preuve d'expert et acceptée par le juge du procès aux fins de détermination de la peine, le gendarme Ferguson a dit qu'il avait repris la maîtrise de l'arme lorsque les coups de feu ont été tirés.

III. Issues

[7] 1. Does imposition of the four-year minimum sentence imposed by s. 236(*a*) of the *Criminal Code* constitute cruel and unusual punishment contrary to s. 12 of the *Charter* in the circumstances of this case?

2. If so, was the trial judge entitled to grant a constitutional exemption from the four-year minimum and to impose a lesser sentence?

III. Questions en litige

[7] 1. Dans les circonstances de l'espèce, infliger la peine minimale de quatre ans d'emprisonnement prévue à l'al. 236*a*) du *Code criminel* équivaut-il à infliger une peine cruelle et inusitée interdite par l'art. 12 de la *Charte*?

2. Dans l'affirmative, le juge du procès pouvait-il accorder une exemption constitutionnelle écartant l'application de la peine minimale de quatre ans et infliger une peine moins lourde?

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with the majority's reasoning in *Corbiere*. In *Smith*, Le Dain J. rejected their use in the context here at issue, mandatory minimum sentence laws. On the other side of the issue are the remarks of L'Heureux-Dubé and Arbour JJ. in their respective concurring opinions in *Rose* and *Morrisey*.

[48] I conclude that while the availability of constitutional exemptions for mandatory minimum sentencing laws has not been conclusively decided, the weight of authority thus far is against them and sounds a cautionary note.

(2) Intrusion on the Role of Parliament

[49] Section 52(1) grants courts the jurisdiction to declare laws of no force and effect only "to the extent of the inconsistency" with the Constitution. It follows that if the constitutional defect of a law can be remedied without striking down the law as a whole, then a court must consider alternatives to striking down. Examples of alternative remedies under s. 52 include severance, reading in and reading down. Constable Ferguson is proposing a constitutional exemption under s. 24(1) as an additional tool for minimizing interference with Parliament's legislative role when a court must grant a remedy for a constitutionally defective provision.

[50] On the other hand, it has long been recognized that in applying alternative remedies such as severance and reading in, courts are at risk of making inappropriate intrusions into the legislative sphere. An alternative to striking down that initially appears to be less intrusive on the legislative role may in fact represent an inappropriate intrusion on the legislature's role. This Court has thus emphasized that in considering alternatives to striking down, courts must carefully consider

Wilson dans *Osborne* et qui concorde avec le raisonnement des juges majoritaires dans *Corbiere*. Dans *Smith*, le juge Le Dain a rejeté ce type de réparation dans le contexte dont il est question en l'espèce, soit celui des dispositions législatives prévoyant une peine minimale obligatoire. Le point de vue opposé a été exprimé par les juges L'Heureux-Dubé et Arbour dans leurs opinions concordantes respectives dans *Rose* et *Morrisey*.

[48] Je conclus que, même si la question de la possibilité de recourir à des exemptions constitutionnelles pour écarter l'application de dispositions prescrivant une peine minimale obligatoire n'a pas encore été résolue de façon définitive, la jurisprudence prépondérante ne tend pas, pour l'heure, à l'octroi de telles exemptions et incite à la prudence.

(2) Usurpation du rôle du législateur

[49] Le paragraphe 52(1) confère aux tribunaux le pouvoir de déclarer inopérantes les « dispositions incompatibles » avec la Constitution. Par conséquent, s'il est possible de corriger l'inconstitutionnalité d'une disposition sans l'invalider complètement, le tribunal doit examiner les solutions de rechange à l'invalidation. Parmi les solutions auxquelles l'art. 52 donne ouverture, on trouve la dissociation, l'interprétation large et l'interprétation atténuée. Le gendarme Ferguson propose une exemption constitutionnelle en application du par. 24(1) à titre de mesure additionnelle permettant de réduire l'empiétement sur le rôle législatif du Parlement lorsqu'un tribunal doit accorder une réparation à l'égard d'une disposition inconstitutionnelle.

[50] Par ailleurs, il est reconnu depuis longtemps que les tribunaux, en accordant d'autres réparations telles la dissociation et l'interprétation large, risquent d'empiéter à tort sur le domaine législatif. Une réparation autre que l'invalidation peut sembler à première vue usurper à un moindre degré le rôle du législateur, mais constituer en réalité un empiétement injustifié. Notre Cour a ainsi souligné que, lorsqu'ils examinent les solutions de rechange à l'invalidation, les tribunaux doivent vérifier

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whether the alternative being considered represents a lesser intrusion on Parliament's legislative role than striking down. Courts must thus be guided by respect for the role of Parliament, as well as respect for the purposes of the *Charter*: *Schachter*; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2. These principles apply with equal force to the proposed alternative remedy of the constitutional exemption. In this case, the effect of granting a constitutional exemption would be to so change the legislation as to create something different in nature from what Parliament intended. It follows that a constitutional exemption should not be granted.

[51] When a court opts for severance or reading in as an alternative to striking down a provision, it does so on the assumption that had Parliament been aware of the provision's constitutional defect, it would likely have passed it with the alterations now being made by the court by means of severance or reading in. For instance, as this Court noted in *Schachter*, the test for severance "recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part" (p. 697). If it is not clear that Parliament would have passed the scheme with the modifications being considered by the court — or if it is probable that Parliament would *not* have passed the scheme with these modifications — then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere. In such cases, the least intrusive remedy is to strike down the constitutionally defective legislation under s. 52. It is then left up to Parliament to decide what legislative response, if any, is appropriate.

[52] It follows that we must ask whether granting a constitutional exemption for a mandatory minimum sentence would represent a lesser intrusion on Parliament's legislative role than striking it down. In my view, the answer to this question is no, because allowing courts to grant constitutional

attentivement si elles représentent un empiétement moins grave que l'invalidation sur les fonctions du législateur. Dans le choix de la réparation, les tribunaux seront donc guidés par le respect du rôle du législateur et des objectifs de la *Charte* : *Schachter*; *Vriend c. Alberta*, [1998] 1 R.C.S. 493; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2. Ces principes s'appliquent de la même façon à l'exemption constitutionnelle, la réparation proposée comme solution de rechange. En l'espèce, l'octroi d'une exemption constitutionnelle aurait pour effet de modifier la loi à tel point qu'elle serait d'une tout autre nature que celle voulue par le législateur. Il s'ensuit qu'une exemption constitutionnelle ne devrait pas être accordée.

[51] Lorsqu'un tribunal choisit la dissociation ou l'interprétation large plutôt que l'invalidation, il part du principe que, si le législateur avait su que la disposition était entachée d'un vice sur le plan constitutionnel, il l'aurait probablement édictée sous la forme modifiée que lui donne maintenant le tribunal en ayant recours à la dissociation ou à l'interprétation large. Par exemple, ainsi que notre Cour l'a fait remarquer dans *Schachter*, le critère applicable en cas de dissociation reconnaît que « l'objet apparemment louable du maintien des parties constitutionnelles de la loi repose sur la supposition que le législateur aurait adopté la partie constitutionnelle de la loi en question sans la partie inconstitutionnelle » (p. 697). S'il n'est pas clair que le législateur aurait édicté la disposition avec les modifications envisagées par le tribunal — ou s'il est probable qu'il *ne* l'aurait *pas* fait —, le tribunal empiéterait de façon injustifiée sur le domaine législatif en les introduisant. En pareil cas, la réparation qui constitue l'empiétement le moins grave consiste à invalider la disposition législative inconstitutionnelle, en application de l'art. 52. Il revient alors au législateur de décider quelle doit être la solution législative appropriée, le cas échéant.

[52] Il faut donc se demander si l'octroi d'une exemption constitutionnelle écartant l'application d'une peine minimale obligatoire constituerait un empiétement moins grave sur les fonctions du législateur que l'invalidation. À mon avis, tel n'est pas le cas, parce que permettre aux tribunaux d'accorder

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exemptions for mandatory minimum sentences directly contradicts Parliament's intent in passing mandatory minimum sentence legislation.

une telle exemption constitutionnelles contrecarre directement l'intention qu'avait le législateur en adoptant une disposition législative prescrivant une peine minimale obligatoire.

[53] A constitutional exemption has the effect of conferring on judges a discretion to reject the mandatory minimum sentence prescribed by Parliament. The mandatory minimum applies, unless the judge concludes that its application constitutes unjustifiable cruel and unusual punishment and that it therefore should not apply.

[53] L'exemption constitutionnelle a pour effet de conférer aux juges le pouvoir discrétionnaire de rejeter une peine minimale obligatoire prescrite par le législateur. La peine minimale s'applique, sauf si le juge conclut qu'elle constitue une peine cruelle et inusitée et qu'elle ne devrait donc pas être infligée.

[54] The intention of Parliament in passing mandatory minimum sentence laws, on the other hand, is to remove judicial discretion to impose a sentence below the stipulated minimum. Parliament must be taken to have specifically chosen to exclude judicial discretion in imposing mandatory minimum sentences, just as it was taken to have done in enacting the rape shield provisions struck down in *Seaboyer*. Parliament made no provision for the exercise of judicial discretion in drafting s. 236(*a*), nor did it authorize any exceptions to the mandatory minimum. There is no provision permitting judges to depart from the mandatory minimum, even in exceptional cases where it would result in grossly disproportionate punishment. Parliament has cast the prescription for the minimum four-year prison sentence here at issue in clear unambiguous terms. Parliament must be taken to have intended what it stated: that all convictions for manslaughter with a firearm would be subject to a mandatory minimum sentence of four years' imprisonment. The law mandates a floor below which judges cannot go. To permit judges to go below this floor on a case-by-case basis runs counter to the clear wording of the section and the intent that it evinces.

[54] Or, en adoptant une disposition législative qui prescrit une peine minimale obligatoire, le législateur veut précisément retirer aux juges le pouvoir discrétionnaire d'infliger une peine inférieure à la peine minimale prescrite. Il faut tenir pour acquis que le législateur a expressément choisi de ne pas accorder de pouvoir discrétionnaire aux juges lorsqu'il a décidé de prescrire une peine minimale obligatoire, comme on a supposé qu'il l'avait choisi en édictant les dispositions sur la protection des victimes de viol qui ont été invalidées dans *Seaboyer*. Lorsqu'il a rédigé l'al. 236*a*), le législateur n'a pas fait place à l'exercice d'un pouvoir discrétionnaire judiciaire ni autorisé d'exception à la peine minimale prescrite. Aucune disposition n'autorise les juges à déroger à la peine minimale obligatoire, même dans les cas exceptionnels où elle entraînerait l'infliction d'une peine exagérément disproportionnée. Le législateur a prescrit la peine minimale de quatre ans d'emprisonnement dont il est question en l'espèce en termes clairs, non ambigus. Il faut présumer que le législateur voulait bel et bien ce qu'il a dit, à savoir que la peine minimale obligatoire soit de quatre ans d'emprisonnement dans tous les cas d'homicide involontaire coupable avec usage d'une arme à feu. La loi prescrit un seuil de sévérité minimale de la peine, que les juges ne peuvent pas franchir. Permettre aux juges d'infliger, en fonction de chaque cas, une peine moins sévère, irait à l'encontre du libellé clair de l'article et de l'intention qu'il traduit.

[55] In granting a constitutional exemption, a judge would be undermining Parliament's purpose in passing the legislation: to remove judicial

[55] En accordant une exemption constitutionnelle, le juge contrecarrerait l'objectif visé par le législateur lorsqu'il a adopté la disposition

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discretion and to send a clear and unequivocal message to potential offenders that if they commit a certain offence, or commit it in a certain way, they will receive a sentence equal to or exceeding the mandatory minimum specified by Parliament. The discretion that a constitutional exemption would confer on judges would violate the letter of the law and undermine the message that animates it.

[56] It is thus clear that granting a constitutional exemption from a mandatory minimum sentence law that results in an unconstitutional sentence goes directly against Parliament's intention. To allow constitutional exemptions for mandatory minimum sentences is, in effect, to read in a discretion to a provision where Parliament clearly intended to exclude discretion. If it would be inappropriate to read in such a discretion under s. 52, then necessarily it would be inappropriate to allow judges to grant constitutional exemptions having the same effect under s. 24(1). It cannot be assumed that Parliament would have enacted the mandatory minimum sentencing scheme with the discretion that allowing constitutional exemptions would create. For the Court to introduce such a discretion would thus represent an inappropriate intrusion into the legislative sphere.

[57] I conclude that these considerations are sufficient to exclude constitutional exemptions as an appropriate remedy for unconstitutional mandatory minimum sentences. In the absence of any provision providing for discretion, a court that concludes that a mandatory minimum sentence imposes cruel and unusual punishment in an exceptional case before it is compelled to declare the provision invalid.

(3) The Remedial Scheme of the *Charter*

[58] As I noted at the outset, remedies for breaches of the *Charter* are governed by s. 24(1)

législative : retirer leur pouvoir discrétionnaire aux juges et faire comprendre de façon claire et non équivoque aux contrevenants éventuels que, s'ils commettent une certaine infraction ou s'ils la commettent d'une certaine manière, ils se verront infliger une peine égale ou supérieure à la peine minimale obligatoire prescrite par le législateur. Le pouvoir discrétionnaire qu'une exemption constitutionnelle conférerait aux juges violerait la lettre de la loi et affaiblirait le message qui la sous-tend.

[56] Il est donc clair que l'octroi d'une exemption constitutionnelle écartant l'application d'une disposition législative prescrivant une peine minimale obligatoire parce que la peine qui en résulte est inconstitutionnelle contrecarre directement l'intention du législateur. Permettre de telles exemptions constitutionnelles a effectivement pour effet d'incorporer un pouvoir discrétionnaire dans une disposition de laquelle le législateur voulait manifestement exclure un tel pouvoir. Au même titre qu'il serait inopportun d'interpréter largement l'art. 52 et d'en conclure qu'il confère un pouvoir discrétionnaire, il serait aussi inopportun de permettre aux juges d'accorder, en vertu du par. 24(1), des exemptions constitutionnelles ayant le même effet. On ne saurait présumer que le législateur aurait édicté le régime de peine minimale obligatoire en l'assortissant du pouvoir discrétionnaire créé par les exemptions constitutionnelles. En incorporant un tel pouvoir discrétionnaire, la Cour empiéterait de façon injustifiée sur le domaine législatif.

[57] Je conclus que ces considérations suffisent pour exclure les exemptions constitutionnelles des réparations qui peuvent être accordées en cas d'inconstitutionnalité d'une peine minimale obligatoire. À défaut d'une disposition qui lui confère un pouvoir discrétionnaire, le tribunal qui conclut qu'une peine minimale obligatoire entraîne l'infliction d'une peine cruelle et inusitée dans un cas exceptionnel est tenu de déclarer invalide la disposition qui la prescrit.

(3) Le régime de réparation prévu par la *Charte*

[58] Comme je l'ai indiqué d'entrée de jeu, les réparations qui peuvent être accordées en cas de

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results and only rarely produce an unconstitutional effect. The mandatory minimum sentence provision in s. 236(*a*) is said to be such a law. However one defines the "rare" case, discussed more fully below, the risk is that the role intended for s. 52(1) would be undermined and that laws that should be struck down — over-inclusive laws that pose a real risk of unconstitutional treatment of Canadians — would remain on the books, contrary to the intention of the framers of the *Charter*.

(4) The Rule of Law

[67] Constable Ferguson's principal argument for constitutional exemptions, as we have seen, is an appeal to flexibility. Yet this flexibility comes at a cost: constitutional exemptions buy flexibility at the cost of undermining the rule of law.

[68] The principles of constitutionalism and the rule of law lie at the root of democratic governance: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. It is fundamental to the rule of law that "the law must be accessible and so far as possible intelligible, clear and predictable": Lord Bingham, "The Rule of Law" (2007), 66 *Cambridge L.J.* 67, at p. 69. Generality, promulgation, and clarity are among the essential elements of the "morality that makes law possible": L. L. Fuller, *The Morality of Law* (2nd ed. 1969), at pp. 33-39.

[69] Constitutional exemptions for mandatory minimum sentence laws raise concerns related to the rule of law and the values that underpin it: certainty, accessibility, intelligibility, clarity and predictability.

[70] As noted in the last section, a constitutional exemption under s. 24(1) is a personal remedy. The remedy proposed by Constable Ferguson is thus distinct from a s. 52 remedy that reads in an

par. 24(1) ne soit utilisé que dans le cas des dispositions législatives qui produisent des résultats constitutionnels dans la plupart des cas, et n'ont que rarement un effet inconstitutionnel, ce qui serait censément le cas de l'al. 236*a*) qui prescrit une peine minimale obligatoire. Peu importe la définition que l'on donne du cas « rare », dont il sera traité davantage plus loin, il y a risque que le rôle que devait jouer le par. 52(1) se trouve affaibli et que des dispositions législatives qui devraient être invalidées — parce que leur portée excessive crée un véritable risque que des Canadiens reçoivent un traitement inconstitutionnel — demeurent en vigueur, contrairement à ce que voulaient les rédacteurs de la *Charte*.

(4) La primauté du droit

[67] Comme nous l'avons vu, le gendarme Ferguson invoque avant tout la souplesse pour justifier les exemptions constitutionnelles. Or, celle-ci a un prix. En effet, les exemptions constitutionnelles offrent la souplesse aux dépens de la primauté du droit.

[68] Les principes du constitutionnalisme et de la primauté du droit sont à la base du gouvernement démocratique : *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217. Un principe essentiel de la primauté de droit porte que [TRADUCTION] « le droit doit être accessible et, dans la mesure du possible, intelligible, clair et prévisible » : lord Bingham, « The Rule of Law » (2007), 66 *Cambridge L.J.* 67, p. 69. Le caractère général, la promulgation et la clarté font partie des éléments essentiels de la [TRADUCTION] « moralité qui rend le droit possible » : L. L. Fuller, *The Morality of Law* (2e éd. 1969), p. 33-39.

[69] Les exemptions constitutionnelles à l'égard des dispositions qui prescrivent une peine minimale obligatoire suscitent des inquiétudes quant à la primauté du droit et aux valeurs qui la sous-tendent : la certitude, l'accessibilité, l'intelligibilité, la clarté et la prévisibilité.

[70] Comme nous l'avons vu dans la section précédente, l'exemption constitutionnelle accordée en vertu du par. 24(1) est un recours personnel. La réparation proposée par le gendarme Ferguson se

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exception for a well-defined class of situations — as, for instance, the remedy in *Sharpe*. When a constitutional exemption is granted, the successful claimant receives a personal remedy under s. 24(1), but the law remains on the books, intact. As Wilson J. put it in *Osborne*, the legislation remains as enacted "in its pristine over-inclusive form" (p. 77). The mere possibility of such a remedy thus necessarily generates uncertainty: the law is on the books, but in practice, it may not apply. As constitutional exemptions are actually granted, the law in the statute books will in fact increasingly diverge from the law as applied.

[71] Constitutional exemptions from mandatory minimum sentences leave the law uncertain and unpredictable, as Le Dain J. pointed out in *Smith*. It is up to judges on a case-by-case basis to decide when to strike down a minimum sentence that is inconsistent with the *Charter*, and when to grant an individual exemption under s. 24(1). But the *Charter* is silent on how a judge should make this decision — the decision, literally, of whether the law stands or falls. In theory, all violations could be remedied under s. 24(1), leaving no role for s. 52(1). The only option would be to introduce a meta-rule as to when a s. 24(1) exemption is available and when a declaration of invalidity should be made under s. 52(1). How such a rule should be fashioned — where the line should be drawn — is far from clear. Constitutional exemptions, it is suggested, should be confined to laws that usually operate constitutionally and only occasionally result in constitutional violations. But how is the judge to decide whether the case before her is rare? The bright line required for constitutional certainty is elusive.

distingue donc d'une réparation accordée en application de l'art. 52 qui incorpore une exception pour une catégorie de situations bien définie — comme la réparation accordée dans *Sharpe*. Lorsqu'une exemption constitutionnelle est accordée, le demandeur obtient une réparation personnelle en vertu du par. 24(1), mais la disposition législative demeure intacte dans le corpus législatif. Ainsi que l'a dit la juge Wilson dans *Osborne*, la disposition législative reste en vigueur « dans sa version primitive de portée excessive » (p. 77). La simple possibilité qu'une telle réparation soit accordée crée forcément de l'incertitude : la disposition existe dans le corpus législatif, mais il se peut qu'elle ne s'applique pas, en pratique. À mesure que des exemptions constitutionnelles sont accordées, la disposition qui figure dans le corpus législatif divergera de plus en plus de la règle de droit appliquée.

[71] Les exemptions constitutionnelles en ce qui a trait aux peines minimales obligatoires créent de l'incertitude et de l'imprévisibilité ainsi que l'a souligné le juge Le Dain dans *Smith*. Il appartiendrait aux juges de décider, au cas par cas, quand invalider une peine minimale incompatible avec la *Charte* et quand accorder une exemption individuelle en application du par. 24(1). Or, la *Charte* ne précise pas comment un juge devrait prendre une telle décision — c'est-à-dire décider, littéralement, si la loi doit survivre ou non. En théorie, il serait possible de remédier à toutes les violations grâce au par. 24(1), ce qui ne laisserait aucune place pour l'application du par. 52(1). La seule option consisterait à mettre en application une règle prééminente précisant quand il est possible d'accorder une exemption en vertu du par. 24(1), et quand une déclaration d'invalidité devrait être prononcée en application du par. 52(1). La façon dont une telle règle devrait être formulée — la délimitation qui devrait être fixée — est loin d'être claire. On suggère que les exemptions constitutionnelles ne devraient être accordées qu'en ce qui a trait aux dispositions législatives qui s'appliquent de manière constitutionnelle dans la plupart des cas et qui n'entraînent que rarement une violation de la Constitution. Mais comment un juge peut-il décider si l'affaire dont il a été saisi est rare? La démarcation nette nécessaire pour qu'il y ait certitude constitutionnelle est difficile à tracer.

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[72] The divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — exacts a price paid in the coin of injustice. First, it impairs the right of citizens to know what the law is in advance and govern their conduct accordingly — a fundamental tenet of the rule of law. Second, it risks overapplication of the law; as Le Dain J. noted in *Smith*, the assumed validity of the law may prejudice convicted persons when judges must decide whether to apply it in particular cases. Third, it invites duplication of effort. The matter of constitutionality would not be resolved once and for all as under s. 52(1); in every case where a violation is suspected, the accused would be obliged to seek a constitutional exemption. In so doing, it creates an unnecessary barrier to the effective exercise of the convicted offender's constitutional rights, thereby encouraging uneven and unequal application of the law.

[72] La divergence entre la disposition figurant dans le corpus législatif et la règle de droit appliquée — ainsi que l'incertitude et l'imprévisibilité qui en découlent — a pour conséquence de créer l'injustice. Premièrement, il y a atteinte au droit des citoyens de savoir d'avance ce que prévoit la loi et de se comporter en conséquence — un principe fondamental de la primauté du droit. Deuxièmement, une trop grande application de la loi risque de survenir. En effet, ainsi que l'a mentionné le juge Le Dain dans *Smith*, la présomption de validité de la loi peut avoir des effets préjudiciables sur les personnes déclarées coupables lorsque le juge doit décider s'il doit l'appliquer dans un cas particulier. Troisièmement, il y a ouverture à un dédoublement des efforts. La question de la constitutionnalité n'est pas tranchée une fois pour toute en application du par. 52(1); dans chaque cas où l'on soupçonne qu'il y a eu violation, l'accusé est obligé de demander une exemption constitutionnelle. Il en résulte un obstacle inutile à l'exercice efficace des droits constitutionnels d'un contrevenant déclaré coupable, ce qui encourage une application inégale de la loi.

[73] A final cost of constitutional exemptions from mandatory minimum sentence laws is to the institutional value of effective law making and the proper roles of Parliament and the courts. Allowing unconstitutional laws to remain on the books deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it. Legislatures need clear guidance from the courts as to what is constitutionally permissible and what must be done to remedy legislation that is found to be constitutionally infirm. In granting constitutional exemptions, courts would be altering the state of the law on constitutional grounds without giving clear guidance to Parliament as to what the Constitution requires in the circumstances: Rosenberg and Perrault, at p. 391. Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada.

[73] Enfin, les exemptions constitutionnelles à l'égard des dispositions prescrivant une peine minimale obligatoire porteraient atteinte à la valeur institutionnelle de l'action législative efficace et aux rôles véritables du législateur et des tribunaux. Permettre que des dispositions législatives inconstitutionnelles demeurent dans le corpus législatif empêche le législateur de savoir avec certitude si la disposition législative en cause est constitutionnelle et, partant, le prive de la possibilité de la corriger. Les assemblées législatives ont besoin que les cours de justice leur indiquent clairement ce qui est permis sur le plan constitutionnel et ce qui doit être fait pour corriger une loi jugée inconstitutionnelle. En accordant des exemptions constitutionnelles, les cours de justice modifieraient l'état du droit pour des motifs constitutionnels sans indiquer clairement au législateur ce que la Constitution exige dans les circonstances : Rosenberg et Perrault, p. 391. De mauvaises lois, auxquelles les cours de justice remédient au cas par cas, ne sont pas compatibles avec le rôle et la responsabilité du législateur d'édicter des règles législatives constitutionnelles pour le peuple canadien.

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Grant per McLachlin CJ and Charron J.
Found at **Tab 80, Volume 15** of Google's BOA.

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society": see *R. v. Hufsky*, [1988] 1 S.C.R. 621, and *R. v. Ladouceur*, [1990] 1 S.C.R. 1257.

[57] Here, the officers acknowledged at trial that they did not have legal grounds or reasonable suspicion to detain the accused prior to his incriminating statements. No issue was taken with this concession on appeal. We therefore conclude that the detention was arbitrary and in breach of s. 9.

4. Was the Appellant's Section 10(*b*) Right to Counsel Infringed?

[58] In *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, we conclude that the s. 10(*b*) right to counsel arises immediately upon detention, whether or not the detention is solely for investigative purposes. That being the case, s. 10(*b*) of the *Charter* required the police to advise Mr. Grant that he had the right to speak to a lawyer, and to give him a reasonable opportunity to obtain legal advice if he so chose, before proceeding to elicit incriminating information from him. Because he now faced significant legal jeopardy and had passed into the effective control of the police, the appellant was "in immediate need of legal advice": *R. v. Brydges*, [1990] 1 S.C.R. 190, at p. 206. Because the officers did not believe they had detained the appellant, they did not comply with their obligations under s. 10(*b*). The breach of s. 10(*b*) is established.

B. *Exclusion of the Evidence*

1. Background

[59] When must evidence obtained in violation of a person's *Charter* rights be excluded? Section 24(2) of the *Charter* provides the following answer:

énoncé à l'art. 9 peut, à l'instar des autres droits, être restreint selon l'article premier « par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique » : voir *R. c. Hufsky*, [1988] 1 R.C.S. 621, et *R. c. Ladouceur*, [1990] 1 R.C.S. 1257.

[57] En l'espèce, les policiers ont reconnu au procès qu'ils n'avaient pas de motif juridique ou de soupçon raisonnable les autorisant à détenir l'accusé avant que celui-ci fasse les déclarations incriminantes. Cet aveu n'a pas été contesté en appel. Nous concluons donc que la détention était arbitraire et qu'elle violait l'art. 9.

4. Y a-t-il eu atteinte au droit de l'appelant d'avoir recours à l'assistance d'un avocat garanti par l'al. 10*b*)?

[58] Dans *R. c. Suberu*, 2009 CSC 33, [2009] 2 R.C.S. 460, nous avons conclu que le droit d'avoir recours à l'assistance d'un avocat garanti par l'al. 10*b*) prend naissance dès la mise en détention, que celle-ci serve exclusivement ou non à des fins d'enquête. Il fallait donc que les policiers informent M. Grant de son droit d'avoir recours à l'assistance d'un avocat et qu'ils lui donnent une possibilité raisonnable de s'en prévaloir — si tel était son souhait — avant de tenter d'obtenir de lui des renseignements incriminants. Parce qu'il courait alors un risque important sur le plan juridique et qu'il se trouvait sous l'autorité de la police, l'appelant avait « immédiatement besoin de conseils juridiques » : *R. c. Brydges*, [1990] 1 R.C.S. 190, p. 206. Or les policiers, ne croyant pas l'avoir mis en détention, ne se sont pas conformés aux obligations que leur imposait l'al. 10*b*). La violation de l'al. 10*b*) est donc établie.

B. *L'exclusion d'éléments de preuve*

1. Le contexte

[59] Quand faut-il écarter les éléments de preuve obtenus en violation de droits garantis par la *Charte*? Le paragraphe 24(2) de la *Charte* répond ainsi à cette question :

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

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

[60] The test set out in s. 24(2) — what would bring the administration of justice into disrepute having regard to all the circumstances — is broad and imprecise. The question is what considerations enter into making this determination. In *Collins* and in *R. v. Stillman*, [1997] 1 S.C.R. 607, this Court endeavoured to answer this question. The *Collins/Stillman* framework, as interpreted and applied in subsequent decisions, has brought a measure of certainty to the s. 24(2) inquiry. Yet the analytical method it imposes and the results it sometimes produces have been criticized as inconsistent with the language and objectives of s. 24(2). In order to understand these criticisms, it is necessary to briefly review the holdings in *Collins* and *Stillman*.

[60] Le test établi par cette disposition — ce qui est susceptible de déconsidérer l'administration de la justice, eu égard aux circonstances — est large et imprécis. Il faut donc se demander quels facteurs entrent dans cette appréciation. Notre Cour s'est efforcée de répondre à cette question dans *Collins* et dans *R. c. Stillman*, [1997] 1 R.C.S. 607. Le cadre d'analyse *Collins/Stillman*, tel qu'il a été interprété et appliqué par la jurisprudence subséquente, a apporté un certain degré de certitude quant à l'examen requis par le par. 24(2). Cependant, la méthode analytique qu'il prescrit et les résultats auxquels il aboutit parfois ont été critiqués et ont fait dire à certains qu'ils ne cadraient ni avec le libellé ni avec les objets de la disposition. Pour comprendre ces critiques, il est nécessaire d'examiner brièvement les décisions rendues dans *Collins* et *Stillman*.

[61] In *Collins*, the Court (*per* Lamer J., as he then was) proceeded by grouping the factors to be considered under s. 24(2) into three categories: (1) whether the evidence will undermine the fairness of the trial by effectively conscripting the accused against himself or herself; (2) the seriousness of the *Charter* breach; and (3) the effect of excluding the evidence on the long-term repute of the administration of justice. While Lamer J. acknowledged that these categories were merely a "matter of personal preference" (p. 284), they quickly became formalized as the governing test for s. 24(2).

[61] Dans *Collins*, la Cour (sous la plume du juge Lamer, plus tard Juge en chef) a regroupé les facteurs à prendre en considération pour l'analyse requise par le par. 24(2) en trois catégories portant respectivement sur : (1) l'atteinte à l'équité du procès du fait que la preuve mobilise l'accusé contre lui-même, (2) la gravité de la violation de la *Charte* et (3) l'effet de l'exclusion de la preuve sur la considération dont jouit l'administration de la justice, vue à long terme. Bien que le juge Lamer ait indiqué que ces catégories relevaient simplement d'une préférence personnelle (p. 284), elles ont rapidement acquis le statut de test officiel pour l'application du par. 24(2).

[62] *Collins* shed important light on the factors relevant to determining admissibility of *Charter*-violative evidence under s. 24(2). However, the concepts of trial fairness and conscription under the first branch of *Collins* introduced new problems of

[62] Malgré les précieux éclaircissements que *Collins* a apportés sur les facteurs applicables en matière d'appréciation de l'admissibilité d'éléments de preuve obtenus en violation de la *Charte*, les notions d'équité du procès et de mobilisation du

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their own. Moreover, questions arose about what work (if any) remained to be done under the second and third categories, once conscription leading to trial unfairness had been found. Finally, issues arose as to how to measure the seriousness of the breach under the second branch and what weight, if any, should be put on the seriousness of the offence charged in deciding whether to admit evidence.

premier volet du test ont elles-mêmes soulevé de nouveaux problèmes. En outre, on s'est demandé ce qu'il restait à examiner (le cas échéant) dans les deuxième et troisième catégories de facteurs lorsque la mobilisation qui a entraîné l'inéquité du procès a été établie. Enfin, on s'est interrogé sur la façon de mesurer la gravité de la violation de la *Charte* dans l'examen du deuxième volet de l'analyse et sur le poids à accorder (le cas échéant) à la gravité de l'infraction en cause pour décider de l'admissibilité d'un élément de preuve.

[63] The admission of physical or "real" evidence obtained from the body of the accused in breach of his or her *Charter* rights proved particularly problematic. Ten years after *Collins*, the Court revisited this question in *Stillman*. The majority held that evidence obtained in breach of the *Charter* should, at the outset of the s. 24(2) inquiry, be classified as either "conscriptive" or "non-conscriptive". Evidence would be classified as conscriptive where "an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples": *Stillman*, at para. 80, *per* Cory J. The category of conscriptive evidence was also held to include real evidence discovered as a result of an unlawfully conscripted statement. This is known as derivative evidence.

[63] L'utilisation d'un élément de preuve matérielle obtenu du corps de l'accusé en violation des droits que lui garantit la *Charte* s'est avérée particulièrement problématique. Dix ans après *Collins*, la Cour a réexaminé la question, dans l'arrêt *Stillman*. Les juges majoritaires ont estimé qu'il faut, dès le début de l'analyse requise par le par. 24(2), classer les éléments de preuve obtenus en violation de la *Charte* selon qu'ils sont ou non le fruit de la « mobilisation » de l'accusé contre lui-même. Les éléments de preuve seront de ceux qui découlent de la mobilisation de l'accusé contre lui-même lorsque « [ce dernier], en violation de ses droits garantis par la *Charte*, est forcé de s'incriminer sur l'ordre de l'État au moyen d'une déclaration, de l'utilisation de son corps ou de la production de substances corporelles » : *Stillman*, par. 80, le juge Cory. Il a aussi été jugé que les éléments de preuve matérielle découverts par suite d'une déclaration mobilisant illégalement l'accusé contre lui-même — ce qu'on a appelé preuve dérivée — entrent dans cette catégorie.

[64] *Stillman* held that conscriptive evidence is generally inadmissible — because of its presumed impact on trial fairness — unless if it would have been independently discovered. Despite reminders that "all the circumstances" must always be considered under s. 24(2) (see *R. v. Burlingham*, [1995] 2 S.C.R. 206, *per* Sopinka J., *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, *per* LeBel J.), *Stillman* has generally been read as creating an all-but-automatic exclusionary rule for non-discoverable conscriptive evidence, broadening the category of conscriptive evidence and

[64] Suivant *Stillman*, les éléments de preuve obtenus en mobilisant l'accusé contre lui-même sont généralement inadmissibles — en raison de leur incidence présumée sur l'équité du procès — sauf si elle pouvait être découverte de façon indépendante. Bien que la Cour ait rappelé que l'examen requis par le par. 24(2) doit toujours se faire « eu égard aux circonstances » (voir *R. c. Burlingham*, [1995] 2 R.C.S. 206, le juge Sopinka, et *R. c. Orbanski*, 2005 CSC 37, [2005] 2 R.C.S. 3, le juge LeBel), on considère généralement que *Stillman* a créé une règle d'exclusion virtuellement automatique des

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increasing its importance to the ultimate decision on admissibility.

éléments de preuve obtenus en mobilisant l'accusé contre lui-même et non susceptibles d'être découverts de façon indépendante. Cette interprétation élargit la catégorie des éléments de preuve obtenus en mobilisant l'accusé contre lui-même et augmente son importance pour la décision à rendre en matière d'admissibilité.

[65] This general rule of inadmissibility of all non-discoverable conscriptive evidence, whether intended by *Stillman* or not, seems to go against the requirement of s. 24(2) that the court determining admissibility must consider "all the circumstances". The underlying assumption that the use of conscriptive evidence always, or almost always, renders the trial unfair is also open to challenge. In other contexts, this Court has recognized that a fair trial "is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused": *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 45. It is difficult to reconcile trial fairness as a multifaceted and contextual concept with a near-automatic presumption that admission of a broad class of evidence will render a trial unfair, regardless of the circumstances in which it was obtained. In our view, trial fairness is better conceived as an overarching systemic goal than as a distinct stage of the s. 24(2) analysis.

[65] Cette règle générale de l'inadmissibilité des éléments de preuve qui ont été obtenus en mobilisant l'accusé contre lui-même et qui ne pouvaient être découverts autrement, voulue ou non par l'arrêt *Stillman*, semble aller à l'encontre de l'exigence formulée au par. 24(2) que la cour statuant sur l'admissibilité le fasse « eu égard aux circonstances ». Le postulat sous-jacent selon lequel le recours à une telle preuve rend toujours ou presque le procès inéquitable est lui aussi contestable. En effet, notre Cour a reconnu dans d'autres contextes que le procès équitable est « celui qui répond à l'intérêt qu'a le public à connaître la vérité, tout en préservant l'équité fondamentale en matière de procédure pour l'accusé » : *R. c. Harrer*, [1995] 3 R.C.S. 562, par. 45. La notion complexe et contextuelle d'équité du procès se concilie mal avec une présomption quasi automatique selon laquelle l'utilisation d'une vaste catégorie d'éléments de preuve compromet l'équité du procès sans égard aux circonstances de leur obtention. À notre avis, il convient davantage de concevoir l'équité du procès comme un but systémique général plutôt que comme une étape distincte de l'analyse requise par le par. 24(2).

[66] This brief review of the impact of *Collins* and *Stillman* brings us to the heart of our inquiry on this appeal: clarification of the criteria relevant to determining when, in "all the circumstances", admission of evidence obtained by a *Charter* breach "would bring the administration of justice into disrepute".

[66] Ce bref examen de l'effet des arrêts *Collins* et *Stillman* nous amène au cœur de ce qui nous occupe en l'espèce : la clarification des facteurs pertinents pour déterminer quand, « eu égard aux circonstances », l'utilisation d'éléments de preuve obtenus par suite d'une violation de la *Charte* serait « susceptible de déconsidérer l'administration de la justice ».

2. Overview of a Revised Approach to Section 24(2)

2. Aperçu de la nouvelle méthode pour procéder à l'examen requis par le par. 24(2)

[67] The words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice. The term "administration of justice" is

[67] Le libellé du par. 24(2) en exprime bien l'objet : préserver la considération dont jouit l'administration de la justice. L'expression « administration

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often used to indicate the processes by which those who break the law are investigated, charged and tried. More broadly, however, the term embraces maintaining the rule of law and upholding *Charter* rights in the justice system as a whole.

de la justice » est souvent employée pour désigner les processus d'enquête, d'accusation et de jugement qui entrent en jeu en cas de non-respect de la loi. Toutefois, elle englobe de façon plus générale le maintien des droits garantis par la *Charte* et du principe de la primauté du droit dans l'ensemble du système de justice.

[68] The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

[68] L'expression « déconsidérer l'administration de la justice » doit être prise dans l'optique du maintien à long terme de l'intégrité du système de justice et de la confiance à son égard. Certes, l'exclusion d'éléments de preuve qui aboutit à un acquittement peut provoquer des critiques sur le coup. Il n'en demeure pas moins que les réactions immédiates, dans des cas particuliers, ne sont pas visées par l'objet du par. 24(2). Cette disposition concerne plutôt l'appréciation de l'effet à long terme de l'utilisation d'éléments de preuve sur la considération globale dont jouit le système de justice et suppose un examen de nature objective, qui vise à déterminer si une personne raisonnable, au fait de l'ensemble des circonstances pertinentes et des valeurs sous-jacentes de la *Charte*, conclurait que l'utilisation d'éléments de preuve donnés serait susceptible de déconsidérer l'administration de la justice.

[69] Section 24(2)'s focus is not only long-term, but prospective. The fact of the *Charter* breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.

[69] L'objet du par. 24(2) n'est pas seulement à long terme, il est également prospectif. L'existence d'une violation de la *Charte* signifie que l'administration de la justice a déjà été mise à mal. Le paragraphe 24(2) part de là et vise à faire en sorte que les éléments de preuve obtenus au moyen de cette violation ne déconsidèrent pas davantage le système de justice.

[70] Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.

[70] Enfin, le par. 24(2) a un objet sociétal. Il ne vise pas à sanctionner la conduite des policiers ou à dédommager l'accusé, il a plutôt une portée systémique. Il se rapporte aux importantes répercussions de l'utilisation d'éléments de preuve sur la considération à long terme portée au système de justice.

[71] A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public

[71] Il ressort de la jurisprudence et de la doctrine qu'il faut, pour déterminer si l'utilisation d'un élément de preuve obtenue en violation de la *Charte* déconsidérerait l'administration de la justice, examiner trois questions tirant chacune leur origine des

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interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

(a) *Seriousness of the Charter-Infringing State Conduct*

[72] The first line of inquiry relevant to the s. 24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct. The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.

[73] This inquiry therefore necessitates an evaluation of the seriousness of the state conduct that led

intérêts publics sous-jacents au par. 24(2), considérés à long terme dans une perspective sociétale prospective. Ainsi, le tribunal saisi d'une demande d'exclusion fondée sur le par. 24(2) doit évaluer et mettre en balance l'effet que l'utilisation des éléments de preuve aurait sur la confiance de la société envers le système de justice en tenant compte de : (1) la gravité de la conduite attentatoire de l'État (l'utilisation peut donner à penser que le système de justice tolère l'inconduite grave de la part de l'État), (2) l'incidence de la violation sur les droits de l'accusé garantis par la *Charte* (l'utilisation peut donner à penser que les droits individuels ont peu de poids) et (3) l'intérêt de la société à ce que l'affaire soit jugée au fond. Le rôle du tribunal appelé à trancher une demande fondée sur le par. 24(2) consiste à procéder à une mise en balance de chacune de ces questions pour déterminer si, eu égard aux circonstances, l'utilisation d'éléments de preuve serait susceptible de déconsidérer l'administration de la justice. Bien qu'elles ne recoupent pas exactement les catégories élaborées dans *Collins*, ces questions visent les facteurs pertinents pour trancher une demande fondée sur le par. 24(2), tels qu'ils ont été formulés dans *Collins* et dans la jurisprudence subséquente.

a) *La gravité de la conduite attentatoire de l'État*

[72] Lorsqu'il se penche sur la première question à se poser dans le cadre de l'analyse requise par le par. 24(2), le tribunal doit évaluer si l'utilisation d'éléments de preuve déconsidérerait l'administration de la justice en donnant à penser que les tribunaux, en tant qu'institution devant répondre de l'administration de la justice, tolèrent en fait les entorses de l'État au principe de la primauté du droit en ne se dissociant pas du fruit de ces conduites illégales. Plus les gestes ayant entraîné la violation de la *Charte* par l'État sont graves ou délibérés plus il est nécessaire que les tribunaux s'en dissocient en excluant les éléments de preuve ainsi acquis, afin de préserver la confiance du public envers le principe de la primauté du droit et de faire en sorte que l'État s'y conforme.

[73] Cet examen requiert donc l'évaluation de la gravité de la conduite de l'État ayant donné lieu à

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to the breach. The concern of this inquiry is not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes. In order to determine the effect of admission of the evidence on public confidence in the justice system, the court on a s. 24(2) application must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the *Charter*.

[74] State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

[75] Extenuating circumstances, such as the need to prevent the disappearance of evidence, may attenuate the seriousness of police conduct that results in a *Charter* breach: *R. v. Silveira*, [1995] 2 S.C.R. 297, *per* Cory J. "Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: *R. v. Genest*, [1989] 1 S.C.R. 59, at p. 87, *per* Dickson C.J.; *R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 32-33, *per* Sopinka J.; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59. Wilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established *Charter* standards tends

la violation. Il ne s'effectue pas dans le but de sanctionner la conduite des policiers ou pour prévenir d'autres violations par la dissuasion, bien qu'un tel résultat puisse être heureux. Son but principal est de préserver la confiance du public envers le principe de la primauté du droit et envers les processus qui le mettent en œuvre. Pour évaluer l'effet de l'utilisation d'éléments de preuve sur la confiance du public envers le système de justice, le tribunal saisi d'une demande fondée sur le par. 24(2) doit examiner l'importance de l'atteinte sous l'angle de la gravité de la conduite répréhensible des autorités étatiques qui, en vertu du principe de la primauté du droit, sont tenues de respecter les droits garantis par la *Charte*.

[74] Les gestes de l'État résultant en une violation de la *Charte* n'ont pas tous la même gravité. À une extrémité de l'éventail des possibilités, l'utilisation d'éléments de preuve obtenus par suite de violations mineures ou commises par inadvertance peut ébranler minimalement la confiance du public à l'égard de la primauté du droit. Par ailleurs, à l'autre extrémité, celle d'éléments de preuve obtenus au mépris délibéré des droits garantis par la *Charte* ou en ne s'en souciant pas aura nécessairement une incidence néfaste sur cette confiance et risquera de déconsidérer l'administration de la justice.

[75] Il se peut que des circonstances atténuantes, telle la nécessité d'empêcher la disparition d'éléments de preuve, réduise la gravité d'actions policières contraires à la *Charte* : *R. c. Silveira*, [1995] 2 R.C.S. 297, le juge Cory. De même, le tribunal aura moins à se dissocier de la conduite de la police lorsque celle-ci a agi de « bonne foi », quoiqu'il soit impératif de ne pas récompenser ou encourager l'ignorance des règles établies par la *Charte* et de ne pas assimiler la négligence ou l'aveuglement volontaire à la bonne foi : *R. c. Genest*, [1989] 1 R.C.S. 59, p. 87, le juge en chef Dickson; *R. c. Kokesch*, [1990] 3 R.C.S. 3, p. 32-33, le juge Sopinka; *R. c. Buhay*, 2003 CSC 30, [2003] 1 R.C.S. 631, par. 59. Le non-respect délibéré ou manifeste de la *Charte* de la part de ceux-là mêmes qui sont chargés du maintien des droits qui y sont garantis peut dicter au tribunal de se dissocier d'une telle conduite. Il s'ensuit que des gestes policiers contrevenant

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to support exclusion of the evidence. It should also be kept in mind that for every *Charter* breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the *Charter*-infringing conduct was part of a pattern of abuse tends to support exclusion.

délibérément aux règles établies par la *Charte* tendront à fonder l'exclusion des éléments de preuve. Il faut également garder à l'esprit que pour chaque violation de la *Charte* qui aboutit devant les tribunaux, il en existe un grand nombre qui ne sont ni révélées ni corrigées parce qu'elles n'ont pas permis de recueillir d'éléments de preuve pouvant mener à des accusations. Compte tenu de la nécessité que les tribunaux se distancient de tels comportements, la preuve que des actes portant atteinte à la *Charte* s'inscrivent dans un contexte d'abus tend à fonder l'exclusion.

(b) *Impact on the Charter-Protected Interests of the Accused*

b) *L'incidence de la violation sur les droits de l'accusé garantis par la Charte*

[76] This inquiry focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

[76] L'examen de cette question met l'accent sur l'importance de l'effet qu'a la violation de la *Charte* sur les droits qui y sont garantis à l'accusé, et il impose d'évaluer la portée réelle de l'atteinte aux intérêts protégés par le droit en cause. Cet effet peut être passager ou d'ordre simplement formel comme il peut être profondément attentatoire. Plus il est marqué, plus l'utilisation des éléments de preuve risque de donner à penser que les droits garantis par la *Charte*, pour encensés qu'ils soient, ne revêtent pas d'utilité réelle pour les citoyens, ce qui engendrerait le cynisme et déconsidérerait l'administration de la justice.

[77] To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. For example, the interests engaged in the case of a statement to the authorities obtained in breach of the *Charter* include the s. 7 right to silence, or to choose whether or not to speak to authorities (*Hebert*) — all stemming from the principle against self-incrimination: *R. v. White*, [1999] 2 S.C.R. 417, at para. 44. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.

[77] Pour juger de la gravité de la violation dans cette perspective, nous examinons les intérêts protégés par le droit transgressé, puis évaluons l'ampleur des conséquences de la violation sur ces intérêts. Par exemple, les intérêts mis en jeu par une déclaration obtenue en violation de la *Charte* comprennent le droit de garder le silence ou de décider de parler ou non aux autorités garanti à l'art. 7 (*Hebert*) — qui découlent tous du principe interdisant l'auto-incrimination : *R. c. White*, [1999] 2 R.C.S. 417, par. 44. Le risque que l'utilisation des éléments de preuve déconsidère l'administration de la justice augmente en fonction de la gravité de l'empiétement sur ces intérêts.

[78] Similarly, an unreasonable search contrary to s. 8 of the *Charter* may impact on the protected

[78] De la même façon, une fouille ou perquisition abusive contraire à l'art. 8 de la *Charte* peut

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interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.

(c) *Society's Interest in an Adjudication on the Merits*

[79] Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": *R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1219-20. Thus the Court suggested in *Collins* that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of *failing to admit* the evidence.

[80] The concern for truth-seeking is only one of the considerations under a s. 24(2) application. The view that reliable evidence is admissible regardless of how it was obtained (see *R. v. Wray*, [1971] S.C.R. 272) is inconsistent with the *Charter*'s affirmation of rights. More specifically, it is inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.

[81] This said, public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. The reliability of the evidence is an important factor in this line of inquiry. If a breach (such as one that effectively compels the suspect to talk) undermines the reliability of the evidence,

avoir une incidence sur les intérêts protégés se rattachant à la vie privée et, plus généralement, à la dignité humaine. La fouille ou perquisition abusive qui est effectuée dans un contexte d'attente raisonnablement élevée en matière de vie privée ou qui porte atteinte à la dignité individuelle est plus grave.

c) *L'intérêt de la société à ce que l'affaire soit jugée au fond*

[79] La société s'attend généralement à ce que les accusations criminelles soient jugées au fond. C'est pourquoi la troisième question à examiner dans le cadre de l'analyse requise par le par. 24(2) vise à déterminer si la fonction de recherche de la vérité que remplit le procès criminel est mieux servie par l'utilisation ou par l'exclusion d'éléments de preuve. Cet examen incorpore l'« intérêt [de la société] à s'assurer que ceux qui transgressent la loi soient traduits en justice et traités selon la loi » : *R. c. Askov*, [1990] 2 R.C.S. 1199, p. 1219. C'est ainsi que la Cour a indiqué, dans *Collins*, que le juge saisi d'une demande fondée sur le par. 24(2) doit tenir compte non seulement des répercussions négatives qu'aurait l'utilisation des éléments de preuve sur la considération dont jouit l'administration de la justice, mais également de celles qu'aurait leur *exclusion*.

[80] La recherche de la vérité n'est pas le seul élément à considérer dans le cadre d'une demande fondée sur le par. 24(2). L'opinion voulant que des éléments de preuve fiables soient admissibles peu importe la façon dont ils ont été obtenus (voir *R. c. Wray*, [1971] R.C.S. 272) est incompatible avec la déclaration de droits énoncée dans la *Charte* et, plus particulièrement, avec le libellé du par. 24(2) qui requiert un large examen de l'ensemble des circonstances, et non la seule appréciation de la fiabilité des éléments de preuve en cause.

[81] Cela étant dit, l'intérêt du public pour la recherche de la vérité demeure un élément pertinent de l'analyse requise par le par. 24(2), et la fiabilité des éléments de preuve est un facteur important à cet égard. Il pourra y avoir lieu d'exclure des éléments de preuve si une violation (par exemple,

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this points in the direction of exclusion of the evidence. The admission of unreliable evidence serves neither the accused's interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

[82] The fact that the evidence obtained in breach of the *Charter* may facilitate the discovery of the truth and the adjudication of a case on its merits must therefore be weighed against factors pointing to exclusion, in order to "balance the interests of truth with the integrity of the justice system": *Mann*, at para. 57, *per* Iacobucci J. The court must ask "whether the vindication of the specific *Charter* violation through the exclusion of evidence exacts too great a toll on the truth-seeking goal of the criminal trial": *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 47, *per* Doherty J.A.

[83] The importance of the evidence to the prosecution's case is another factor that may be considered in this line of inquiry. Like Deschamps J., we view this factor as corollary to the inquiry into reliability, in the following limited sense. The admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.

[84] It has been suggested that the judge should also, under this line of inquiry, consider the seriousness of the offence at issue. Indeed, Deschamps J. views this factor as very important, arguing that the more serious the offence, the greater society's interest in its prosecution (para. 226). In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut

contraindre un suspect à parler) en compromet la fiabilité. L'utilisation d'éléments de preuve non fiables ne sert en effet ni l'intérêt qu'a l'accusé à bénéficier d'un procès équitable ni l'intérêt qu'a le public à découvrir la vérité. À l'inverse, l'exclusion d'éléments de preuve pertinents et fiables risque de compromettre la fonction de recherche de la vérité du système de justice et de rendre le procès inéquitable aux yeux du public, ce qui déconsidérerait l'administration de la justice.

[82] Il faut donc soupeser l'utilité des éléments de preuve obtenus en violation de la *Charte* pour faciliter la découverte de la vérité et amener une décision au fond par rapport aux facteurs tendant à leur exclusion afin de « mettre en balance l'intérêt de l'État à découvrir la vérité d'une part et l'intégrité du système judiciaire d'autre part » : *Mann*, par. 57, le juge Iacobucci. Le tribunal doit se demander [TRADUCTION] « si la sanction de l'atteinte à la *Charte* par l'exclusion de l'élément de preuve entrave trop sévèrement l'objectif du procès pénal qu'est la recherche de la vérité » : *R. c. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (C.A. Ont.), par. 47, le juge Doherty.

[83] L'importance des éléments de preuve pour la poursuite est un autre facteur à prendre en considération. Comme la juge Deschamps, nous estimons qu'il s'agit là d'un corollaire à l'examen de la fiabilité, au sens restreint où l'utilisation d'un élément de preuve d'une fiabilité douteuse est davantage susceptible de déconsidérer l'administration de la justice lorsqu'il représente la totalité de la preuve de la poursuite. À l'inverse, l'exclusion d'éléments de preuve d'une grande fiabilité peut être plus dommageable pour la considération dont jouit l'administration de la justice si, en réalité, cette mesure est fatale pour la poursuite.

[84] D'aucuns font valoir que la gravité de l'infraction reprochée doit également être prise en considération. La juge Deschamps estime d'ailleurs qu'il s'agit d'un élément important de l'analyse et que plus l'infraction est grave plus la société a intérêt à ce qu'il y ait un procès (par. 226). Nous estimons pour notre part que s'il peut effectivement s'agir d'un facteur valide, c'en est un qui peut jouer dans

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both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in *Collins*, "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[85] To review, the three lines of inquiry identified above — the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and the societal interest in an adjudication on the merits — reflect what the s. 24(2) judge must consider in assessing the effect of admission of the evidence on the repute of the administration of justice. Having made these inquiries, which encapsulate consideration of "all the circumstances" of the case, the judge must then determine whether, on balance, the admission of the evidence obtained by *Charter* breach would bring the administration of justice into disrepute.

[86] In all cases, it is the task of the trial judge to weigh the various indications. No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible. However, the preceding analysis creates a decision tree, albeit more flexible than the *Stillman* self-incrimination test. We believe this to be required by the words of s. 24(2). We also take comfort in the fact that patterns emerge with respect to

les deux sens. L'exclusion d'éléments de preuve qui empêche l'examen judiciaire d'une infraction grave peut avoir un effet immédiat sur la perception publique du système de justice, mais nous le répétons, c'est la considération dont il jouit à long terme qui importe pour l'application du par. 24(2). Comme la Cour l'a indiqué dans *Burlingham*, les objectifs visés par le par. 24(2) « s'appliquent indépendamment du genre de crime reproché à l'accusé » (par. 51). Le juge Lamer a également fait remarquer, dans *Collins*, que « [l]a *Charte* vise à protéger l'accusé contre la majorité, donc la mise en application de la *Charte* ne doit pas être laissée à cette majorité » (p. 282). La clameur publique immédiate exigeant une condamnation ne doit pas faire perdre de vue au juge appelé à appliquer le par. 24(2) la réputation à plus long terme du système de justice. En outre, si la gravité d'une infraction accroît l'intérêt du public à ce qu'il y ait un jugement au fond, l'intérêt du public en l'irréprochabilité du système de justice n'est pas moins vital, particulièrement lorsque l'accusé encourt de lourdes conséquences pénales.

[85] En résumé, les trois questions à examiner énumérées plus haut — la gravité de la conduite attentatoire de l'État, l'incidence de la violation sur les droits de l'accusé garantis par la *Charte* et l'intérêt de la société à ce que l'affaire soit jugée au fond — rendent compte de ce que doit examiner le juge saisi d'une demande fondée sur le par. 24(2) pour juger de l'effet de l'utilisation d'éléments de preuve sur la considération dont jouit l'administration de la justice. Après avoir examiné ces questions, qui englobent « toutes les circonstances » de l'affaire, le juge doit déterminer si, tout compte fait, l'utilisation des éléments de preuve obtenus en violation de la *Charte* déconsidérerait l'administration de la justice.

[86] C'est toujours au juge du procès qu'il revient de mettre en balance les différents facteurs. Aucune règle prépondérante ne régit cet exercice, qui ne peut manifestement pas être effectué avec une précision mathématique. La grille d'analyse décrite précédemment fournit cependant un arbre décisionnel, quoique plus souple que le critère établi par *Stillman* fondé sur l'auto-incrimination. Nous sommes d'avis que c'est ce que requiert le libellé

particular types of evidence. These patterns serve as guides to judges faced with s. 24(2) applications in future cases. In this way, a measure of certainty is achieved. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.

3. Application to Different Kinds of Evidence

[87] We have seen that a trial judge on a s. 24(2) application for exclusion of evidence obtained in breach of the *Charter* must consider whether admission would bring the administration of justice into disrepute, having regard to the results of the three lines of inquiry identified above.

[88] We now turn to some of the types of evidence the cases have considered.

(a) *Statements by the Accused*

[89] Statements by the accused engage the principle against self-incrimination, "one of the cornerstones of our criminal law": *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 2. This Court in *White*, at para. 44, *per* Iacobucci J., described the principle against self-incrimination as "an overarching principle within our criminal justice system, from which a number of specific common law and *Charter* rules emanate, such as the confessions rule, and the right to silence". The principle also informs "more specific procedural protections such as, for example, the right to counsel in s. 10(*b*), the right to non-compellability in s. 11(*c*), and the right to use immunity set out in s. 13". Residual protection for the principle against self-incrimination is derived from s. 7.

[90] This case concerns s. 24(2). However, it is important to note at the outset that the common law

du par. 24(2). Nous sommes également rassurées par le fait que des tendances se dessinent quant à des types de preuve particuliers. Elles pourront servir de guides pour les juges appelés à trancher des demandes fondées sur le par. 24(2). Ainsi, on atteint une certitude relative. Lorsque le juge a examiné les bons facteurs, les cours d'appel devraient faire preuve d'une retenue considérable à l'égard de la décision rendue.

3. Application aux différents types de preuve

[87] Nous avons vu que le juge de première instance saisi d'une demande fondée sur le par. 24(2) visant l'exclusion d'éléments de preuve obtenus en violation de la *Charte* doit déterminer si l'utilisation de ces éléments déconsidérerait l'administration de la justice, en fonction des conclusions qu'il tire de l'examen des trois questions décrites précédemment.

[88] Voyons maintenant certains types d'éléments de preuve qui ont été examinés par les tribunaux.

a) *Les déclarations faites par l'accusé*

[89] Les déclarations d'un accusé mettent en jeu le principe interdisant l'auto-incrimination, « l'une des pierres angulaires de notre droit criminel » : *R. c. Henry*, 2005 CSC 76, [2005] 3 R.C.S. 609, par. 2, que notre Cour, sous la plume du juge Iacobucci, a décrit comme suit dans *White* : « . . . un principe prépondérant dans notre système de justice criminelle, duquel émanent un certain nombre de règles issues de la common law et de la *Charte*, comme la règle des confessions et le droit de garder le silence . . . » (par. 44). Ce principe est également à la base de « plusieurs protections procédurales plus précises, comme, par exemple, le droit à l'avocat selon l'al. 10*b*), le droit à la non-contraignabilité selon l'al. 11*c*) et le droit à l'immunité contre l'utilisation de la preuve selon l'art. 13 ». L'article 7 lui confère en outre une protection résiduelle contre l'auto-incrimination.

[90] Le présent pourvoi porte sur le par. 24(2). Il importe toutefois de signaler d'entrée de jeu que

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Found at Tab 62, Volume 12 of Google's BOA.

Antal Babos *Appellant*

v.

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- and -

Sergio Piccirilli *Appellant*

v.

Her Majesty The Queen *Respondent*

Antal Babos *Appelant*

c.

Sa Majesté la Reine *Intimée*

- et -

Sergio Piccirilli *Appelant*

c.

Sa Majesté la Reine *Intimée*

2014 SCC 16 (CanLII)

INDEXED AS: R. *v.* BABOS

2014 SCC 16

File No.: 34824.

2013: October 9; 2014: February 21.

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

RÉPERTORIÉ : R. *c.* BABOS

2014 CSC 16

N° du greffe : 34824.

2013 : 9 octobre; 2014 : 21 février.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Stay of proceedings — Abuse of process — Accused charged with offences related to firearms and importation, production and trafficking of methamphetamine — Accused alleging Crown misconduct in obtaining medical records, police collusion to mislead court, and Crown threats pressuring accused to plead guilty — Trial judge staying proceedings — Whether stay of proceedings necessary to protect integrity of justice system.

The accused were charged with numerous firearms offences, as well as offences related to the importation, production and trafficking of methamphetamine. During the course of the trial, the accused brought an application to stay the proceedings for abuse of process. They took issue with three forms of state misconduct: attempts by the Crown to intimidate them into foregoing their right to a trial by threatening them with additional charges should they choose to plead not guilty, collusion on the part of two police officers to mislead the court about the seizure of a firearm, and improper means used by the Crown in obtaining the medical records of one of the

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit criminel — Arrêt des procédures — Abus de procédure — Accusés inculpés d'infractions relatives aux armes à feu et à l'importation, à la production et au trafic de méthamphétamine — Accusés allèguent des comportements répréhensibles du ministère public en ce qui a trait à l'obtention d'un dossier médical, à de la collusion entre policiers pour induire le tribunal en erreur et à des menaces proférées par la substitut du procureur général pour inciter les accusés à plaider coupable — Arrêt des procédures ordonné par le juge du procès — L'arrêt des procédures était-il nécessaire pour protéger l'intégrité du système judiciaire?

Les accusés ont été inculpés de nombreuses infractions liées aux armes à feu et d'autres infractions relatives à l'importation, à la production et au trafic de méthamphétamine. Durant le procès, les accusés ont présenté une demande d'arrêt des procédures pour abus de procédure. Ils se plaignaient de trois actes répréhensibles du ministère public, soit du fait que la substitut du procureur général a essayé plusieurs fois de les intimider pour qu'ils renoncent à leur droit à un procès en les menaçant de porter d'autres accusations contre eux s'ils décidaient de nier leur culpabilité; que deux agents de police se sont concertés pour induire le tribunal en erreur au sujet

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Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 11(*b*), 24.
Criminal Code, R.S.C. 1985, c. C-46, ss. 574(1)(*b*), 577.

APPEALS from a judgment of the Quebec Court of Appeal (Duval Hesler C.J. and Chamberland and Doyon JJ.A.), 2012 QCCA 471, [2012] J.Q. nº 2107 (QL), 2012 CarswellQue 1987, SOQUIJ AZ-50839397, setting aside the stay of proceedings entered by Garneau J. and ordering a new trial, 2008 QCCQ 11373, [2008] J.Q. nº 12838 (QL), 2008 CarswellQue 12200, SOQUIJ AZ-50525272. Appeals dismissed, Abella J. dissenting.

Franco Schiro and *Xuan Trung Nguyen*, for the appellant Antal Babos.

Guylaine Tardif, *Jean-Pierre Pilon* and *Maxime Wilkins*, for the appellant Sergio Piccirilli.

Gilles Villeneuve and *François Lacasse*, for the respondent.

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

MOLDAVER J. —

I. Introduction

[1] This appeal provides the Court with an opportunity to revisit the law of abuse of process as it relates to state conduct that impinges on the integrity of the justice system but does not affect trial fairness — sometimes referred to as the "residual category" of cases for which a judicial stay of proceedings may be ordered. In particular, we are tasked with clarifying the approach to be followed when determining whether a stay of proceedings should be ordered where such conduct is uncovered.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 8, 11*b*), 24.
Code criminel, L.R.C. 1985, ch. C-46, art. 574(1)*b*), 577.

POURVOIS contre un arrêt de la Cour d'appel du Québec (la juge en chef Duval Hesler et les juges Chamberland et Doyon), 2012 QCCA 471, [2012] J.Q. nº 2107 (QL), 2012 CarswellQue 1987, SOQUIJ AZ-50839397, qui a annulé l'arrêt des procédures ordonné par le juge Garneau et ordonné la tenue d'un nouveau procès, 2008 QCCQ 11373, [2008] J.Q. nº 12838 (QL), 2008 CarswellQue 12200, SOQUIJ AZ-50525272. Pourvois rejetés, la juge Abella est dissidente.

Franco Schiro et *Xuan Trung Nguyen*, pour l'appelant Antal Babos.

Guylaine Tardif, *Jean-Pierre Pilon* et *Maxime Wilkins*, pour l'appelant Sergio Piccirilli.

Gilles Villeneuve et *François Lacasse*, pour l'intimée.

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

LE JUGE MOLDAVER —

I. Introduction

[1] Le présent pourvoi donne à la Cour l'occasion de revoir les règles régissant l'abus de procédure auxquelles sont assujettis les comportements de l'État qui portent atteinte à l'intégrité du système de justice, mais ne nuisent pas à l'équité du procès. Ce sont les comportements qui font partie de ce qu'on appelle parfois la « catégorie résiduelle » de cas où le tribunal peut ordonner l'arrêt des procédures. Plus particulièrement, il nous incombe de préciser la marche à suivre pour décider s'il y a lieu d'ordonner l'arrêt des procédures lorsqu'une telle conduite est dévoilée.

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determination that the officers' conduct amounted to collusion lacked an evidentiary foundation.

[27] With respect to Ms. Kovacevich's conduct in securing Mr. Piccirilli's medical records, Doyon J.A. concluded that there was no misconduct and that the trial judge committed another palpable and overriding error in finding otherwise. Mr. Piccirilli put his medical condition in issue and at least implicitly waived his right to invoke confidentiality in the information. The Crown was free to seek evidence to contradict Mr. Piccirilli's assertions for purposes of resisting his application for interim release.

[28] Having reassessed the facts, Doyon J.A. observed that Ms. Tremblay's threats remained the sole cause of concern. In assessing whether those threats warranted a stay, he noted that they were uttered months before trial, by a Crown who was replaced before trial, and about whom the appellants did not complain until after their trial had been in progress for at least six months. In his view, this did not amount to an extreme case that required a stay of proceedings.

IV. Issues

[29] The narrow issue on appeal is whether the trial judge erred in granting a stay of proceedings. More broadly, we are tasked with clarifying the proper analysis to be undertaken when a stay of proceedings is sought for prior state conduct that is said to impinge on the integrity of the justice system.

V. Analysis

A. *Abuse of Process and Stays of Proceedings*

[30] A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It

livré des témoignages différents. La décision du juge du procès que la conduite des agents était assimilable à de la collusion n'était fondée sur aucune preuve.

[27] Pour ce qui est de l'obtention, par M^e^ Kovacevich, du dossier médical de M. Piccirilli, le juge Doyon a conclu qu'il ne s'agissait pas d'un acte répréhensible et que le juge du procès avait commis une autre erreur manifeste et dominante en concluant le contraire. M. Piccirilli a mis en cause ses problèmes de santé et a renoncé, à tout le moins implicitement, à son droit d'invoquer le caractère confidentiel des renseignements. Ainsi, il était loisible au ministère public de tenter d'obtenir des éléments de preuve pour contredire les affirmations de M. Piccirilli dans le but de s'opposer à sa demande de libération provisoire.

[28] Après avoir réexaminé les faits, le juge Doyon a fait observer que seules les menaces de M^e^ Tremblay posaient encore problème. Au moment de déterminer si ces menaces justifiaient l'arrêt des procédures, il a souligné qu'elles avaient été proférées des mois avant le procès par une substitut du procureur général remplacée avant le procès et que les appelants ne s'en sont pas plaints avant au moins six mois après l'ouverture du procès. À son avis, il ne s'agissait pas d'un cas extrême où l'arrêt des procédures s'impose.

IV. Questions en litige

[29] La question précise qui se pose en l'espèce est celle de savoir si le juge du procès a eu tort d'ordonner l'arrêt des procédures. D'un point de vue plus général, nous sommes appelés à clarifier l'analyse qu'il convient de faire lorsqu'on demande l'arrêt des procédures en raison d'actes antérieurs de l'État qui porteraient atteinte à l'intégrité du système de justice.

V. Analyse

A. *Abus de procédure et arrêt des procédures*

[30] L'arrêt des procédures est la réparation la plus draconienne qu'une cour criminelle puisse accorder (*R. c. Regan*, 2002 CSC 12, [2002]

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permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.

[31] Nonetheless, this Court has recognized that there are rare occasions — the "clearest of cases" — when a stay of proceedings for an abuse of process will be warranted (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) (*O'Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.

[32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:

(1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);

(2) There must be no alternative remedy capable of redressing the prejudice; and

(3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).

1 R.C.S. 297, par. 53). Il met un terme de façon définitive à la poursuite de l'accusé, ce qui a pour effet d'entraver la fonction de recherche de la vérité du procès et de priver le public de la possibilité de voir justice faite sur le fond. En outre, dans bien des cas, l'arrêt des procédures empêche les victimes alléguées d'actes criminels de se faire entendre.

[31] La Cour a néanmoins reconnu qu'il existe de rares cas — les « cas les plus manifestes » — dans lesquels un abus de procédure justifie l'arrêt des procédures (*R. c. O'Connor*, [1995] 4 R.C.S. 411, par. 68). Ces cas entrent généralement dans deux catégories : (1) ceux où la conduite de l'État compromet l'équité du procès de l'accusé (la catégorie « principale »); (2) ceux où la conduite de l'État ne présente aucune menace pour l'équité du procès, mais risque de miner l'intégrité du processus judiciaire (la catégorie « résiduelle ») (*O'Connor*, par. 73). La conduite attaquée en l'espèce ne met pas en cause la catégorie principale. Elle fait plutôt nettement partie de la deuxième catégorie.

[32] Le test servant à déterminer si l'arrêt des procédures se justifie est le même pour les deux catégories et comporte trois exigences :

(1) Il doit y avoir une atteinte au droit de l'accusé à un procès équitable ou à l'intégrité du système de justice qui « sera révélé[e], perpétué[e] ou aggravé[e] par le déroulement du procès ou par son issue » (*Regan*, par. 54);

(2) Il ne doit y avoir aucune autre réparation susceptible de corriger l'atteinte;

(3) S'il subsiste une incertitude quant à l'opportunité de l'arrêt des procédures à l'issue des deux premières étapes, le tribunal doit mettre en balance les intérêts militant en faveur de cet arrêt, comme le fait de dénoncer la conduite répréhensible et de préserver l'intégrité du système de justice, d'une part, et « l'intérêt que représente pour la société un jugement définitif statuant sur le fond », d'autre part (*ibid.*, par. 57).

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[33] The test is the same for both categories because concerns regarding trial fairness and the integrity of the justice system are often linked and regularly arise in the same case. Having one test for both categories creates a coherent framework that avoids "schizophrenia" in the law (*O'Connor*, at para. 71). But while the framework is the same for both categories, the test may — and often will — play out differently depending on whether the "main" or "residual" category is invoked.

[34] Commencing with the first stage of the test, when the main category is invoked, the question is whether the accused's right to a fair trial has been prejudiced and whether that prejudice will be carried forward through the conduct of the trial; in other words, the concern is whether there is *ongoing* unfairness to the accused.

[35] By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.

[36] In *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, this Court described the residual category in the following way:

> For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well — society will not

[33] Le test est le même pour les deux catégories parce que les problèmes touchant l'équité du procès et ceux touchant l'intégrité du système de justice sont souvent liés et se posent couramment dans la même affaire. Le recours à un seul test pour les deux catégories crée un cadre cohérent qui permet d'éviter une « dichotomie » inutile dans le droit (*O'Connor*, par. 71). Cela dit, bien que le cadre d'analyse soit le même pour les deux catégories, le test pourra s'appliquer — et s'appliquera souvent — différemment, selon qu'on invoque la catégorie « principale » ou la catégorie « résiduelle ».

[34] Passons d'abord à la première étape du test. Lorsqu'on invoque la catégorie principale, la question est celle de savoir s'il y a eu atteinte au droit de l'accusé à un procès équitable et si cette atteinte sera perpétuée par le déroulement du procès; autrement dit, il faut chercher à savoir s'il y a une injustice *persistante* envers l'accusé.

[35] Par contre, lorsque la catégorie résiduelle est invoquée, il s'agit de savoir si l'État a adopté une conduite choquant le sens du franc-jeu et de la décence de la société et si la tenue d'un procès malgré cette conduite serait préjudiciable à l'intégrité du système de justice. Pour dire les choses plus simplement, il y a des limites au genre de conduite que la société tolère dans la poursuite des infractions. Parfois, la conduite de l'État est si troublante que la tenue d'un procès — même un procès équitable — donnera l'impression que le système de justice cautionne une conduite heurtant le sens du franc-jeu et de la décence qu'a la société, et cela porte préjudice à l'intégrité du système de justice. Dans ce genre d'affaires, la première étape du test est franchie.

[36] La Cour décrit la catégorie résiduelle en ces termes dans *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391 :

> Pour que la suspension des procédures soit appropriée dans un cas visé par la catégorie résiduelle, il doit ressortir que la conduite répréhensible de l'État risque de continuer à l'avenir ou que la poursuite des procédures choquera le sens de la justice de la société. Ordinairement, la dernière condition ne sera pas remplie

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take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare. [para. 91]

[37] Two points of interest arise from this description. First, while it is generally true that the residual category will be invoked as a result of state *misconduct*, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct. Repeatedly prosecuting an accused for the same offence after successive juries have been unable to reach a verdict stands as an example (see, e.g., *R. v. Keyowski*, [1988] 1 S.C.R. 657), as does using the criminal courts to collect a civil debt (see, e.g., *R. v. Waugh* (1985), 68 N.S.R. (2d) 247 (S.C., App. Div.)).

[38] Second, in a residual category case, regardless of the type of conduct complained of, the question to be answered at the first stage of the test is the same: whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system. While I do not question the distinction between ongoing and past misconduct, it does not completely resolve the question of whether carrying on with a trial occasions further harm to the justice system. The court must still consider whether proceeding would lend judicial condonation to the impugned conduct.

[39] At the second stage of the test, the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category). Where the concern is trial fairness, the focus is on restoring an accused's right to a fair trial. Here, procedural remedies, such

à moins que la première ne le soit aussi — la société ne s'offusquera pas de la poursuite des procédures à moins qu'une forme de conduite répréhensible soit susceptible de persister. Il peut y avoir des cas exceptionnels où la conduite reprochée est si grave que le simple fait de poursuivre le procès serait choquant. Mais de tels cas devraient être relativement très rares. [par. 91]

[37] Deux points d'intérêt se dégagent de cette description. Premièrement, bien qu'il soit généralement vrai que l'on invoque la catégorie résiduelle à la suite d'une *conduite répréhensible* de l'État, il n'en est pas toujours ainsi. Il peut y avoir des situations où l'intégrité du système de justice est en jeu en l'absence d'une conduite répréhensible. Poursuivre plusieurs fois un accusé pour la même infraction après que des jurys successifs ne soient pas parvenus à rendre un verdict en est un exemple (voir, p. ex., *R. c. Keyowski*, [1988] 1 R.C.S. 657), tout comme le fait d'avoir recours aux tribunaux criminels pour percevoir une dette civile (voir, p. ex., *R. c. Waugh* (1985), 68 N.S.R. (2d) 247 (C.S., Div. app.)).

[38] Deuxièmement, dans un cas relevant de la catégorie résiduelle, peu importe le type de conduite dont on se plaint, la question à laquelle il faut répondre à la première étape du test demeure la même : la tenue d'un procès en dépit de la conduite reprochée causerait-elle un préjudice supplémentaire à l'intégrité du système de justice? Je ne remets pas en question la distinction entre la conduite répréhensible persistante et la conduite répréhensible antérieure, mais cette distinction ne résout pas totalement la question de savoir si la tenue d'un procès cause un préjudice supplémentaire au système de justice. Le tribunal doit tout de même déterminer si la tenue d'un procès reviendrait à absoudre judiciairement la conduite reprochée.

[39] À la deuxième étape du test, il s'agit de déterminer si une autre réparation, moindre que l'arrêt des procédures, permettrait de corriger le préjudice. Différentes réparations peuvent être accordées, selon que le préjudice touche le droit de l'accusé à un procès équitable (la catégorie principale) ou l'intégrité du système de justice (la catégorie résiduelle). Quand c'est l'équité du procès qui est en cause, l'objectif est de rétablir le droit de l'accusé

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as ordering a new trial, are more likely to address the prejudice of ongoing unfairness. Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is *not* to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.

à un procès équitable. En l'espèce, les réparations procédurales, comme la tenue d'un nouveau procès, ont plus de chance de corriger le préjudice causé par une injustice persistante. En revanche, lorsque la catégorie résiduelle est invoquée et que le préjudice dénoncé porte atteinte à l'intégrité du système de justice, les réparations doivent s'attaquer à ce préjudice. Il faut se rappeler que, dans les affaires entrant uniquement dans la catégorie résiduelle, l'objectif *n'*est *pas* d'accorder réparation à l'accusé pour un tort qui lui a été causé auparavant. L'accent est plutôt mis sur la question de savoir si une autre réparation, moindre que l'arrêt des procédures, permettra au système de justice de se dissocier suffisamment à l'avenir de la conduite reprochée à l'État.

[40] Finally, the balancing of interests that occurs at the third stage of the test takes on added significance when the residual category is invoked. This Court has stated that the balancing need only be undertaken where there is still uncertainty as to whether a stay is appropriate after the first two parts of the test have been completed (*Tobiass*, at para. 92). When the main category is invoked, it will often be clear by the time the balancing stage has been reached that trial fairness has not been prejudiced or, if it has, that another remedy short of a stay is available to address the concern. In those cases, no balancing is required. In rare cases, it will be evident that state conduct has permanently prevented a fair trial from taking place. In these "clearest of cases", the third and final balancing step will often add little to the inquiry, as society has no interest in unfair trials.

[40] Enfin, la mise en balance des intérêts effectuée à la troisième étape du test revêt une importance accrue lorsque la catégorie résiduelle est invoquée. La Cour a indiqué que la mise en balance n'est nécessaire que s'il subsiste une incertitude quant à l'opportunité de l'arrêt des procédures à l'issue des deux premiers volets du test (*Tobiass*, par. 92). Lorsque la catégorie principale est invoquée, il est souvent clair, au moment où le tribunal atteint l'étape de la mise en balance, qu'il n'y a pas eu atteinte à l'équité du procès ou que, en cas d'atteinte à celle-ci, une autre réparation, moindre que l'arrêt des procédures, permettrait de régler la question. Aucune mise en balance n'est nécessaire dans ces circonstances. Dans de rares cas, la conduite de l'État a manifestement empêché en permanence la tenue d'un procès équitable. Dans ces « cas les plus manifestes », la troisième et dernière étape, la mise en balance, ajoute souvent peu de choses à l'analyse, parce que la société n'a aucun intérêt dans la tenue de procès inéquitables.

[41] However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is

[41] Par contre, lorsque c'est la catégorie résiduelle qui est invoquée, l'étape de la mise en balance revêt une importance accrue. Si on allègue une atteinte à l'intégrité du système de justice, le tribunal est appelé à décider quelle des deux solutions suivantes assure le mieux l'intégrité du système de justice : l'arrêt des procédures ou la tenue d'un procès en dépit de la conduite contestée. Cette analyse suppose nécessairement une mise en balance. Le tribunal doit prendre en compte des

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isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits.[5] Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

éléments comme la nature et la gravité de la conduite reprochée — que celle-ci soit un cas isolé ou la manifestation d'un problème systémique et persistant —, la situation de l'accusé, les accusations auxquelles il doit répondre et l'intérêt de la société à ce que les accusations soient jugées au fond[5]. De toute évidence, plus la conduite de l'État est grave, plus il est nécessaire que le tribunal s'en dissocie. Lorsque la conduite en question choque la conscience de la communauté ou heurte son sens du franc-jeu et de la décence, il est peu probable que l'intérêt de la société dans la tenue d'un procès complet sur le fond l'emporte au terme de la mise en balance. Or, dans les cas faisant partie de la catégorie résiduelle, il faut toujours tenir compte de l'équilibre.

[42] This Court's recent decision in *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509, attests to the need for balancing when the conduct in question falls solely within the residual category. In *Bellusci*, the accused was assaulted in the back of a van by a prison guard while he was shackled and handcuffed. The accused was charged with assaulting the guard and intimidating a justice system participant. Fish J., writing for a unanimous Court, upheld the trial judge's decision to issue a stay of proceedings for state misconduct falling in the residual category. In doing so, he noted that the trial judge had

[42] L'arrêt récent *R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509, illustre la nécessité d'une mise en balance dans le cas d'une conduite entrant uniquement dans la catégorie résiduelle. Dans cette affaire, l'accusé avait été agressé à l'arrière d'une fourgonnette par un agent de détention alors qu'il était enchaîné et menotté. L'accusé a été inculpé de voies de fait contre l'agent de détention et d'intimidation à l'endroit d'une personne associée au système judiciaire. Rédigeant l'arrêt unanime de la Cour, le juge Fish a confirmé la décision du juge du procès d'ordonner l'arrêt des procédures en raison de la conduite répréhensible d'un représentant de l'État qui entre dans la catégorie résiduelle. Ce faisant, il a signalé que le juge du procès avait

appreciated the need to balance the competing interests at play in contemplating a stay of proceedings. He expressly took into account the difficult position of prison guards, the importance to the justice system of ensuring their protection, the seriousness of the charges against the accused, the integrity of the justice system, and the nature and gravity of the violation of Mr. Bellusci's rights. Only then did he conclude that a stay was warranted. [Emphasis added; para. 29.]

reconn[u] la nécessité de mettre en balance les intérêts en jeu qui s'opposent avant d'ordonner l'arrêt des procédures. Il [a] consid[éré] expressément la difficulté inhérente au travail d'agent de détention, la nécessité que le système de justice assure la protection de ce dernier, la gravité des accusations portées contre l'accusé, l'intégrité du système de justice, ainsi que la nature et la gravité de l'atteinte aux droits de M. Bellusci. Ce n'est qu'à l'issue de cet examen qu'il [a] concl[u] que l'arrêt des procédures [était] justifié. [Je souligne; par. 29.]

5 At this stage, whether the impugned conduct is a systemic and ongoing problem or lies purely in the past may also become relevant. Where the conduct is ongoing and systemic, it may be more difficult for the court to dissociate itself from it with anything less than a stay.

5 La question de savoir si la conduite reprochée constitue un problème systémique et persistant ou est uniquement chose du passé peut également s'avérer pertinente à ce stade. Si la conduite en question se poursuit et est systémique, il peut être plus difficile pour le tribunal de s'en dissocier en optant pour une solution moins draconienne que l'arrêt des procédures.

[43] The Ontario Court of Appeal has also recently emphasized the importance of the balancing stage when the residual category is in issue:

> In some sense, an accused who is granted a stay under the residual category realizes a windfall. Thus, it is important to consider if the price of the stay of a charge against a particular accused is worth the gain. Does the advantage of staying the charges against this accused outweigh the interest in having the case decided on the merits? In answering that question, a court will almost inevitably have to engage in the type of balancing exercise that is referred to in the third criterion. [Emphasis added.]

(*R. v. Zarinchang*, 2010 ONCA 286, 99 O.R. (3d) 721, at para. 60)

[44] Undoubtedly, the balancing of societal interests that must take place and the "clearest of cases" threshold presents an accused who seeks a stay under the residual category with an onerous burden. Indeed, in the residual category, cases warranting a stay of proceedings will be "exceptional" and "very rare" (*Tobiass*, at para. 91). But this is as it should be. It is only where the "affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases" that a stay of proceedings will be warranted (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667).

[45] To recapitulate, while the framework is the same for both categories, the test may — and often will — play out differently depending on whether the "main" or "residual" category is invoked.

[46] The following hypothetical may serve as a useful illustration. Take a case where it is discovered, after trial, that the police have tampered with the jury in order to secure the conviction of an accused. Manifestly, the police conduct would impinge on the accused's right to a fair trial — but it would also impinge on the integrity of the justice system.

[43] La Cour d'appel de l'Ontario a également souligné récemment l'importance que revêt l'étape de la mise en balance lorsque la catégorie résiduelle est en jeu :

> [TRADUCTION] En un sens, l'accusé qui obtient un arrêt des procédures au titre de la catégorie résiduelle bénéficie d'une aubaine. Il importe donc de se demander si le prix de l'arrêt des procédures contre un accusé en vaut la peine. L'avantage que présente l'arrêt des procédures contre cet accusé l'emporte-t-il sur l'intérêt à ce que l'affaire soit tranchée au fond? Pour répondre à cette question, le tribunal doit presque inévitablement procéder à une mise en balance du type de celle dont il est question au troisième critère. [Je souligne.]

(*R. c. Zarinchang*, 2010 ONCA 286, 99 O.R. (3d) 721, par. 60)

[44] La mise en balance nécessaire des intérêts de la société et le critère des « cas les plus manifestes » imposent sans aucun doute un lourd fardeau à l'accusé qui demande l'arrêt des procédures au titre de la catégorie résiduelle. En fait, les cas faisant partie de la catégorie résiduelle qui justifient l'arrêt des procédures sont « exceptionnels » et « très rares » (*Tobiass*, par. 91). Mais les choses sont comme elles doivent être. Ce n'est que lorsque l'« atteinte au franc-jeu et à la décence est disproportionnée à l'intérêt de la société d'assurer que les infractions criminelles soient efficacement poursuivies » que l'arrêt des procédures est justifié (*R. c. Conway*, [1989] 1 R.C.S. 1659, p. 1667).

[45] Bref, bien que le cadre soit le même pour les deux catégories, le test pourra s'appliquer — et s'appliquera souvent — différemment, selon qu'on invoque la catégorie « principale » ou la catégorie « résiduelle ».

[46] La situation hypothétique suivante peut servir d'exemple utile. Prenons le cas où l'on constate, à l'issue du procès, que les policiers ont corrompu le jury pour qu'il déclare l'accusé coupable. Manifestement, la conduite des policiers porterait atteinte au droit de l'accusé à un procès équitable, mais aussi à l'intégrité du système de justice.

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[47] Ordering a new trial would probably redress the unfairness of the original trial. But the inquiry would not end there. The court would also have to decide whether ordering a new trial, or some other remedy, would suffice to dissociate it from the prejudice occasioned to the integrity of the justice system by the police misconduct. If no remedy would suffice, the court would have to engage in the balancing process and determine whether the integrity of the justice system would be better served by a stay of proceedings or a full trial on the merits. Given the seriousness of the misconduct — jury tampering strikes at the very heart of the criminal justice system — the residual category might well necessitate a stay of proceedings to redress the threat to the integrity of the justice system, even though the unfairness that marred the first trial could be cured by a second trial.

B. *Whether a Stay of Proceedings Was Warranted in the Instant Case*

[48] The standard of review for a remedy ordered under s. 24(1) of the *Charter* is well established. Appellate intervention is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is "so clearly wrong as to amount to an injustice" (*Bellusci*, at para. 19; *Regan*, at para. 117; *Tobiass*, at para. 87; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51).

[49] In the instant case, the appellants acknowledge that trial fairness is not in issue. They accept that the trial judge viewed the misconduct as coming within the residual category. Approaching the matter from that perspective, I am respectfully of the view that the trial judge erred in assessing all three forms of alleged state misconduct.

(1) The Medical Records

[50] In order for the Crown's conduct in securing Mr. Piccirilli's medical records to factor into a decision to stay proceedings, it must pass the first

[47] La tenue d'un nouveau procès corrigerait vraisemblablement l'iniquité du premier procès, mais l'analyse ne se terminerait pas là. Le tribunal aurait aussi à décider si la tenue d'un nouveau procès ou une autre réparation serait suffisante pour lui permettre de se dissocier du préjudice causé à l'intégrité du système de justice par la conduite répréhensible des policiers. Si aucune réparation n'est adéquate, le tribunal doit procéder à la mise en balance et décider si l'intégrité du système de justice serait mieux servie par un arrêt des procédures ou par un procès complet sur le fond. Vu la gravité de la conduite répréhensible — la corruption du jury va à l'encontre de l'essence même du système de justice pénale — l'arrêt des procédures pourrait fort bien s'imposer dans la catégorie résiduelle pour neutraliser la menace à l'intégrité du système de justice, bien qu'un deuxième procès aurait permis de remédier à l'iniquité ayant entaché le premier.

B. *L'arrêt des procédures était-il justifié en l'espèce?*

[48] La norme de contrôle applicable à une réparation accordée en vertu du par. 24(1) de la *Charte* est bien établie. Une cour d'appel n'est justifiée d'intervenir que si le juge du procès s'est fondé sur des considérations erronées en droit, a commis une erreur de fait susceptible de contrôle ou a rendu une décision « erronée au point de créer une injustice » (*Bellusci*, par. 19; *Regan*, par. 117; *Tobiass*, par. 87; *R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651, par. 15 et 51).

[49] Dans la présente affaire, les appelants reconnaissent que l'équité du procès n'est pas en cause. Ils conviennent que, selon le juge du procès, la conduite répréhensible entre dans la catégorie résiduelle. En abordant la question sous cet angle, j'estime avec égards que le juge du procès a mal apprécié les trois actes répréhensibles qu'auraient commis les représentants de l'État.

(1) Le dossier médical

[50] Pour que la conduite du ministère public consistant à obtenir le dossier médical de M. Piccirilli joue dans la décision d'arrêter les procédures, elle doit

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Found at Tab 28, Volume 3 of Google's BOA.

2015 SCC 7 (CanLII)

Attorney General of Canada *Appellant*

v.

Federation of Law Societies of Canada *Respondent*

and

Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association, Law Society of British Columbia, Canadian Bar Association, Advocates' Society, Barreau du Québec and Chambre des notaires du Québec *Interveners*

INDEXED AS: CANADA (ATTORNEY GENERAL) *v.* FEDERATION OF LAW SOCIETIES OF CANADA

2015 SCC 7

File No.: 35399.

2014: May 13; 2015: February 13.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to liberty — Fundamental justice — Search and seizure — Solicitor-client privilege — Lawyer's duty of commitment to client's cause — Whether Canada's anti-money laundering and anti-terrorist financing legislation, as it applies to legal profession, infringes right to be free of unreasonable searches and seizures — Whether legislation infringes right not to be deprived of liberty otherwise than in accordance with principles of fundamental justice — If so, whether infringements justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 7, 8 — Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17, ss. 5(i), 5(j), 62, 63, 63.1, 64 — Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, SOR/2002-184, ss. 11.1, 33.3, 33.4, 33.5, 59.4.

Procureur général du Canada *Appelant*

c.

Fédération des ordres professionnels de juristes du Canada *Intimée*

et

Criminal Lawyers' Association (Ontario), Association canadienne des libertés civiles, Law Society of British Columbia, Association du Barreau canadien, Advocates' Society, Barreau du Québec et Chambre des notaires du Québec *Intervenants*

RÉPERTORIÉ : CANADA (PROCUREUR GÉNÉRAL) *c.* FÉDÉRATION DES ORDRES PROFESSIONNELS DE JURISTES DU CANADA

2015 CSC 7

N° du greffe : 35399.

2014 : 13 mai; 2015 : 13 février.

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

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

Droit constitutionnel — Charte des droits — Droit à la liberté — Justice fondamentale — Fouilles, perquisitions et saisies — Secret professionnel de l'avocat — Devoir de l'avocat de se dévouer à la cause du client — Les dispositions de la législation canadienne visant à lutter contre le recyclage des produits de la criminalité et le financement des activités terroristes qui s'appliquent aux avocats portent-elles atteinte au droit à la protection contre les fouilles, les perquisitions et les saisies abusives? — La législation porte-t-elle atteinte au droit de ne pas être privé de sa liberté, sauf en conformité avec les principes de justice fondamentale? — Dans l'affirmative, les atteintes sont-elles justifiables? — Charte canadienne des droits et libertés, art. 1, 7, 8 — Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes, L.C. 2000, c. 17, art. 5i), 5j), 62, 63, 63.1, 64 — Règlement sur le recyclage des produits de la criminalité et le financement des activités terroristes, DORS/2002-184, art. 11.1, 33.3, 33.4, 33.5, 59.4.

181, 297 C.C.C. (3d) 429, 2 C.R. (7th) 324, 278 C.R.R. (2d) 273, [2013] 5 W.W.R. 1, [2013] B.C.J. No. 632 (QL), 2013 CarswellBC 812 (WL Can.), affirming a decision of Gerow J., 2011 BCSC 1270, 25 B.C.L.R. (5th) 265, 339 D.L.R. (4th) 48, 48 Admin. L.R. (5th) 285, 89 C.R. (6th) 80, 244 C.R.R. (2d) 129, [2012] 2 W.W.R. 758, [2011] B.C.J. No. 1779 (QL), 2011 CarswellBC 2436 (WL Can.). Appeal allowed in part.

Christopher Rupar and *Jan Brongers*, for the appellant.

John J. L. Hunter, *Q.C.*, and *Roy W. Millen*, for the respondent.

Michal Fairburn and *Justin Safayeni*, for the intervener the Criminal Lawyers' Association (Ontario).

Mahmud Jamal, *David Rankin* and *Pierre-Alexandre Henri*, for the intervener the Canadian Civil Liberties Association.

Leonard T. Doust, *Q.C.*, and *Michael A. Feder*, for the intervener the Law Society of British Columbia.

Craig A. B. Ferris and *Laura Bevan*, for the intervener the Canadian Bar Association.

Paul D. Stern and *Robert A. Centa*, for the intervener the Advocates' Society.

Raymond Doray and *Loïc Berdnikoff*, for the interveners Barreau du Québec and Chambre des notaires du Québec.

The judgment of LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. was delivered by

CROMWELL J. —

I. Introduction

[1] Lawyers must keep their clients' confidences and act with commitment to serving and protecting

L.R. (5th) 181, 297 C.C.C. (3d) 429, 2 C.R. (7th) 324, 278 C.R.R. (2d) 273, [2013] 5 W.W.R. 1, [2013] B.C.J. No. 632 (QL), 2013 CarswellBC 812 (WL Can.), qui a confirmé une décision de la juge Gerow, 2011 BCSC 1270, 25 B.C.L.R. (5th) 265, 339 D.L.R. (4th) 48, 48 Admin. L.R. (5th) 285, 89 C.R. (6th) 80, 244 C.R.R. (2d) 129, [2012] 2 W.W.R. 758, [2011] B.C.J. No. 1779 (QL), 2011 CarswellBC 2436 (WL Can.). Pourvoi accueilli en partie.

Christopher Rupar et *Jan Brongers*, pour l'appelant.

John J. L. Hunter, *c.r.*, et *Roy W. Millen*, pour l'intimée.

Michal Fairburn et *Justin Safayeni*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Mahmud Jamal, *David Rankin* et *Pierre-Alexandre Henri*, pour l'intervenante l'Association canadienne des libertés civiles.

Leonard T. Doust, *c.r.*, et *Michael A. Feder*, pour l'intervenante Law Society of British Columbia.

Craig A. B. Ferris et *Laura Bevan*, pour l'intervenante l'Association du Barreau canadien.

Paul D. Stern et *Robert A. Centa*, pour l'intervenante Advocates' Society.

Raymond Doray et *Loïc Berdnikoff*, pour les intervenants le Barreau du Québec et la Chambre des notaires du Québec.

Version française du jugement des juges LeBel, Abella, Cromwell, Karakatsanis et Wagner rendu par

LE JUGE CROMWELL —

I. Introduction

[1] Les avocats doivent garder secrètes les confidences de leurs clients et se dévouer au service et

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their clients' legitimate interests. Both of these duties are essential to the due administration of justice. However, some provisions of Canada's anti-money laundering and anti-terrorist financing legislation are repugnant to these duties. They require lawyers, on pain of imprisonment, to obtain and retain information that is not necessary for ethical legal representation and provide inadequate protection for the client's confidences subject to solicitor-client privilege. I agree with the British Columbia courts that these provisions are therefore unconstitutional. They unjustifiably limit the right to be free of unreasonable searches and seizures under s. 8 of the *Canadian Charter of Rights and Freedoms* and the right under s. 7 of the *Charter* not to be deprived of liberty otherwise than in accordance with the principles of fundamental justice.

à la défense de leurs intérêts légitimes. Ces deux obligations sont essentielles à la bonne administration de la justice. Toutefois, certaines dispositions de la législation canadienne visant à lutter contre le recyclage des produits de la criminalité et le financement des activités terroristes sont incompatibles avec ces obligations. Elles obligent les avocats, sous peine d'emprisonnement, à recueillir et à conserver des renseignements qui ne sont pas nécessaires à la représentation éthique de leur client et elles ne protègent pas suffisamment ses confidences visées par le secret professionnel. Je souscris à l'opinion des tribunaux de la Colombie-Britannique que ces dispositions sont de ce fait inconstitutionnelles. Elles limitent de façon injustifiable le droit à la protection contre les fouilles, les perquisitions et les saisies abusives garanti par l'art. 8 de la *Charte canadienne des droits et libertés* ainsi que le droit, reconnu à l'art. 7 de la *Charte*, de ne pas être privé de sa liberté, sauf en conformité avec les principes de justice fondamentale.

II. Overview and Background

A. *Overview*

[2] There is a risk that financial intermediaries — those who handle funds on behalf of others — may facilitate money laundering or terrorist financing. To reduce that risk, Canada's anti-money laundering and anti-terrorist financing legislation imposes duties on financial intermediaries, including lawyers, accountants, life insurance brokers, securities dealers and others. They must collect information in order to verify the identity of those on whose behalf they pay or receive money, keep records of the transactions, and establish internal programs to ensure compliance. The legislation also subjects financial intermediaries, including lawyers, to searches and seizures of the material that they are required to collect, record and retain.

II. Survol et contexte

A. *Survol*

[2] Il existe un risque que les intermédiaires financiers — ceux qui manipulent des fonds pour le compte d'autrui — facilitent le recyclage des produits de la criminalité ou le financement des activités terroristes. Pour réduire ce risque, la législation canadienne visant à lutter contre le recyclage des produits de la criminalité et le financement des activités terroristes impose des obligations aux intermédiaires financiers, notamment aux avocats, comptables, courtiers d'assurance-vie et courtiers en valeurs mobilières. Ils doivent recueillir des renseignements afin de vérifier l'identité des personnes pour le compte desquelles ils paient ou reçoivent de l'argent, tenir des relevés des opérations et établir des programmes internes pour assurer le respect de la loi. La législation assujettit également les intermédiaires financiers, y compris les avocats, à la perquisition et à la saisie des documents qu'ils sont tenus de recueillir et de conserver.

[3] Lawyers object to these provisions and the Federation of Law Societies of Canada ("Federation"),

[3] Les avocats s'opposent à ces dispositions et la Fédération des ordres professionnels de juristes du

supported by several interveners, challenges them on constitutional grounds. The Federation says that the scheme makes lawyers unwilling state agents. They are required to obtain and retain information about their clients. They must do this within a scheme that authorizes unreasonable searches and seizures and provides inadequate protections for solicitor-client privilege. This, the Federation argues, turns law offices into archives for use by the police and prosecution. The provisions therefore violate both s. 7 and s. 8 of the *Charter*.

Canada (« Fédération »), avec l'appui de plusieurs intervenants, les attaque en invoquant des motifs d'ordre constitutionnel. La Fédération affirme que le régime fait des avocats des agents de l'État contre leur gré. Ils sont tenus de recueillir et de conserver des renseignements sur leurs clients, et ce, dans le cadre d'un régime qui autorise des fouilles, perquisitions et saisies abusives et qui ne protège pas suffisamment le secret professionnel de l'avocat. Selon la Fédération, les cabinets d'avocats deviennent ainsi des dépôts d'archives à la disposition de la police et de la poursuite. Les dispositions en cause violent donc à la fois l'art. 7 et l'art. 8 de la *Charte*.

[4] The British Columbia courts agreed with the Federation that the provisions violate s. 7 of the *Charter* but they did not address the s. 8 challenge.

[4] Les tribunaux de la Colombie-Britannique ont convenu avec la Fédération que les dispositions violent l'art. 7 de la *Charte*, mais ils n'ont pas tranché la contestation fondée sur l'art. 8.

[5] The Attorney General of Canada appeals and the Chief Justice has stated constitutional questions which I have reproduced at the conclusion of my reasons. The issues raised by the appeal and my resolution of them are as follows:

[5] Le procureur général du Canada a formé le présent pourvoi et la Juge en chef a formulé une liste de questions constitutionnelles que j'ai reproduites à la fin de mes motifs. Voici les questions soulevées par le pourvoi et mes réponses à ces questions :

1. Do the provisions infringe the s. 8 *Charter* right to be free of unreasonable searches and seizures?

1. Les dispositions portent-elles atteinte au droit à la protection contre les fouilles, les perquisitions et les saisies abusives garanti par l'art. 8 de la *Charte*?

[6] In my opinion, the search provisions in the legislation do not provide the constitutionally required protection for solicitor-client privilege and, as a result, infringe the s. 8 *Charter* right to be free of unreasonable searches and seizures.

[6] À mon avis, les dispositions de la législation relatives aux fouilles et aux perquisitions n'assurent pas la protection exigée par la Constitution en ce qui concerne le secret professionnel de l'avocat et, par conséquent, elles portent atteinte au droit à la protection contre les fouilles, les perquisitions et les saisies abusives garanti par l'art. 8 de la *Charte*.

2(a). With respect to s. 7 of the *Charter*, do the provisions limit lawyers' and/or clients' right to liberty?

2a). En ce qui concerne l'art. 7 de la *Charte*, les dispositions limitent-elles le droit à la liberté des avocats et/ou des clients?

[7] The provisions limit the liberty interests of lawyers. It is not necessary to decide whether clients' liberty interests are also engaged.

[7] Les dispositions limitent le droit à la liberté des avocats. Il n'est pas nécessaire de décider si celui des clients entre aussi en jeu.

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2(b). Is that limitation in accordance with the principles of fundamental justice in relation to (i) solicitor-client privilege or (ii) the independence of the bar?

[8] The provisions, taken as a whole, interfere with the lawyer's duty of commitment to the client's cause, which, I conclude, is a principle of fundamental justice. Given my conclusion concerning s. 8, there is no need to conduct a separate analysis relating to the proposed principle of fundamental justice relating to solicitor-client privilege.

3. Are any limitations of rights under ss. 7 or 8 demonstrably justified as required by s. 1 of the *Charter*?

[9] The Attorney General failed to demonstrate that these limitations of *Charter* rights are demonstrably justified in a free and democratic society and they are therefore not saved by s. 1 of the *Charter*.

B. *The Legislation*

[10] The legislative scheme out of which this appeal arises is complex and a good grasp of how its provisions affect lawyers and clients is necessary in order to understand the issues on appeal.

[11] Laundering the proceeds of crime and financing terrorist activity are serious crimes: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 462.31, 83.02 and 83.03. The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, seeks to detect and deter these crimes and to facilitate their investigation and prosecution: s. 3. The Act pursues these objectives in three main ways: by establishing record keeping and client identification standards, by requiring reporting from financial intermediaries, and by putting in place an agency to oversee compliance — the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC").

2b). Cette restriction est-elle conforme aux principes de justice fondamentale en ce qui concerne (i) le secret professionnel de l'avocat ou (ii) l'indépendance du barreau?

[8] Considérées dans leur ensemble, ces dispositions nuisent à l'accomplissement du devoir de l'avocat de se dévouer à la cause du client, devoir qui, à mon sens, constitue un principe de justice fondamentale. Vu ma conclusion concernant l'art. 8, point n'est besoin d'analyser séparément le principe proposé de justice fondamentale qui a trait au secret professionnel de l'avocat.

3. Peut-on démontrer la justification de restrictions aux droits reconnus par les art. 7 ou 8, comme l'exige l'article premier de la *Charte*?

[9] Le procureur général n'a pas démontré la justification des restrictions ainsi apportées à des droits garantis par la *Charte* dans le cadre d'une société libre et démocratique, et elles ne sont donc pas sauvegardées par l'article premier de la *Charte*.

B. *La législation*

[10] Le régime législatif à l'origine du présent pourvoi est complexe et il faut bien saisir l'incidence de ses dispositions sur les avocats et les clients pour comprendre les questions portées en appel.

[11] Le recyclage des produits de la criminalité et le financement des activités terroristes sont des crimes graves (*Code criminel*, L.R.C. 1985, c. C-46, art. 462.31, 83.02 et 83.03). La *Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes*, L.C. 2000, c. 17, a pour objet de détecter et de décourager ces crimes en plus de faciliter les enquêtes et les poursuites relatives à ceux-ci (art. 3). La Loi poursuit ces objectifs de trois principales manières : en fixant des normes de tenue de documents et d'identification des clients, en soumettant les intermédiaires financiers à des obligations de déclaration et en constituant un organisme chargé de contrôler le respect de la Loi, en l'occurrence le Centre d'analyse des opérations et déclarations financières du Canada (« CANAFE »).

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Lavallee, at para. 46; *R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 18-19.

[59] I accept, of course, that the objectives of combating money laundering and terrorist financing are pressing and substantial as both the application judge and the Court of Appeal held.

[60] With respect to the proportionality analysis, the appellant has the burden of proving that (i) the objective is rationally connected to the limit; (ii) the limit impairs the right as little as possible; and (iii) there is proportionality between the effects of the limitation of the *Charter* right and the objective. The rational connection does not impose a particularly onerous threshold: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228. There is a logical and direct link between, on one hand, the combating of money laundering and terrorist financing (in which lawyers may unbeknownst to them be participating) and, on the other, governmental supervision through searches conducted at law offices.

[61] In my view, however, the justification fails the minimal impairment test. There are other less drastic means of pursuing the same identified objectives. The Court has previously outlined the sorts of protections that are required in order to meet the constitutional standard of protection for solicitor-client privilege: *Lavallee.*

[62] I am therefore of the view that s. 64, and to the extent that they operate in relation to lawyers' offices, ss. 62, 63 and 63.1 of the Act, cannot be justified.

(6) Remedy

[63] With respect to ss. 62, 63 and 63.1, I would follow the example of the application judge and

des dispositions, comme celles qui nous intéressent en l'espèce, dont il a été jugé qu'elles autorisent des fouilles et des perquisitions abusives (*Lavallee*, par. 46; *R. c. Kokesch*, [1990] 3 R.C.S. 3, p. 18-19).

[59] Je reconnais évidemment que les objectifs de la lutte contre le recyclage des produits de la criminalité et le financement des activités terroristes sont des objectifs urgents et réels, ainsi que l'ont conclu la juge de première instance et la Cour d'appel.

[60] En ce qui concerne l'analyse de la proportionnalité, il incombe à l'appelant de démontrer : (i) qu'il existe un lien rationnel entre l'objectif et la restriction; (ii) que la restriction porte le moins possible atteinte au droit en question; (iii) qu'il y a proportionnalité entre les effets de la restriction apportée au droit garanti par la *Charte* et l'objectif visé. Pour démontrer l'existence d'un lien rationnel, il n'est pas nécessaire de répondre à une norme particulièrement exigeante (*Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, 2000 CSC 69, [2000] 2 R.C.S. 1120, par. 228). Il existe un lien logique et direct entre, d'une part, la lutte contre le recyclage des produits de criminalité et le financement des activités terroristes (auxquels les avocats peuvent participer à leur insu) et, d'autre part, le contrôle qu'exerce l'État au moyen de perquisitions effectuées dans des cabinets d'avocats.

[61] J'estime toutefois que la justification ne satisfait pas au critère de l'atteinte minimale. Il existe d'autres moyens moins radicaux de poursuivre les mêmes objectifs. La Cour a déjà défini le type de protection nécessaire pour satisfaire à la norme constitutionnelle de protection du secret professionnel de l'avocat (*Lavallee*).

[62] Je suis par conséquent d'avis que l'art. 64 et, dans la mesure où ils s'appliquent aux cabinets d'avocats, les art. 62, 63 et 63.1 de la Loi ne peuvent se justifier.

(6) Réparation

[63] En ce qui concerne les art. 62, 63 et 63.1, je suis d'avis de suivre l'exemple de la juge de

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read those provisions down to exclude legal counsel and legal firms from the scope of their operation.

[64] The correct approach to s. 64 is more controversial. The Attorney General submits that the appropriate remedy is to read into s. 64 the requirements that would render these provisions constitutionally sound. I cannot accept this approach, however.

[65] The Attorney General's argument rests on the premise that s. 64 (as it now stands) can only violate s. 8 to a "very limited extent": A.F., at para. 116. This is not the case in my respectful view, for the reasons I have developed at length earlier. Moreover, "reading in" as a constitutional remedy is generally not appropriate when there is a variety of options that would render the provision constitutional: see *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 705-7. In this case, there is such a variety of legislative approaches available. As Arbour J. said in *Lavallee*, at para. 48:

> The need to ensure that privilege holders are given a genuine opportunity to enforce the protection of their confidential communications to their lawyers, at the time when they need the protection of the law the most, cannot easily be met by a judicial redrafting of the provision. Neither can the need to ensure that the courts are given enough flexibility and discretion to remain the protectors of constitutional rights and the guardians of the law. In my view, the process for seizing documents in the possession of a lawyer is indeed a delicate matter, which presents some procedural options that are best left to Parliament.

[66] Applying this reasoning, reading in is not appropriate to remedy the constitutional defects of s. 64.

première instance et de donner une interprétation atténuée de ces dispositions pour exclure les conseillers juridiques et les cabinets d'avocats de leur champ d'application.

[64] La méthode qu'il convient d'utiliser dans le cas de l'art. 64 fait moins l'unanimité. D'après le procureur général, la réparation appropriée consiste à ajouter par interprétation à l'art. 64 des exigences qui rendraient ces dispositions constitutionnelles. Je ne puis toutefois souscrire à cette approche.

[65] L'argument du procureur général repose sur la prémisse que l'art. 64 (dans sa forme actuelle) ne peut violer l'art. 8 que de [TRADUCTION] « façon très limitée » (m.a., par. 116). Avec égards, j'estime que ce n'est pas le cas, et ce, pour les raisons que j'ai déjà longuement exposées. Qui plus est, le recours à une « interprétation large » en tant que réparation constitutionnelle ne convient généralement pas lorsque plusieurs solutions permettent de rendre la disposition constitutionnelle (voir *Schachter c. Canada*, [1992] 2 R.C.S. 679, p. 705-707). En l'espèce, un large éventail de solutions s'offrent au législateur. Comme l'a dit la juge Arbour dans *Lavallee*, par. 48 :

> Une reformulation judiciaire de la disposition ne peut pas aisément combler le besoin d'assurer que les détenteurs du privilège aient une occasion réelle de veiller à la protection de la confidentialité de leurs communications avec leurs avocats au moment où ils ont le plus besoin de la protection de la loi. Cette reformulation ne peut pas non plus aisément combler le besoin d'assurer que les tribunaux jouissent de la souplesse et du pouvoir discrétionnaire nécessaires pour garantir qu'ils demeurent les protecteurs des droits constitutionnels et les gardiens de la loi. D'après moi, la saisie de documents en la possession d'un avocat est effectivement une question délicate comportant des choix de procédure qu'il incombe davantage au législateur de faire.

[66] Si l'on applique ce raisonnement au cas qui nous occupe, force est de constater que le recours à une interprétation large ne convient pas pour remédier aux lacunes constitutionnelles de l'art. 64.

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(7) Conclusion

[67] I would declare that s. 64 is of no force or effect and that ss. 62, 63 and 63.1 should be read down so that they do not apply to documents in the possession of legal counsel or in law office premises.

[68] I add this. The issues that would arise in the event of a challenge to professional regulatory schemes are not before us in this case. Different considerations would come into play in relation to regulatory audits of lawyers conducted on behalf of lawyers' professional governing bodies. The regulatory schemes in which the professional governing bodies operate in Canada serve a different purpose from the Act and Regulations and generally contain much stricter measures to protect solicitor-client privilege.

B. *Do the Provisions Violate Section 7 of the Charter?*

[69] There are two steps to the analysis under s. 7 of the *Charter*. The first is to determine whether the challenged provisions limit the right to life, liberty or security of the person. If they do, the analysis moves to the second step of determining whether that limitation is in accordance with the principles of fundamental justice: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 57; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 47.

[70] The Attorney General maintains that there is no s. 7 violation here, but I respectfully disagree. These provisions limit the liberty of lawyers in a way that is not in accordance with the principle of fundamental justice in relation to the lawyer's duty of commitment to the client's cause.

(7) Conclusion

[67] Je suis d'avis de déclarer inopérant l'art. 64 et de donner aux art. 62, 63 et 63.1 une interprétation atténuée pour qu'ils ne s'appliquent pas aux documents en la possession d'un conseiller juridique ou se trouvant dans un cabinet d'avocats.

[68] J'ajouterais ceci. Les questions qui se poseraient en cas de contestation de régimes réglementaires professionnels ne nous ont pas été soumises en l'espèce. D'autres considérations entreraient en jeu dans le cas des vérifications réglementaires effectuées à l'endroit des avocats au nom des ordres professionnels qui encadrent la profession. Les régimes réglementaires dans le cadre desquels les ordres professionnels exercent leurs activités au Canada visent un objectif différent de celui de la Loi et du Règlement et ils prévoient en règle générale des mesures beaucoup plus strictes pour protéger le secret professionnel de l'avocat.

B. *Les dispositions violent-elles l'art. 7 de la Charte?*

[69] L'analyse fondée sur l'art. 7 de la *Charte* se fait en deux étapes. Dans un premier temps, on doit déterminer si les dispositions contestées restreignent le droit à la vie, à la liberté ou à la sécurité de la personne. Dans l'affirmative, on passe alors à la seconde étape de l'analyse, qui consiste à se demander si cette restriction est conforme aux principes de justice fondamentale (*Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101, par. 57; *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307, par. 47).

[70] Le procureur général soutient qu'il n'y a aucune violation de l'art. 7 en l'espèce. Je ne suis pas de cet avis. Ces dispositions restreignent la liberté des avocats d'une manière non conforme au principe de justice fondamentale concernant le devoir de l'avocat de se dévouer à la cause du client.

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Ontario v. G per Karakatsanis J.
Found at **Tab 54, Volume 10** of
Google's BOA.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ. was delivered by

KARAKATSANIS J. —

I. Introduction

[1] People with mental illnesses face persistent stigma and prejudicial treatment in Canadian society, which has imposed profound and widespread social, political, and legal disadvantage on them. In particular, discriminatory perceptions that those with mental illnesses are inherently and indefinitely dangerous persist. These perceptions have served to support some of the most unjust treatment of those with mental illnesses. As this case demonstrates, such perceptions still find some expression in legislation.

[2] Section 15 of the *Canadian Charter of Rights and Freedoms* prevents such discrimination from being given the force of law. This appeal requires the Court to apply the equality guarantee to the manner in which those found not criminally responsible on account of mental disorder (NCRMD) of sexual offences are treated by Ontario's sex offender registry regime. It also provides an opportunity to set out a consistent set of principles applicable to granting remedies for legislation that violates the *Charter*.

[3] In Ontario, *Christopher's Law (Sex Offender Registry), 2000*, S.O. 2000, c. 1 (*Christopher's Law*), requires those who are either convicted or found NCRMD of a sexual offence to physically report to a police station to have their personal information added to the province's sex offender registry. They must continue to report in person at least once a year to keep their information up to date. They must also report every time certain information changes. Even when individuals are no longer required to report

Version française du jugement du juge en chef Wagner et des juges Abella, Moldaver, Karakatsanis, Martin et Kasirer rendu par

LA JUGE KARAKATSANIS —

I. Introduction

[1] Les personnes souffrant de troubles mentaux font l'objet d'une stigmatisation continuelle et d'un traitement préjudiciable dans la société canadienne, de sorte qu'elles sont grandement et largement défavorisées sur les plans social, politique et juridique. Plus particulièrement, il subsiste à leur égard des perceptions discriminatoires suivant lesquelles elles sont en soi dangereuses et elles présenteront toujours un danger. Ces perceptions ont d'ailleurs servi à justifier certains des traitements les plus injustes que subissent ces personnes. Comme le démontre la présente affaire, de telles perceptions discriminatoires se manifestent encore à l'occasion dans les textes législatifs.

[2] L'article 15 de la *Charte canadienne des droits et libertés* empêche que ce type de discrimination se voit conférer force de loi. Dans le présent pourvoi, notre Cour est appelée à appliquer la garantie d'égalité à la manière dont sont traitées les personnes qui sont déclarées non responsables criminellement pour cause de troubles mentaux à l'égard d'infractions sexuelles par le régime d'enregistrement des délinquants sexuels de l'Ontario. Le présent pourvoi donne également à notre Cour l'occasion d'établir un ensemble cohérent de principes qui s'appliqueront à l'octroi de réparations lorsque des textes législatifs violent la *Charte*.

[3] En Ontario, la *Loi Christopher de 2000 sur le registre des délinquants sexuels*, L.O. 2000, c. 1 (*Loi Christopher*), exige des personnes déclarées coupables ou non responsables criminellement pour cause de troubles mentaux à l'égard d'une infraction sexuelle qu'elles se présentent en personne à un poste de police pour fournir leurs renseignements personnels afin que ceux-ci soient consignés au registre des délinquants sexuels de la province. Elles doivent continuer de se présenter en personne

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or when they die, information previously gathered about them under the registry is retained.

[4] Those who are found guilty of a sexual offence can be exempted from reporting in the first place by receiving a discharge under s. 730 of the *Criminal Code*, R.S.C. 1985, c. C-46, can be removed from the registry upon receipt of a free pardon, and can be exempted from continuing to report upon receipt of either a free pardon or criminal record suspension. There is therefore some opportunity, based on an individualized assessment, to be exempted from the sex offender registry. By contrast, everyone found NCRMD *must* report upon discharge by a provincial review board or court, without exception, no one found NCRMD can *ever* be removed from the registry, and no one found NCRMD can *ever* be exempted from reporting. This is so even if they have received a discharge from a review board.

[5] G, the respondent, was found NCRMD of two sexual offences and then absolutely discharged by the Ontario Review Board (ORB). His record in the 19 years since those offences occurred has been spotless. Nevertheless, as *Christopher's Law* currently stands, G will have to report and will be a registered "sex offender" for the rest of his life. His information will remain in the registry even after he passes away. He has *no* opportunity for removal.

[6] In my view, *Christopher's Law* draws discriminatory distinctions between people found guilty and

devant les autorités au moins une fois par année pour mettre leurs renseignements à jour. De plus, elles doivent se présenter devant les autorités chaque fois que certains de leurs renseignements changent. Même lorsqu'elles ne sont plus tenues de se présenter devant les autorités ou qu'elles décèdent, les renseignements qui ont été recueillis à leur sujet sont conservés dans le registre.

[4] Les personnes déclarées coupables d'une infraction d'ordre sexuel peuvent être dispensées au départ de l'obligation de se présenter devant les autorités si elles reçoivent une absolution en vertu de l'art. 730 du *Code criminel*, L.R.C. 1985, c. C-46. Elles peuvent également être retirées du registre lorsqu'elles reçoivent un pardon absolu et être dispensées de l'obligation de continuer de se présenter devant les autorités lorsqu'elles obtiennent un pardon absolu ou la suspension de leur casier judiciaire. Il existe donc certaines possibilités, après une évaluation individuelle, d'être exempté du registre des délinquants sexuels. À l'inverse, toutes les personnes déclarées non responsables criminellement pour cause de troubles mentaux *doivent*, sans exception, se présenter devant les autorités après avoir été libérées par une commission d'examen provinciale ou un tribunal. De plus, elles ne peuvent *jamais* être retirées du registre et ne peuvent *jamais* être dispensées de l'obligation de se présenter devant les autorités, et ce, même si elles ont obtenu une libération d'une commission d'examen.

[5] G, l'intimé, a été déclaré non responsable criminellement pour cause de troubles mentaux à l'égard de deux infractions sexuelles et a par la suite été libéré inconditionnellement par la Commission ontarienne d'examen (Commission). Depuis la perpétration de ces infractions il y a 19 ans, G n'a rien à se reprocher. Toutefois, tel que la *Loi Christopher* est actuellement rédigée, G sera tenu de se présenter devant les autorités et sera un « délinquant sexuel » enregistré jusqu'à la fin de sa vie. De plus, ses renseignements seront conservés dans le registre même après son décès, et il n'a *aucune* possibilité de faire retirer son nom du registre.

[6] À mon avis, la *Loi Christopher* crée des distinctions discriminatoires entre les personnes déclarées

people found NCRMD of sexual offences on the basis of mental disability, contrary to s. 15(1) of the *Charter*. These discriminatory distinctions cannot be justified in a free and democratic society. I would therefore dismiss the appeal and uphold the Court of Appeal's orders declaring *Christopher's Law* to be of no force or effect as it applies to those found NCRMD and granted an absolute discharge, suspending the declaration of invalidity for 12 months, and exempting G from that suspension by relieving him of further compliance with the legislation and ordering that his information be deleted from the registry immediately.

coupables et les personnes déclarées non responsables criminellement pour cause de troubles mentaux à l'égard d'infractions sexuelles sur le fondement de leur déficience mentale, ce qui va à l'encontre du par. 15(1) de la *Charte*. Ces distinctions discriminatoires ne peuvent se justifier dans une société libre et démocratique. Je suis donc d'avis de rejeter le pourvoi et de confirmer les ordonnances de la Cour d'appel portant que la *Loi Christopher* est inopérante à l'égard des personnes jugées non responsables criminellement pour cause de troubles mentaux qui obtiennent une libération inconditionnelle, que l'effet de la déclaration d'invalidité doit être suspendu pendant une période de 12 mois, et qu'il faut exempter G de cette suspension en le dispensant de l'obligation de continuer de se conformer à la *Loi* et en ordonnant que ses renseignements soient supprimés du registre sur-le-champ.

II. Background

[7] In September 2001, G experienced his first and only manic episode. A month later, he was charged with two counts of sexually assaulting his then-wife, one count of unlawfully confining her, and one count of harassment. The two incidents underlying the charges occurred as a result of that manic episode.

[8] In June 2002, G was found NCRMD. When G appeared before the ORB in July 2002, he received a conditional discharge. In August 2003, the ORB ordered that he be absolutely discharged on the basis that "[t]here is simply no evidence to find that [G] is a significant risk to the safety of the public" (2017 ONSC 6713, 401 C.R.R. (2d) 297, at para. 17). G has not engaged in criminal activity since being absolutely discharged approximately 17 years ago. He has adhered to treatment and his symptoms have been in full remission. He has maintained stable employment and has strong and supportive relationships with his family.

[9] G was placed on the provincial sex offender registry in August 2004, and on the federal registry in January 2005. Since then, G has fully complied with

II. Contexte

[7] En septembre 2001, G a eu son premier et seul épisode maniaque. Un mois plus tard, il a été accusé de deux chefs d'agression sexuelle sur son épouse de l'époque, d'un chef de séquestration de cette dernière et d'un chef de harcèlement. Les deux incidents à l'origine des accusations découlent de cet épisode maniaque.

[8] En juin 2002, G a été déclaré non responsable criminellement pour cause de troubles mentaux. Lorsque G a comparu devant la Commission en juillet 2002, il a obtenu une libération conditionnelle. En août 2003, la Commission a ordonné qu'il soit libéré inconditionnellement au motif qu'il [TRADUCTION] « n'existe tout simplement pas de preuve permettant de conclure que [G] représente un risque important pour la sécurité du public » (2017 ONSC 6713, 401 C.R.R. (2d) 297, par. 17). G ne s'est livré à aucune activité criminelle depuis sa libération inconditionnelle il y a environ 17 ans. Il suit un traitement et ses symptômes ont complètement disparu. Il garde un emploi stable et a des relations de soutien solides avec les membres de sa famille.

[9] G a été inscrit au registre provincial des délinquants sexuels en août 2004 et au registre fédéral en janvier 2005. Depuis, G s'est toujours acquitté de

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(1) Minimal Impairment

[74] I agree with the Court of Appeal that *Christopher's Law* is not minimally impairing of the s. 15(1) rights of those who were found NCRMD of a sexual offence and discharged. *Christopher's Law* itself includes mechanisms by which, after some form of individualized assessment of their circumstances, offenders who were not found NCRMD can be removed from the registry (free pardon), relieved of the obligation to report (free pardon and record suspension), or exempted from reporting in the first place (discharge under s. 730 of the *Criminal Code*). The inclusion of *any* method of exempting and removing those found NCRMD from the registry based on individualized assessment would be less impairing of their s. 15(1) rights and could actually increase the registry's effectiveness by narrowing its application to individuals who pose a greater risk to the community.

[75] I would reject the Attorney General's submission that risk assessments can never be certain, and therefore the object of the legislation can only be achieved by a mandatory and permanent registry for all those found NCRMD. First, the same could be said for all those found guilty of sexual offences: the individualized assessments that occur when an absolute discharge, a free pardon, or a record suspension is granted can equally never predict risk with certainty. Second, the minimal impairment requirement requires only that the objective be *substantially* achieved (*Hutterian Brethren*, at paras. 53-55). Individual assessment does not need to perfectly predict risk — certainty cannot be the standard. There was no evidence that providing persons found NCRMD with the opportunity to be exempted or removed from the registry based on an individualized assessment of their circumstances would significantly lessen the usefulness of the registry to law enforcement. Indeed, as Doherty J.A.

(1) Atteinte minimale

[74] Je suis d'accord avec la Cour d'appel pour dire que la *Loi Christopher* ne porte pas atteinte de façon minimale aux droits garantis par le par. 15(1) aux personnes déclarées non responsables criminellement pour cause de troubles mentaux à l'égard d'une infraction sexuelle qui ont obtenu une libération. La *Loi Christopher* elle-même prévoit des mécanismes qui, après une évaluation individuelle de la situation des délinquants, permettent aux délinquants qui n'ont pas reçu de verdict de non-responsabilité criminelle pour cause de troubles mentaux d'être retirés du registre (pardon absolu), d'être dispensés de l'obligation de se présenter devant les autorités (pardon absolu et suspension du casier judiciaire), ou d'être dispensés au départ de l'obligation de se présenter devant les autorités (absolution au sens du par. 730 du *Code criminel*). L'inclusion de *toute* méthode permettant aux personnes déclarées non responsables criminellement pour cause de troubles mentaux d'être dispensées des obligations qui leur incombent et d'être retirées du registre à la suite d'une évaluation individuelle porterait moins atteinte aux droits que leur garantit le par. 15(1) et permettrait en fait d'améliorer l'efficacité du registre en restreignant son application aux personnes qui présentent un risque élevé pour la société.

[75] Je suis d'avis de rejeter l'argument du procureur général selon lequel les évaluations du risque ne peuvent jamais être certaines et que l'objectif de la *Loi* ne peut donc être réalisé qu'en imposant à toutes les personnes déclarées non responsables criminellement pour cause de troubles mentaux l'obligation de s'inscrire au registre et d'y être inscrites de façon permanente. Tout d'abord, on pourrait en dire autant de toutes les personnes déclarées coupables d'infractions sexuelles : les évaluations individuelles qui sont menées lorsqu'une absolution inconditionnelle, un pardon absolu ou une suspension du casier judiciaire est accordé ne peuvent également jamais être certaines. De plus, selon l'exigence de l'atteinte minimale, l'objectif doit être réalisé de façon *substantielle* (*Hutterian Brethren*, par. 53-55). Les évaluations individuelles n'ont pas besoin de prédire le risque avec une exactitude parfaite — la certitude ne saurait servir de norme. Rien ne prouve que le fait d'offrir aux personnes déclarées non responsables

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noted, there is "no evidence that, while the objective of the legislation is consistent with exceptions and exemptions for persons found guilty, it is somehow undermined by comparable exceptions and exemptions for persons found NCRMD" (C.A. reasons, at para. 145).

[76] I accordingly conclude that the Attorney General has not met his burden under s. 1 to demonstrate that the infringing measure is not minimally impairing of the right and therefore has not justified the s. 15(1) infringement.

C. *Does Christopher's Law Infringe the Right to Life, Liberty and Security of the Person?*

[77] Given that I have concluded that *Christopher's Law* violates s. 15(1) in its application to persons found NCRMD and that G's s. 7 claim does not extend beyond those persons, it is not necessary to address whether *Christopher's Law* also violates s. 7. As I will explain, because the privacy and liberty interests of those found NCRMD are the very interests that are unequally burdened by *Christopher's Law*, they inform the remedy for the breach of s. 15(1). It is therefore not necessary to determine whether there is also a breach of s. 7 in order to inform the appropriate remedy. Further, addressing some of the s. 7 arguments would have an impact on the broader issue of the nature of the registry's effects on all registrants and whether the entire scheme complies with s. 7; such determinations are best left for another case.

criminellement pour cause de troubles mentaux la possibilité d'être dispensées des obligations qui leur incombent ou d'être retirées du registre à la suite d'une évaluation individuelle de leur situation réduirait considérablement l'utilité du registre pour les forces de l'ordre. En effet, comme l'a fait remarquer le juge Doherty, [TRADUCTION] « rien ne prouve que même si l'objectif de la loi est conforme aux exceptions et aux dispenses qui s'appliquent aux personnes déclarées coupables, il est en quelque sorte compromis par les exceptions et les dispenses comparables qui s'appliquent aux personnes déclarées non responsables criminellement pour cause de troubles mentaux » (motifs de la C.A., par. 145).

[76] Par conséquent, je conclus que le procureur général ne s'est pas acquitté du fardeau que lui impose l'article premier de démontrer que la mesure attentatoire ne porte pas atteinte de façon minimale au droit et qu'il n'a donc pas justifié la violation du par. 15(1).

C. *La Loi Christopher porte-t-elle atteinte au droit à la vie, à la liberté et à la sécurité de la personne?*

[77] Comme j'ai conclu que la *Loi Christopher* viole le par. 15(1) du fait qu'elle s'applique aux personnes déclarées non responsables criminellement pour cause de troubles mentaux et que la réclamation de G concernant l'art. 7 ne vaut que pour ces personnes, point n'est besoin d'examiner la question de savoir si la *Loi Christopher* viole également l'art. 7. Comme je vais l'expliquer, étant donné que les droits à la vie privée et à la liberté des personnes déclarées non responsables criminellement pour cause de troubles mentaux sont précisément ceux qui sont touchés de façon inégale par la *Loi Christopher*, ils guident la réparation à accorder en cas de contravention au par. 15(1). Il n'est donc pas nécessaire de chercher à savoir s'il y a également violation de l'art. 7 pour déterminer la réparation appropriée. Qui plus est, l'analyse de certains des arguments concernant l'art. 7 aurait une incidence sur la question plus générale de la nature des effets qu'a le registre sur tous les délinquants inscrits et la question de savoir si le régime dans son ensemble est conforme à l'art. 7; il est préférable d'attendre une autre occasion pour trancher ces questions.

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[78] Even so, these reasons should not be taken as agreeing with the Ontario Court of Appeal's approach to s. 7 in this case, or in *Dyck* and *Long*. Those approaches rest on the conclusion in those cases that the legislation's intrusion on liberty is "modest", a conclusion that has been challenged. I make no further comment on this point, given that a s. 7 challenge to the federal sex offender registry is currently before the courts (see *R. v. Ndhlovu*, 2020 ABCA 307, rev'g 2016 ABQB 595, 44 Alta. L.R. (6th) 382).

[78] Néanmoins, il ne faut pas tirer des présents motifs la conclusion que je suis d'accord avec la façon dont la Cour d'appel de l'Ontario a abordé l'art. 7 en l'espèce ou dans les arrêts *Dyck* et *Long*. L'approche adoptée par la Cour d'appel dans ces affaires repose sur la conclusion selon laquelle la *Loi* porte atteinte au droit à la liberté de façon [TRADUCTION] « minime », laquelle conclusion a été contestée. Je ne ferai aucune autre observation sur ce point, car le registre fédéral des délinquants sexuels fait actuellement l'objet d'une contestation fondée sur l'art. 7 devant les tribunaux (voir *R. c. Ndhlovu*, 2020 ABCA 307, inf. 2016 ABQB 595, 44 Alta. L.R. (6th) 382).

D. *What Is the Appropriate Remedy?*

D. *Quelle est la réparation appropriée?*

[79] The Court of Appeal issued a declaration that *Christopher's Law* is of no force or effect insofar as it applies to those found NCRMD of a sexual offence and granted an absolute discharge by a provincial review board. It suspended the effect of that declaration for a year but exempted G from the suspension, ordering that his information be immediately removed from the registry.

[79] La Cour d'appel a déclaré que la *Loi Christopher* est inopérante dans la mesure où elle s'applique aux personnes déclarées non responsables criminellement pour cause de troubles mentaux à l'égard d'une infraction sexuelle qui ont obtenu une libération inconditionnelle d'une commission d'examen provinciale. La Cour d'appel a suspendu pour un an l'effet de cette déclaration, mais elle a exempté G de cette suspension et ordonné que ses renseignements soient immédiatement retirés du registre.

[80] The parties submit that the effect of any declaration that *Christopher's Law* is of no force or effect should be suspended, but disagree on whether G should be immediately exempted from that suspension. The Attorney General submits that individual exemptions from suspensions should not be granted except in extreme cases where, absent an exemption, the claimant will not benefit from the declaration. The intervener, the David Asper Centre for Constitutional Rights, submits that issuing the appropriate remedy in this appeal will require clarification of this Court's remedial jurisprudence by returning to the principles that underlie the remedies it has granted in the past.

[80] Les parties soutiennent que l'effet de toute déclaration d'inopérabilité de la *Loi Christopher* devrait être suspendu, mais elles ne s'entendent pas sur l'opportunité d'exempter immédiatement G de cette suspension. Le procureur général affirme que des exemptions individuelles d'une suspension ne devraient être accordées que dans des cas extrêmes où le demandeur ne pourra pas bénéficier des avantages de la déclaration s'il ne fait pas l'objet d'une exemption. L'intervenant David Asper Centre for Constitutional Rights fait valoir que pour accorder la réparation appropriée en l'espèce, il faudra clarifier la jurisprudence de notre Cour en matière de réparation en revenant aux principes qui sous-tendent les réparations qu'elle a octroyées dans le passé.

[81] In recent years, academic commentators have urged that remedies for unconstitutional laws be determined in a more principled, coherent, and transparent way. In particular, our jurisprudence dealing

[81] Au cours des dernières années, des auteurs de doctrine ont demandé instamment qu'une méthode plus cohérente et transparente, davantage fondée sur des principes, soit utilisée pour déterminer les

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with suspensions of declarations of invalidity, and the exemption of individuals from those suspensions, has been criticized for unduly compromising the protection of rights by failing to grant meaningful remedies (see, e.g., R. Leckey, "The harms of remedial discretion" (2016), 14 *I CON* 584, at pp. 591-93), and for diminishing the quality of decision making by failing to transparently explain the basis for a suspension (see, e.g., G. R. Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law" (2011), 49 *Alta. L. Rev.* 107, at pp. 118 and 123). I would accept the Asper Centre's invitation to articulate a principled approach to remedies for legislation that violates the *Charter*.

réparations qu'il convient d'accorder lorsque des textes législatifs sont inconstitutionnels. Plus particulièrement, notre jurisprudence sur les suspensions de déclarations d'invalidité, et l'exemption de certains individus de ces suspensions, a été critiquée parce que notre Cour aurait compromis indûment la protection des droits en n'accordant pas des réparations valables (voir, p. ex., R. Leckey, « The harms of remedial discretion » (2016), 14 *I CON* 584, p. 591-593), et aurait diminué la qualité du processus décisionnel en n'expliquant pas le motif de la suspension de façon transparente (voir, p. ex., G. R. Hoole, « Proportionality as a Remedial Principle : A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law » (2011), 49 *Alta. L. Rev.* 107, p. 118 et 123). J'accepte l'invitation du Asper Centre de définir une méthode fondée sur des principes pour l'octroi de réparations lorsque des textes législatifs violent la *Charte*.

[82] As I shall explain, this Court's leading decision on remedies for laws that violate the *Charter*, *Schachter v. Canada*, [1992] 2 S.C.R. 679, has provided helpful guidance on how to craft a responsive and effective remedy for unconstitutional laws for nearly three decades. But, in some respects, this Court's remedial jurisprudence has moved beyond *Schachter*. By employing and building on *Schachter*'s guidance in determining the form and breadth of declarations of invalidity, suspending the effect of those declarations, and exempting individuals from suspensions, this Court's remedial practice has come to coalesce around a group of core remedial principles. Recognizing those remedial principles and explicitly identifying approaches that strike the right balance between them will encourage greater consistency and transparency in remedial decision making.

[82] Comme je vais l'expliquer, l'arrêt de principe de notre Cour sur les réparations à accorder lorsque des lois violent la *Charte*, l'arrêt *Schachter c. Canada*, [1992] 2 R.C.S 679, inspire depuis près de trois décennies l'approche que suivent les tribunaux pour concevoir une réparation adaptée et efficace lorsque des textes législatifs sont inconstitutionnels. Toutefois, à certains égards, la jurisprudence de notre Cour sur les réparations a dépassé l'arrêt *Schachter*. En s'inspirant de l'arrêt *Schachter* et en l'employant pour définir le type et la portée des déclarations d'invalidité, ainsi que pour suspendre l'effet de ces déclarations et exempter des personnes de ces suspensions, notre Cour a intégré un groupe de principes fondamentaux en matière de réparation dans la méthode qu'elle utilise pour accorder des réparations. La reconnaissance de ces principes et la définition explicite des méthodes servant à établir un juste équilibre entre ces principes favoriseront une plus grande cohérence et une plus grande transparence dans les décisions en matière de réparation.

[83] As I will explain, I conclude that suspensions of declarations of invalidity should be rare, granted only when an identifiable public interest, grounded in the Constitution, is endangered by an immediate declaration to such an extent that it outweighs the harmful impacts of delaying the declaration's effect.

[83] Pour les motifs que je vais exposer, je conclus que l'effet de déclarations d'invalidité devrait être suspendu en de rares cas, seulement lorsque le risque que représente une déclaration avec effet immédiat sur un intérêt public identifiable, fondé sur la Constitution, l'emporte sur les conséquences

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And when declarations are suspended, granting individual exemptions pursuant to s. 24(1) of the *Charter* will often balance the interests of the litigant, the broader public, and the legislature in a manner that is "appropriate and just".

(1) Principled Remedial Discretion

[84] Section 52(1) of the *Constitution Act, 1982*, reads:

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

[85] Section 52(1) of the *Constitution Act, 1982*, provides in absolute terms that laws inconsistent with the Constitution are of no force or effect to the extent of the inconsistency. Although it states the legal result where there is conflict between a law and the Constitution, s. 52(1) does not explicitly provide courts with a grant of remedial jurisdiction.[2] A general declaration pursuant to courts' statutory or inherent jurisdiction is the means by which they give full effect to the broad terms of s. 52(1).

[86] That a law is "of no force or effect" only "to the extent of the inconsistency" with the Constitution means that a court faced with a constitutional challenge to a law must determine to what extent it is unconstitutional and declare it to be so. Our jurisprudence teaches us that a measure of discretion is inevitable in determining how to respond to an inconsistency between legislation and the Constitution.

[2] Unlike, e.g., the Constitution of South Africa, s. 172(1)(a), which specifically mandates courts to "declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

néfastes de la suspension de l'effet de cette déclaration. Qui plus est, lorsque l'effet de déclarations est suspendu, l'octroi d'exemptions individuelles conformément au par. 24(1) de la *Charte* permettra souvent de mettre en balance les intérêts du plaideur, du public en général et du législateur d'une manière qui est « convenable et juste ».

(1) Pouvoir discrétionnaire de réparation fondé sur des principes

[84] Le paragraphe 52(1) de la *Loi constitutionnelle de 1982* est ainsi rédigé :

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

[85] Selon les termes absolus édictés au par. 52(1) de la *Loi constitutionnelle de 1982*, la Constitution rend inopérantes les dispositions incompatibles de toute autre règle de droit. Bien que le résultat juridique qui découle de l'incompatibilité entre des dispositions législatives et la Constitution soit énoncé au par. 52(1), cette disposition n'accorde pas explicitement aux tribunaux une compétence en matière de réparation[2]. Les tribunaux ont plutôt le pouvoir de prononcer une déclaration générale conformément à la compétence légale ou inhérente dont ils sont investis pour donner aux termes généraux du par. 52(1) leur plein effet.

[86] Par « rend inopérantes les dispositions incompatibles de toute autre règle de droit », on veut dire que le tribunal qui est appelé à statuer sur la contestation constitutionnelle d'une loi doit déterminer dans quelle mesure la loi contestée est inconstitutionnelle et la déclarer telle. Notre jurisprudence nous enseigne qu'un degré de discrétion est inévitable pour décider comment répondre à l'incompatibilité entre des dispositions législatives et la Constitution.

[2] Contrairement, p. ex., à l'al. 172(1)(a) de la Constitution de l'Afrique du Sud, qui prévoit expressément que la Cour doit [TRADUCTION] « déclarer invalide toute règle de droit ou conduite incompatible avec la Constitution ».

principles and resolve conflicts between them while justifying their prioritization of certain considerations over others.

[93] "Remedial principles", in this sense, are more general than rules and, unlike rules, may conflict and be weighed differently (Roach (2004), at pp. 111-13, citing R. Dworkin, *Taking Rights Seriously* (1977)). Articulating the core general principles that structure the exercise of principled remedial discretion will assist in promoting principled, transparent, and consistent approaches to s. 52(1) remedies.

[94] *Schachter* provided remedial principles of this kind, identifying twin principles of respect for the purposes of the *Charter* and respect for the legislature, and thereby guiding the discretion of Canadian courts for nearly three decades. But in the process of applying that approach, this Court has sometimes articulated additional relevant or analogous principles. As I will explain, when legislation violates the *Charter*, courts have been guided by the following fundamental remedial principles, grounded in the Constitution, in determining the appropriate remedy, applying them at every stage:

A. *Charter* rights should be safeguarded through effective remedies.

B. The public has an interest in the constitutional compliance of legislation.

C. The public is entitled to the benefit of legislation.

D. Courts and legislatures play different institutional roles.

[95] Safeguarding rights lies at the core of granting *Charter* remedies because the *Charter* exists to protect rights, freedoms, and inherent dignity; this purpose inheres in the *Charter* as a whole (see *Vriend*, at para. 153; *Canadian Egg Marketing Agency v.*

les juges à prendre en compte de nombreux principes contradictoires en matière de réparation et à réconcilier ces principes tout en justifiant la priorité qu'ils accordent à certaines considérations par rapport à d'autres.

[93] En ce sens, les « principes en matière de réparation » sont plus généraux que les règles et, contrairement à celles-ci, ils peuvent entrer en conflit et être soupesés différemment (Roach (2004), p. 111-113, citant R. Dworkin, *Taking Rights Seriously* (1977)). La formulation des principes généraux fondamentaux qui structurent l'exercice du pouvoir discrétionnaire de réparation fondé sur des principes permettra de favoriser l'adoption de méthodes transparentes et uniformes fondées sur des principes pour ce qui est de l'octroi de réparations en application du par. 52(1).

[94] Des principes en matière de réparation de ce genre ont été énoncés dans l'arrêt *Schachter*, qui établit des principes jumeaux — soit celui du respect des objets de la *Charte* et celui du respect du législateur — qui, depuis près de trois décennies, guident les tribunaux canadiens dans l'exercice de leur pouvoir discrétionnaire. Cependant, en appliquant la méthode établie dans cet arrêt, notre Cour a parfois formulé d'autres principes pertinents ou analogues. Comme je l'expliquerai, lorsque des textes législatifs violent la *Charte*, les tribunaux se sont inspirés des principes fondamentaux suivants en matière de réparation, qui sont fondés sur la Constitution, pour déterminer la réparation qu'il convient d'accorder et ils ont appliqué ces principes à toutes les étapes de leur analyse :

A. Les droits garantis par la *Charte* doivent être protégés par l'octroi de réparations efficaces.

B. Il est dans l'intérêt du public que les lois soient conformes à la Constitution.

C. Le public a droit au bénéfice de la loi.

D. Les tribunaux et les législateurs jouent des rôles institutionnels différents.

[95] La protection des droits est un aspect fondamental de l'octroi de réparations sous le régime de la *Charte*, car la *Charte* vise à protéger les droits, les libertés et la dignité inhérente des personnes; cet objectif est d'ailleurs présent dans l'ensemble de la *Charte* (voir

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Richardson, [1998] 3 S.C.R. 157, at para. 57). The Court's purposive approach to constitutional remedies ensures that the effective vindication and protection of rights is at the core of the remedies it grants for legislation that violates the *Charter* (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 104).

[96] The rule of law is explicitly recognized in the preamble to the *Charter*, which says that "Canada is founded upon principles that recognize . . . the rule of law". It is also implicitly recognized in the preamble to the *Constitution Act, 1867*, which says Canada has "a Constitution similar in Principle to that of the United Kingdom" (see *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 750). Two facets of the rule of law are foundational here: the government must act within the law and there must be positive laws to preserve order in society. This Court has recognized that adherence to the principle of the rule of law means that the impact of legislation, even unconstitutional legislation, extends beyond those whose rights are violated — it is bad for all of society for unconstitutional legislation to "remain on the books" (*R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 51; see also *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524 (*SWUAV*), at para. 31). But the public interest cuts both ways — the public is also entitled to the benefit of legislation, which individuals rely upon to organize their lives and protect them from harm (*Manitoba Language Rights*, at pp. 748-49 and 757). Laws validly enacted by democratically elected legislatures "are generally passed for the common good" and there is accordingly a "public interest" in legislation that "weighs heavily in the balance" of remedial discretion (*Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 135; see also *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764, at para. 9).

[97] Legislation is enacted by the legislature, which is sovereign in the sense that, within

Vriend, par. 153; *Office canadien de commercialisation des œufs c. Richardson*, [1998] 3 R.C.S. 157, par. 57). La manière téléologique dont notre Cour aborde les réparations constitutionnelles permet de s'assurer que la défense et la protection efficaces des droits est au cœur des réparations qu'elle accorde lorsque des textes législatifs violent la *Charte* (*Osborne c. Canada (Conseil du Trésor)*, [1991] 2 R.C.S. 69, p. 104).

[96] La primauté du droit est explicitement reconnue dans le préambule de la *Charte*, lequel dispose que « le Canada est fondé sur des principes qui reconnaissent [. . .] la primauté du droit ». Elle est aussi reconnue implicitement dans le préambule de la *Loi constitutionnelle de 1867*, qui précise que le Canada a « une constitution reposant sur les mêmes principes que celle du Royaume-Uni » (voir *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, p. 750). La primauté du droit repose sur deux principes fondamentaux : les actes de l'État doivent être conformes à la loi et il doit exister des règles de droit positif pour préserver l'ordre dans la société. Notre Cour a reconnu qu'en raison du respect du principe de la primauté du droit, les effets des lois, même les lois inconstitutionnelles, s'étendent au-delà des personnes dont les droits sont violés — il est désavantageux pour l'ensemble de la société que des lois inconstitutionnelles « demeure[nt] en vigueur indéfiniment » (*R. c. Nur*, 2015 CSC 15, [2015] 1 R.C.S. 773, par. 51; voir aussi *Canada (Procureur général) c. Downtown Eastside Sex Workers United Against Violence Society*, 2012 CSC 45, [2012] 2 R.C.S. 524 (*SWUAV*), par. 31). Or, l'intérêt public est une arme à double tranchant — le public a également droit au bénéfice de la loi, sur laquelle les individus s'appuient pour organiser leur vie et se protéger (*Droits linguistiques au Manitoba*, p. 748-749 et 757). Les lois valablement adoptées par des législatures démocratiquement élues « visent généralement le bien commun » et suscitent donc un « intérêt public » qui « joue un grand rôle » dans l'exercice du pouvoir discrétionnaire de réparation (*Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110, p. 135; voir également *Harper c. Canada (Procureur général)*, 2000 CSC 57, [2000] 2 R.C.S. 764, par. 9).

[97] Les lois sont adoptées par une législature, qui est souveraine en ce sens que, conformément à la

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remedies for *Charter* violations. Lamer C.J. concluded that individual remedies under s. 24(1) of the *Charter* "will rarely be available in conjunction with" remedies involving legislation (p. 720).

[106] Much of *Schachter* remains good guidance three decades later. However, as I will explain, the jurisprudence on *Charter* remedies has built upon the foundation of *Schachter* and moved beyond it in some ways. While *Schachter* wisely advised courts to consider the principled basis for their remedial decisions, those remedial principles have since been further developed. In part, the guidelines *Schachter* endorsed for determining the extent of rights violations were tied to an articulation of the *Oakes* test that has since been overtaken. Aspects of its discussion of suspended declarations have been overlooked by courts and criticized in academic commentary for their failure to rely on coherent principles and encourage transparent application. Finally, its admonition against combining s. 52(1) and individual remedies has frequently not been followed.

[107] Since *Schachter*, this Court has granted at least 60 s. 52(1) remedies for *Charter* breaches. In my view, the guidelines given in *Schachter* should be clarified and updated in light of those decisions.

(3) The Form and Breadth of Section 52(1) Declarations

[108] As our jurisprudence demonstrates, and the language of s. 52(1) directs, the first step in crafting an appropriate s. 52(1) remedy in a given case is determining the extent of the legislation's inconsistency with the Constitution. Courts should bear in mind both "the manner in which the law violates

prévues par le par. 52(1) en même temps qu'une mesure de réparation individuelle pour des violations de la *Charte*. Le juge en chef Lamer a conclu qu'« [i]l y aura rarement lieu à une réparation en vertu du par. 24(1) de la *Charte* en même temps » qu'une mesure de réparation qui concerne la loi (p. 720).

[106] Trois décennies plus tard, une grande partie de l'arrêt *Schachter* fournit toujours des balises valables aux tribunaux. Toutefois, comme je l'expliquerai, la jurisprudence sur les réparations accordées sous le régime de la *Charte* a pris appui sur les fondements établis dans l'arrêt *Schachter*, mais l'a dépassé à certains égards. Il est certes vrai que, dans cet arrêt, notre Cour recommandait judicieusement aux tribunaux de s'appuyer sur les principes lorsqu'ils rendent des décisions en matière de réparation, mais ces principes ont été peaufinés depuis. En effet, les lignes directrices entérinées dans l'arrêt *Schachter* pour ce qui est de déterminer l'étendue des violations des droits étaient liées à une formulation du critère de l'arrêt *Oakes* qui a depuis été remplacée. De plus, certains aspects de l'analyse de la Cour concernant la suspension de l'effet d'une déclaration d'invalidité n'ont pas été pris en compte par les tribunaux et ont été critiqués par des auteurs de doctrine parce qu'ils n'étaient pas fondés sur des principes cohérents et ne favorisaient pas une application transparente. Enfin, la mise en garde de la Cour contre l'octroi de réparations fondées sur le par. 52(1) en même temps que des réparations individuelles n'a souvent pas été suivie par les tribunaux.

[107] Depuis l'arrêt *Schachter*, notre Cour a accordé au moins 60 réparations fondées sur le par. 52(1) pour des violations de la *Charte*. À mon avis, les lignes directrices établies dans l'arrêt *Schachter* devraient être précisées et mises à jour compte tenu de ces décisions.

(3) Le type et la portée des déclarations prononcées en vertu du par. 52(1)

[108] Comme le démontre la jurisprudence de notre Cour, et comme le prescrit le libellé du par. 52(1), la première étape de l'élaboration de la réparation qu'il convient d'accorder dans un cas donné consiste à déterminer l'étendue de l'incompatibilité de la loi et de la Constitution. Lorsqu'ils conçoivent des réparations

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the *Charter* and the manner in which it fails to be justified under s. 1" (*Schachter*, at p. 702) in crafting tailored remedies. (While this general guideline remains useful, courts should bear in mind that the *Oakes* test has evolved since *Schachter* was decided, such that it now focuses on justifying the infringing measure rather than the law as a whole (compare *Schachter*, at pp. 703-5 and *RJR-MacDonald*, at para. 144).) The nature and extent of the underlying *Charter* violation lays the foundation for the remedial analysis because the breadth of the remedy ultimately granted will reflect at least the extent of the breach.

[109] Defining the extent of the constitutional defect by reference to the substantive violation of the *Charter* safeguards the rights of all those directly affected by ensuring that the law is cured of all its constitutional defects. It also serves the broader public interest in having government act in accordance with the Constitution. These remedies reach beyond the claimant — and can even be granted when the claimant is not directly affected by the law — because "[n]o one should be subjected to an unconstitutional law" (*Nur*, at para. 51; see also *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 313). This step of the analysis therefore reflects the *Charter*'s rights-protecting purpose, the public's interest in constitutional compliance, and the text of s. 52(1) — the law is of no force or effect to the *full* extent of its inconsistency with the Constitution.

[110] For example, in some cases where a criminal offence's effects on particular groups of people or in certain circumstances have been found unconstitutional, *all* of those people and circumstances have been exempted from criminal liability (see, e.g., *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, as interpreted in *R. v. Barabash*, 2015 SCC 29, [2015] 2 S.C.R. 522; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, as interpreted in *R. v. Rajaratnam*, 2019 BCCA 209, 376 C.C.C. (3d) 181; *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602). The same is true for mandatory

adaptées, les tribunaux devraient garder à l'esprit « de quelle façon la loi en question viole la *Charte* et pourquoi cette violation ne peut être justifiée en vertu de l'article premier » (*Schachter*, p. 702). (Bien que cette ligne directrice générale demeure utile, les tribunaux devraient garder à l'esprit que le critère de l'arrêt *Oakes* a évolué depuis le prononcé de l'arrêt *Schachter* et qu'il met maintenant l'accent sur la justification de la mesure attentatoire plutôt que de la loi dans son ensemble (comparer l'arrêt *Schachter*, p. 703-705, à l'arrêt *RJR-MacDonald*, par. 144).) L'analyse de la réparation qu'il convient d'accorder repose sur la nature et l'étendue de la violation sous-jacente de la *Charte*, car la portée de la réparation qui est finalement accordée dépend notamment de l'étendue de la violation.

[109] Définir l'étendue de l'inconstitutionnalité en fonction de la violation substantielle de la *Charte* permet de protéger les droits de toutes les personnes directement touchées en veillant à ce que tous les vices constitutionnels qu'elle renferme soient supprimés. Cela sert également l'intérêt général du public de veiller à ce que les actes de l'État soient conformes à la Constitution. Ce type de réparation va au-delà du demandeur — et peut même être accordé lorsque le demandeur n'est pas directement touché par la loi — parce que « [n]ul ne doit être soumis à une loi inconstitutionnelle » (*Nur*, par. 51; voir aussi *Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 313). Cette étape de l'analyse tient donc compte de l'objectif de protection des droits que vise la *Charte*, de l'intérêt qu'a le public à ce que les lois soient conformes à la Constitution, et du libellé du par. 52(1) — la loi est inopérante dans la *pleine* mesure de son incompatibilité avec la Constitution.

[110] Par exemple, lorsque les effets d'une infraction criminelle sur certains groupes de personnes ou dans certaines situations sont jugés inconstitutionnels, *l'ensemble* de ces personnes, quelle que soit la situation, ont été dégagées de toute responsabilité criminelle (voir, p. ex., *Carter c. Canada (Procureur général)*, 2015 CSC 5, [2015] 1 R.C.S. 331; *R. c. Sharpe*, 2001 CSC 2, [2001] 1 R.C.S. 45, tel qu'interprété dans *R. c. Barabash*, 2015 CSC 29, [2015] 2 R.C.S. 522; *R. c. Appulonappa*, 2015 CSC 59, [2015] 3 R.C.S. 754, tel qu'interprété dans *R. c. Rajaratnam*, 2019 BCCA 209, 376 C.C.C. (3d) 181; *R. c. Smith*, 2015 CSC 34, [2015] 2 R.C.S. 602). Il en va de même des dispositions qui

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minimum penalties, which can be invalidated even when the applicant is not directly affected (see, e.g., *Nur*; *Lloyd*).

[111] On the other hand, it also follows from s. 52(1) that to the extent they are not inconsistent with the Constitution, the public is entitled to the benefit of laws passed by the legislature. Tailored remedies that address the precise constitutional flaw can permit a court to both safeguard the constitutional rights of all those affected and preserve the constitutional aspects of the law. Many of the Court's tailored remedies reflect both these principles. The criminal offences considered in *Carter*, *Sharpe*, *Smith*, and *Appulonappa*, for example, were declared of no force or effect *only* to the extent that they violated rights, preserving their constitutionally compliant effects.

[112] The second step is determining the form that a declaration should take. In doing so, *Schachter* explained that remedies other than full declarations of invalidity should be granted when the nature of the violation and the intention of the legislature allows for them. Full statutory schemes or Acts are rarely struck down in their entirety — to my knowledge, this Court has only done so on eight occasions.[3] To ensure the public has the benefit of enacted legislation, remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved (*Schachter*, at p. 700; *Vriend*, at paras. 149-50). Crucially, in Canada, the declaration issued cures the law's unconstitutionality. A declaration that fails to do so, like the kind suggested by my colleagues, Justice Côté and Justice Brown, at para. 248 of their reasons, is more

[3] See *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 246, at para. 97; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at para. 40; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 118; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 88; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 176-77; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, at p. 1108; *R. v. Généreux*, [1992] 1 S.C.R. 259, at pp. 309-10; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 355-56.

prescrivent des peines minimales obligatoires, qui peuvent être invalidées même si le demandeur n'est pas directement touché (voir, p. ex., *Nur*; *Lloyd*).

[111] Par contre, il se dégage également du par. 52(1) que le public a droit au bénéfice des lois adoptées par le législateur dans la mesure où ces lois ne sont pas incompatibles avec la Constitution. En accordant des réparations adaptées pour corriger un vice constitutionnel en particulier, le tribunal peut préserver les droits constitutionnels de toutes les personnes touchées ainsi que les aspects constitutionnels de la loi en question. D'ailleurs, bon nombre des réparations adaptées qu'a accordées notre Cour tiennent compte de ces deux principes. Les dispositions relatives à des infractions criminelles qui ont été examinées dans les arrêts *Carter*, *Sharpe*, *Smith* et *Appulonappa*, par exemple, ont été déclarées inopérantes *uniquement* dans la mesure où elles violaient des droits, préservant ainsi leurs effets conformes sur le plan constitutionnel.

[112] Dans l'arrêt *Schachter*, notre Cour a expliqué que lors du choix du type de déclaration, qui constitue la deuxième étape, des réparations autres que des déclarations d'invalidité intégrales devraient être accordées lorsque la nature de la violation et l'intention du législateur le justifient. Il est rare que des régimes législatifs exhaustifs ou des lois soient annulés dans leur totalité — à ma connaissance, notre Cour n'a procédé ainsi qu'à huit reprises[3]. Pour garantir au public le bénéfice des lois qui sont adoptées, l'interprétation atténuée, l'interprétation large et la dissociation, qui sont des réparations adaptées à l'étendue de la violation, devraient être utilisées dans la mesure du possible afin de préserver les aspects constitutionnels des lois (*Schachter*, p. 700; *Vriend*, par. 149-150). Fait essentiel, au Canada, la déclaration prononcée supprime les vices constitutionnels de la loi; la déclaration qui ne le fait pas, à l'instar

[3] Voir *Saskatchewan Federation of Labour c. Saskatchewan*, 2015 CSC 4, [2015] 1 R.C.S. 246, par. 97; *Alberta (Information and Privacy Commissioner) c. Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401*, 2013 CSC 62, [2013] 3 R.C.S. 733, par. 40; *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, 2003 CSC 54, [2003] 2 R.C.S. 504, par. 118; *Mackin c. Nouveau-Brunswick (Ministre des Finances)*, 2002 CSC 13, [2002] 1 R.C.S. 405, par. 88; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 176-177; *Ramsden c. Peterborough (Ville)*, [1993] 2 R.C.S. 1084, p. 1108; *R. c. Généreux*, [1992] 1 R.C.S. 259, p. 309-310; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 355-356.

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akin to the declaration of "inconsistency" or "incompatibility" made in jurisdictions where courts do not have the authority to strike down unconstitutional legislation (see, e.g., *Attorney-General v. Taylor*, [2018] NZSC 104, [2019] 1 N.Z.L.R. 213; *Human Rights Act 1998* (U.K.), 1998, c. 42, s. 4(4) and (6)).

[113] Reading *down* is when a court limits the reach of legislation by declaring it to be of no force and effect to a precisely defined extent. Reading down is an appropriate remedy when "the offending portion of a statute can be defined in a limited manner" (*Schachter*, at p. 697). Inversely, reading *in* is when a court broadens the grasp of legislation by declaring an implied limitation on its scope to be without force or effect. Reading in is an appropriate remedy when the inconsistency with the Constitution can be defined as "what the statute wrongly excludes rather than what it wrongly includes" (*Schachter*, at p. 698 (emphasis in original)). *Severance* is when a court declares certain words to be of no force or effect, thereby achieving the same effects as reading down or reading in, depending on whether the severed portion serves to limit or broaden the legislation's reach. Severance is appropriate where the offending portion is set out explicitly in the words of the legislation. These forms of remedy illustrate a court's flexibility in responding to a constitutional violation.

[114] However, if granted in the wrong circumstances, tailored remedies can intrude on the legislative sphere. *Schachter* cautioned that tailored remedies should only be granted where it can be fairly assumed that "the legislature would have passed the constitutionally sound part of the scheme without the unsound part" and where it is possible to precisely define the unconstitutional aspect of the law (p. 697, citing *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (P.C.), at p. 518). If it appears unlikely that the legislature would have enacted the tailored version of the statute, tailoring the remedy would not conform to its policy choice

du type de déclaration qu'ont proposé mes collègues les juges Côté et Brown au par. 248 de leurs motifs, s'apparente davantage à la déclaration de « non-conformité » ou d'« incompatibilité » prononcée là où les tribunaux n'ont pas le pouvoir d'annuler une loi inconstitutionnelle (voir, p. ex., *Attorney-General c. Taylor*, [2018] NZSC 104, [2019] 1 N.Z.L.R. 213; *Human Rights Act 1998* (R.-U.), 1998, c. 42, par. 4(4) et (6)).

[113] L'interprétation *atténuée* consiste pour un tribunal à limiter la portée d'une loi en la déclarant inopérante dans une mesure qu'il définit avec précision. L'interprétation atténuée est une réparation appropriée « [s]i la partie irrégulière d'une loi peut être isolée » (*Schachter*, p. 697). Inversement, l'interprétation *large* consiste pour un tribunal à étendre le champ d'application d'une loi en déclarant inopérante une limitation implicite de sa portée. L'interprétation large est une réparation appropriée lorsque l'incompatibilité avec la Constitution « découle de ce que la loi exclut à tort plutôt que de ce qu'elle inclut à tort » (*Schachter*, p. 698 (souligné dans l'original)). La *dissociation* consiste pour un tribunal à déclarer inopérants certains termes d'une loi. Cette technique a les mêmes effets que l'interprétation atténuée ou l'interprétation large dans la mesure où la partie retranchée sert à restreindre ou à élargir la portée de la loi. La dissociation est de mise lorsque la partie irrégulière de la loi est énoncée explicitement dans son libellé. Ces types de réparations démontrent la latitude dont dispose le tribunal lorsqu'il statue sur une violation constitutionnelle.

[114] Cependant, si les circonstances ne se prêtent pas à l'octroi de réparations adaptées, il se peut que les réparations empiètent sur la sphère législative. Dans l'arrêt *Schachter*, notre Cour a précisé que des réparations adaptées ne devraient être accordées que s'il est très plausible de présumer que « le législateur aurait adopté la partie constitutionnelle de la loi en question sans la partie inconstitutionnelle » et qu'il est possible de définir avec précision la partie inconstitutionnelle de la loi (p. 697, citant *Attorney-General for Alberta c. Attorney-General for Canada*, [1947] A.C. 503 (C.P.), p. 518). S'il semble peu probable que le législateur aurait édicté la version adaptée de la loi, l'adaptation de la réparation ne serait pas

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and would therefore undermine parliamentary sovereignty (*Schachter*, at pp. 705-6; *Hunter*, at p. 169). The significance of the remaining portion of the statute must be considered, and tailored remedies should not be granted when they would interfere with the legislative objective of the law as a whole (*Schachter*, at pp. 705-15). For example, in *Vriend*, Iacobucci J. read "sexual orientation" into the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, because the term was sufficiently precise and because the legislature would rather have included that protection than sacrificed the entire scheme (paras. 155-60 and 167-69). In *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, McLachlin C.J. severed part of the tertiary ground for denying bail because the rest of the provision "is capable of standing alone without doing damage to Parliament's intention" (para. 44). This Court has granted a remedy short of full invalidity of a statutory provision at least 24 times.[4] Nonetheless, a tailored remedy will frequently not be appropriate. This Court has opted to fully invalidate a provision at least

conforme à son choix de politique et porterait donc atteinte à la souveraineté parlementaire (*Schachter*, p. 705-706; *Hunter*, p. 169). Le sens de la partie de la loi qui reste doit donc être examiné, et des réparations adaptées ne devraient pas être accordées lorsqu'elles risquent de nuire à l'objectif législatif de la loi dans son ensemble (*Schachter*, p. 705-715). Par exemple, dans l'arrêt *Vriend*, le juge Iacobucci a conclu que l'*Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, devrait être interprétée comme si les mots « orientation sexuelle » y figuraient parce que ces mots sont assez précis et que le législateur aurait choisi d'intégrer cette catégorie protégée plutôt que de sacrifier l'ensemble du régime (par. 155-160 et 167-169). Dans l'arrêt *R. c. Hall*, 2002 CSC 64, [2002] 3 R.C.S. 309, la juge en chef McLachlin a retranché une partie du troisième motif de refuser d'accorder la mise en liberté sous caution parce que le reste de la disposition « demeure applicable en soi et ne compromet pas l'intention du législateur » (par. 44). Notre Cour a accordé une réparation autre qu'une déclaration d'invalidité intégrale d'une disposition législative au moins 24 fois[4]. Néanmoins,

[4] See *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 83; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 96; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at paras. 83-85; *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602, at paras. 30-31; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at paras. 67-115; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at paras. 126-27, 132 and 147; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 164; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 164; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 142; *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, at paras. 22, 44 and 45; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, at para. 70; *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at paras. 1, 55 and 101; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at paras. 128-29; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at paras. 105 and 159; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at paras. 23-24 and 114-18; *Vriend v. Alberta,* [1998] 1 S.C.R. 493, at paras. 148-79; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 276 and 294; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, at paras. 103-5; *Miron v. Trudel*, [1995] 2 S.C.R. 418, at paras. 176-81; *R. v. Laba*, [1994] 3 S.C.R. 965, at pp. 1011-16; *R. v. Grant*, [1993] 3 S.C.R. 223, at pp. 243-45; *R. v. Morales*, [1992] 3 S.C.R. 711, at pp. 741-43; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at pp. 101-6; *R. v. Hess*, [1990] 2 S.C.R. 906, at pp. 933-34; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88.

[4] Voir *Frank c. Canada (Procureur général)*, 2019 CSC 1, [2019] 1 R.C.S. 3, par. 83; *R. c. K.R.J.*, 2016 CSC 31, [2016] 1 R.C.S. 906, par. 96; *R. c. Appulonappa*, 2015 CSC 59, [2015] 3 R.C.S. 754, par. 83-85; *R. c. Smith*, 2015 CSC 34, [2015] 2 R.C.S. 602, par. 30-31; *Canada (Procureur général) c. Fédération des ordres professionnels de juristes du Canada*, 2015 CSC 7, [2015] 1 R.C.S. 401, par. 67-115; *Carter c. Canada (Procureur général)*, 2015 CSC 5, [2015] 1 R.C.S. 331, par. 126-127, 132 et 147; *Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1102, par. 164; *Saskatchewan (Human Rights Commission) c. Whatcott*, 2013 CSC 11, [2013] 1 R.C.S. 467, par. 164; *Charkaoui c. Canada (Citoyenneté et Immigration)*, 2007 CSC 9, [2007] 1 R.C.S. 350, par. 142; *R. c. Hall*, 2002 CSC 64, [2002] 3 R.C.S. 309, par. 22, 44, et 45; *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94, [2001] 3 R.C.S. 1016, par. 70; *R. c. Ruzic*, 2001 CSC 24, [2001] 1 R.C.S. 687, par. 1, 55 et 101; *R. c. Sharpe*, 2001 CSC 2, [2001] 1 R.C.S. 45, par. 128-129; *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, 2000 CSC 69, [2000] 2 R.C.S. 1120, par. 105 et 159; *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203, par. 23-24 et 114-118; *Vriend c. Alberta*, [1998] 1 R.C.S. 493, par. 148-179; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, par. 276 et 294; *Benner c. Canada (Secrétaire d'État)*, [1997] 1 R.C.S. 358, par. 103-105; *Miron c. Trudel*, [1995] 2 R.C.S. 418, par. 176-181; *R. c. Laba*, [1994] 3 R.C.S. 965, p. 1011-1016; *R. c. Grant*, [1993] 3 R.C.S. 223, p. 243-245; *R. c. Morales*, [1992] 3 R.C.S. 711, p. 741-743; *Osborne c. Canada (Conseil du Trésor)*, [1991] 2 R.C.S. 69, p. 101-106; *R. c. Hess*, [1990] 2 R.C.S. 906, p. 933-934; *Procureur général du Québec c. Quebec Association of Protestant School Boards*, [1984] 2 R.C.S. 66, p. 88.

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55 times.[5] These include the cases dealing with mandatory minimum penalties referenced above — the goal of a mandatory minimum sentence is to

[5] Note that some of the cases listed here are also listed at footnote 4, *supra*, since they contain both full invalidations of certain legislative provisions, as well as only partial invalidations of other provisions. See *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 73; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 83; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 98; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, at paras. 5, 23 and 58; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 103; *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336, at para. 4; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 74; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 56; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 119; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at paras. 67 and 115; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at paras. 154 and 158; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at paras. 81-89; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1102, at para. 164; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at paras. 100-103; *Quebec (Education Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208, at para. 46; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at paras. 89-91; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 168; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 142; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, at paras. 56 and 58; *Nova Scotia (Worker's Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 118; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 93; *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835, at paras. 43 and 46; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 64; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 47-48; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472, at paras. 32 and 34; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, at para. 70; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at paras. 79-80; *M. v. H.*, [1999] 2 S.C.R. 3, at paras. 136-45; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 131; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 86; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 292; *R. v. Heywood*, [1994] 3 S.C.R. 761, at pp. 803-4; *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438, at pp. 439-40; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, at pp. 89-90 and 117; *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 778; *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 725; *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 104 and 164-65; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at pp. 207-8 and 255; *R. v. Sit*, [1991] 3 S.C.R. 124, at p. 130; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 630; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991]

une réparation adaptée ne sera souvent pas appropriée. Notre Cour a décidé d'invalider complètement une disposition dans au moins 55 affaires[5], dont les

[5] Veuillez noter que certains des arrêts énumérés ci-dessous figurent aussi à la note en bas de page 4, *supra*, car la Cour y a invalidé intégralement certaines dispositions législatives et en a invalidé d'autres en partie seulement. Voir *R. c. Morrison*, 2019 CSC 15, [2019] 2 R.C.S. 3, par. 73; *Frank c. Canada (Procureur général)*, 2019 CSC 1, [2019] 1 R.C.S. 3, par. 83; *R. c. Boudreault*, 2018 CSC 58, [2018] 3 R.C.S. 599, par. 98; *Québec (Procureure générale) c. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 CSC 17, [2018] 1 R.C.S. 464, par. 5, 23 et 58; *Conférence des juges de paix magistrats du Québec c. Québec (Procureure générale)*, 2016 CSC 39, [2016] 2 R.C.S. 116, par. 103; *Canada (Procureur général) c. Chambre des notaires du Québec*, 2016 CSC 20, [2016] 1 R.C.S. 336, par. 4; *R. c. Safarzadeh-Markhali*, 2016 CSC 14, [2016] 1 R.C.S. 180, par. 74; *R. c. Lloyd*, 2016 CSC 13, [2016] 1 R.C.S. 130, par. 56; *R. c. Nur*, 2015 CSC 15, [2015] 1 R.C.S. 773, par. 119; *Canada (Procureur général) c. Fédération des ordres professionnels de juristes du Canada*, 2015 CSC 7, [2015] 1 R.C.S. 401, par. 67 et 115; *Association de la police montée de l'Ontario c. Canada (Procureur général)*, 2015 CSC 1, [2015] 1 R.C.S. 3, par. 154 et 158; *Canada (Procureur général) c. Whaling*, 2014 CSC 20, [2014] 1 R.C.S. 392, par. 81-89; *Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1102, par. 164; *R. c. Tse*, 2012 CSC 16, [2012] 1 R.C.S. 531, par. 100-103; *Québec (Éducation, Loisir et Sport) c. Nguyen*, 2009 CSC 47, [2009] 3 R.C.S. 208, par. 46; *Greater Vancouver Transportation Authority c. Fédération canadienne des étudiantes et étudiants — Section Colombie-Britannique*, 2009 CSC 31, [2009] 2 R.C.S. 295, par. 89-91; *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391, par. 168; *Charkaoui c. Canada (Citoyenneté et Immigration)*, 2007 CSC 9, [2007] 1 R.C.S. 350, par. 142; *R. c. Demers*, 2004 CSC 46, [2004] 2 R.C.S. 489, par. 56 et 58; *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, 2003 CSC 54, [2003] 2 R.C.S. 504, par. 118; *Figueroa c. Canada (Procureur général)*, 2003 CSC 37, [2003] 1 R.C.S. 912, par. 93; *Trociuk c. Colombie-Britannique (Procureur général)*, 2003 CSC 34, [2003] 1 R.C.S. 835, par. 43 et 46; *Sauvé c. Canada (Directeur général des élections)*, 2002 CSC 68, [2002] 3 R.C.S. 519, par. 64; *Lavallee, Rackel & Heintz c. Canada (Procureur général)*, 2002 CSC 61, [2002] 3 R.C.S. 209, par. 47-48; *R. c. Guignard*, 2002 CSC 14, [2002] 1 R.C.S. 472, par. 32 et 34; *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94, [2001] 3 R.C.S. 1016, par. 70; *T.U.A.C., section locale 1518 c. KMart Canada Ltd.*, [1999] 2 R.C.S. 1083, par. 79-80; *M. c. H.*, [1999] 2 R.C.S. 3, par. 136-145; *Thomson Newspapers Co. c. Canada (Procureur général)*, [1998] 1 R.C.S. 877, par. 131; *Libman c. Québec (Procureur général)*, [1997] 3 R.C.S. 569, par. 86; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, par. 292; *R. c. Heywood*, [1994] 3 R.C.S. 761, p. 803-804; *Sauvé c. Canada (Procureur général)*, [1993] 2 R.C.S. 438, p. 439-440; *Kourtessis c. M.R.N.*, [1993] 2 R.C.S. 53, p. 89-90 et 117; *R. c. Zundel*, [1992] 2 R.C.S. 731, p. 778; *Schachter c. Canada*, [1992] 2 R.C.S. 679, p. 725; *R. c. Bain*, [1992] 1 R.C.S. 91, p. 104 et 164-165; *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154, p. 207-208 et 255; *R. c. Sit*, [1991] 3 R.C.S. 124, p. 130; *R. c. Seaboyer*, [1991] 2 R.C.S. 577, p. 630; *Tétreault-Gadoury c. Canada (Commission de l'Emploi et de l'Immigration)*, [1991] 2 R.C.S. 22, p. 38-47; *R. c. Swain*,

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remove judicial discretion, so tailoring the declaration to reintroduce that discretion would distort the provision so that it no longer conformed to its legislative purpose (*R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at paras. 50 and 53).

[115] Lamer C.J. was also conscious of the limitation of the judicial role, explaining in *Schachter* that tailored remedies should not be granted when they do not "flo[w] with sufficient precision from the requirements of the Constitution", because although courts are capable of determining what the Constitution requires, they are not well-suited to making "*ad hoc* choices from a variety of options" (p. 707).

[116] In sum, consistent with the principle of constitutional supremacy embodied in s. 52(1) and the importance of safeguarding rights, courts must identify and remedy the full extent of the unconstitutionality by looking at the precise nature and scope of the *Charter* violation. To ensure the public retains the benefit of legislation enacted in accordance with our democratic system, remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved (*Schachter*, at p. 700; *Vriend*, at paras. 149-50). To

affaires précitées portant sur des dispositions qui prescrivent des peines minimales obligatoires. En adoptant une disposition qui prescrit une peine minimale obligatoire, le législateur veut retirer aux juges leur pouvoir discrétionnaire en la matière. Ainsi, le fait d'adapter une déclaration de manière à rétablir ce pouvoir discrétionnaire dénaturerait la disposition en cause, qui ne serait alors plus conforme à son objectif législatif (*R. c. Ferguson*, 2008 CSC 6, [2008] 1 R.C.S. 96, par. 50 et 53).

[115] Le juge en chef Lamer était également conscient de la limite du rôle judiciaire lorsqu'il a expliqué dans l'arrêt *Schachter* que des réparations adaptées ne devraient pas être accordées lorsqu'elles ne se « dégage[nt] pas avec suffisamment de précision des exigences de la Constitution », car même si les tribunaux sont en mesure de déterminer les exigences de la Constitution, ils ne sont pas aptes à faire « des choix particuliers entre diverses options » (p. 707).

[116] En somme, conformément au principe de la suprématie de la Constitution qui est incorporé dans le par. 52(1), et compte tenu de l'importance de protéger les droits, les tribunaux doivent définir toute l'étendue de l'inconstitutionnalité et corriger celle-ci en examinant la nature et la portée précises de la violation de la *Charte*. Pour garantir le droit du public au bénéfice des lois qui sont adoptées conformément à notre système démocratique, l'interprétation atténuée, l'interprétation large et la dissociation, qui sont des réparations adaptées à l'étendue de la violation, devraient être utilisées dans la mesure du possible afin de préserver les aspects

2 S.C.R. 22, at pp. 38-47; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 1021; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at pp. 164-66, 226-27 and 251; *R. v. Arkell*, [1990] 2 S.C.R. 695, at p. 702; *R. v. Martineau*, [1990] 2 S.C.R. 633; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at pp. 251-53; *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at pp. 394-96; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1351 and 1368; *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, at pp. 633-34; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 745; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, at p. 812; *Corporation professionnelle des médecins du Québec v. Thibault*, [1988] 1 S.C.R. 1033, at pp. 1045-46; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 80 and 184; *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1081; *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 142; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 521; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169.

[1991] 1 R.C.S. 933, p. 1021; *Comité pour la République du Canada c. Canada* [1991] 1 R.C.S. 139, p. 164-166, 226-227 et 251; *R. c. Arkell*, [1990] 2 R.C.S. 695, p. 702; *R. c. Martineau*, [1990] 2 R.C.S. 633; *Rocket c. Collège royal des chirurgiens dentistes de l'Ontario*, [1990] 2 R.C.S. 232, p. 251-253; *Mahe c. Alberta*, [1990] 1 R.C.S. 342, p. 394-396; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, p. 1351 et 1368; *Black c. Law Society of Alberta*, [1989] 1 R.C.S. 591, p. 633-634; *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712, p. 745; *Devine c. Québec (Procureur général)*, [1988] 2 R.C.S. 790, p. 812; *Corporation professionnelle des médecins du Québec c. Thibault*, [1988] 1 R.C.S. 1033, p. 1045-1046; *R. c. Morgentaler*, [1988] 1 R.C.S. 30, p. 80 et 184; *R. c. Smith*, [1987] 1 R.C.S. 1045, p. 1081; *R. c. Oakes*, [1986] 1 R.C.S. 103, p. 142; *Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486, p. 521; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 169.

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respect the differing roles of courts and legislatures foundational to our constitutional architecture, determining whether to strike down legislation in its entirety or to instead grant a tailored remedy of reading in, reading down, or severance, depends on whether the legislature's intention was such that a court can fairly conclude it would have enacted the law as modified by the court. This requires the court to determine whether the law's overall purpose can be achieved without violating rights. If a tailored remedy can be granted without the court intruding on the role of the legislature, such a remedy will preserve a law's constitutionally compliant effects along with the benefit that law provides to the public. The rule of law is thus served both by ensuring that legislation complies with the Constitution and by securing the public benefits of laws where possible.

constitutionnels des lois (*Schachter*, p. 700; *Vriend*, par. 149-150). Pour respecter les rôles différents des tribunaux et des législateurs, un principe fondamental de notre architecture constitutionnelle, le choix d'annuler une loi dans sa totalité ou d'accorder une réparation adaptée en donnant à cette loi une interprétation large, une interprétation atténuée ou en retranchant une de ses dispositions dépend de la réponse à la question de savoir si l'intention du législateur était telle qu'une cour peut raisonnablement conclure qu'il aurait adopté la loi telle que l'a modifiée la cour. Pour ce faire, la cour doit déterminer si l'objet général de la loi peut être réalisé sans qu'il y ait violation des droits. Si une réparation adaptée peut être accordée sans que la cour empiète sur le rôle du législateur, une telle réparation permettra de préserver les effets conformes sur le plan constitutionnel d'une loi ainsi que le bénéfice que cette loi procure au public. La primauté du droit est donc respectée si l'on veille à la conformité des lois avec la Constitution et si l'on s'assure que le public bénéficie des lois dans la mesure du possible.

(4) Suspending the Effect of Section 52(1) Declarations

[117] There are times when an immediately effective declaration of invalidity would endanger an interest of such great importance that, on balance, the benefits of delaying the effect of that declaration outweigh the cost of preserving an unconstitutional law that violates *Charter* rights.

[118] In total, this Court has suspended declarations of invalidity in 23 out of approximately 90 decisions in which it declared legislation to be of no force or effect for violating the *Charter*.[6] The

(4) Suspendre l'effet de déclarations prononcées en vertu du par. 52(1)

[117] Il arrive parfois qu'une déclaration d'invalidité avec effet immédiat soit susceptible de porter atteinte à un intérêt qui revêt une importance si grande que, tout bien considéré, les avantages qu'il y a à suspendre l'effet de cette déclaration l'emportent sur les inconvénients du maintien d'une loi inconstitutionnelle qui viole des droits garantis par la *Charte*.

[118] En tout, notre Cour a suspendu l'effet de déclarations d'invalidité dans 23 des quelque 90 arrêts où elle a déclaré inopérantes des dispositions législatives parce qu'elles violaient la *Charte*[6]. Au

[6] *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531; *Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007]

[6] *Carter c. Canada (Procureur général)*, 2015 CSC 5, [2015] 1 R.C.S. 331; *Saskatchewan Federation of Labour c. Saskatchewan*, 2015 CSC 4, [2015] 1 R.C.S. 245; *Association de la police montée de l'Ontario c. Canada (Procureur général)*, 2015 CSC 1, [2015] 1 R.C.S. 3; *Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101; *Alberta (Information and Privacy Commissioner) c. Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401*, 2013 CSC 62, [2013] 3 R.C.S. 733; *R. c. Tse*, 2012 CSC 16, [2012] 1 R.C.S. 531; *Québec (Éducation, Loisir et Sport) c. Nguyen*, 2009 CSC 47, [2009] 3 R.C.S. 208; *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391; *Charkaoui c. Canada (Citoyenneé et*

[141] The Attorney General also relies on a "rule" endorsed in *Demers* that s. 24(1) remedies cannot be combined with s. 52(1) remedies, precluding courts from granting a s. 24(1) individual remedy during the suspension period (para. 62). However, in *Demers*, at para. 61, Iacobucci and Bastarache JJ. drew that conclusion from a passage in *Schachter* cautioning that "where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available" (p. 720 (emphasis added)) because such a remedy would undermine the suspension. When it came to giving an individual remedy during a period of suspension, Lamer C.J. reasoned that it would be "tantamount" to giving the declaration retroactive effect.

[142] To the extent that *Demers* reads *Schachter* as setting out a hard-and-fast rule against combining s. 24(1) and s. 52(1) remedies, it misreads that case. As I will explain, s. 24(1) is too flexible to be restricted in this way. As other jurisprudence of this Court suggests, individual exemptions from suspensions will often be an "appropriate and just" remedy when an individual claimant has braved the storm of constitutional litigation and obtained a declaration whose benefit "enures to society at large" (*Demers*, at para. 99, per LeBel J.). On the other hand, where an exemption would undermine the rationale for the suspension, this will be a strong countervailing factor against granting an exemption.

[143] Section 24(1) of the *Charter* provides:

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

[141] Le procureur général s'appuie également sur une « règle » qui a été approuvée dans l'arrêt *Demers* selon laquelle des réparations fondées sur le par. 24(1) ne peuvent pas être combinées à des réparations fondées sur le par. 52(1), ce qui empêche les tribunaux d'octroyer une réparation individuelle en vertu du par. 24(1) pendant la période de suspension (par. 62). Cependant, au par. 61 de *Demers*, les juges Iacobucci et Bastarache ont tiré cette conclusion d'un passage de l'arrêt *Schachter* où la Cour précisait que « si l'effet de la déclaration d'invalidité est temporairement suspendu, il n'y aura pas non plus souvent lieu à une réparation en vertu de l'art. 24 » (p. 720 (je souligne)) parce qu'une telle réparation saperait l'effet de la suspension. En ce qui concerne l'octroi d'une réparation individuelle pendant une période de suspension, le juge en chef Lamer a expliqué que cette mesure « équivaudrait » à donner un effet rétroactif à la déclaration d'invalidité.

[142] Dans la mesure où, dans l'arrêt *Demers*, la Cour affirme que l'arrêt *Schachter* énonce une règle rigide qui interdit de combiner des réparations fondées sur le par. 24(1) et des réparations fondées sur le par. 52(1), elle interprète erronément ce jugement. Comme je vais l'expliquer, le par. 24(1) a une application trop souple pour être restreint de cette manière. Comme le laissent entendre d'autres arrêts de notre Cour, l'exemption individuelle d'une suspension constituera souvent une réparation « convenable et juste » dans les cas où un demandeur a bravé la tempête d'un litige constitutionnel et a obtenu un jugement déclaratoire dont « toute la société [. . .] profite » (*Demers*, par. 99, le juge LeBel). Par contre, si une exemption mine la raison d'être d'une suspension, ce facteur important ira à l'encontre de l'octroi d'une exemption.

[143] Le paragraphe 24(1) de la *Charte* est ainsi libellé :

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

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[144] This Court has said that to be "appropriate and just", a s. 24(1) remedy should meaningfully vindicate the right of the claimant, conform to the separation of powers, invoke the powers and function of a court, be fair to the party against whom the remedy is ordered, and allow s. 24(1) to evolve to meet the challenges of each case (*Doucet-Boudreau*, at paras. 55-59). In particular, an effective remedy that meaningfully vindicates the rights and freedoms of the claimant will take into account the nature of the rights violation and the situation of the claimant, will be relevant to the claimant's experience and address the circumstances of the rights violation, and will not be "smothered" in procedural delays and difficulties (para. 55). The court's approach to s. 24(1) remedies must stay flexible and responsive to the needs of a given case (para. 59).

[144] Notre Cour a déclaré que pour être « convenable et juste », une réparation fondée sur le par. 24(1) devrait permettre de défendre utilement les droits du demandeur, respecter la séparation des pouvoirs, mettre à contribution le rôle et les pouvoirs d'un tribunal, être équitable pour la partie visée par la réparation et permettre au par. 24(1) d'évoluer de manière à relever les défis de chaque cas (*Doucet-Boudreau*, par. 55-59). Plus particulièrement, une réparation efficace qui permet de défendre utilement les droits et libertés du demandeur tiendra compte de la nature des droits violés et de la situation du demandeur, sera adaptée à l'expérience vécue par le demandeur et tiendra compte des circonstances de la violation des droits en cause, et ne sera pas « étouffé[e] » dans les délais et les difficultés de procédure (par. 55). De plus, la manière dont la Cour aborde les réparations accordées sur le fondement du par. 24(1) doit rester souple et prendre en considération les besoins en cause (par. 59).

[145] This Court's jurisprudence makes clear that granting individual remedies while the effects of declarations of invalidity are suspended can be appropriate and just. The Court granted a worker disability benefits for chronic pain during the suspension of a declaration that provisions were invalid for *excluding* chronic pain from the workers' compensation system (*Martin*, at paras. 121-22). The Court has acquitted individuals of criminal or quasi-criminal charges stemming from unconstitutional laws despite suspending the effects of the declarations of invalidity (*Guignard*, at para. 32; *Bain*, at pp. 105 and 165; see also *Corbiere*, at paras. 22-23).

[145] Il ressort clairement de la jurisprudence de notre Cour qu'il peut être convenable et juste d'accorder des réparations individuelles pendant la suspension de l'effet d'une déclaration d'invalidité. Par exemple, notre Cour a accordé des prestations d'invalidité à une travailleuse souffrant de douleur chronique pendant la suspension de l'effet d'une déclaration qui invalidait des dispositions *excluant* la douleur chronique du champ d'application du régime d'indemnisation des accidentés du travail (*Martin*, par. 121-122). La Cour a également acquitté des individus d'accusations criminelles ou quasi criminelles qui découlaient de lois inconstitutionnelles en dépit de la suspension des effets des déclarations d'invalidité (*Guignard*, par. 32; *Bain*, p. 105 et 165; voir aussi *Corbiere*, par. 22-23).

[146] A rule that individual claimants cannot be exempted from suspensions of declarations of invalidity would improperly fetter the broad discretion afforded under s. 24(1) of the *Charter* for courts to grant remedies they "conside[r] appropriate and just in the circumstances." Remedial discretion is a fundamental feature of the *Charter*. A bar on exempting individual claimants would often be unfair to the claimant, especially given that it is a court's decision to grant a suspension that makes the individual

[146] Une règle selon laquelle les demandeurs individuels ne peuvent pas être exemptés de la suspension de l'effet d'une déclaration d'invalidité entraverait indûment l'exercice du large pouvoir discrétionnaire qui est conféré aux tribunaux par le par. 24(1) de la *Charte*, qui leur permet d'accorder les réparations qu'ils « estime[nt] convenable[s] et juste[s] eu égard aux circonstances ». Le pouvoir discrétionnaire de réparation est un élément fondamental de la *Charte*. Interdire aux demandeurs

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remedy necessary. While the reason the suspension was granted is no doubt an important consideration in granting a s. 24(1) remedy — and, as I explain below, should be taken into account when the court is considering granting an exemption — Brendan Brammall has aptly described a strict rule as prioritizing fairness to government "over all countervailing reasons, such as providing an effective remedy" ("A Comment on *Doucet-Boudreau v. Nova Scotia (Minister of Education)* and *R. v. Demers*" (2006), 64 *U.T. Fac. L. Rev.* 113, at p. 117).

[147] In my view, when the effect of a declaration is suspended, an individual remedy for the claimant will often be appropriate and just. The importance of safeguarding constitutional rights weighs heavily in favour of an individual remedy. The concern for vindicating individual rights with effective remedies reaches back to Blackstone and Dicey, and continues to have force in the present day (see K. Roach, "Dialogic remedies" (2019), 17 *I CON* 860, at pp. 862-65).

[148] Exempting only the claimant from a suspension may appear unfair at first glance (see, in the context of prospective remedies, Choudhry and Roach, at p. 223, fn. 65, citing *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995)). But the claimant is not in the same position as others subject to the impugned law in a key respect: the claimant who brings a successful constitutional challenge has done the public interest a service by ensuring that an unconstitutional law is taken off the books — the claimant has pursued the "right of the citizenry to constitutional behaviour by Parliament" (*Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 163). While, as the Attorney General submits, it is in the public interest

individuels d'être exemptés d'une suspension sera souvent injuste pour ces derniers, surtout compte tenu du fait que la nécessité de la réparation individuelle découle de la décision du tribunal de suspendre l'effet de la déclaration en cause. Il ne fait certes aucun doute que la raison pour laquelle l'effet d'une déclaration a été suspendu est un facteur important qui doit être pris en compte lors de l'octroi d'une réparation fondée sur le par. 24(1) — et, comme je l'explique plus loin, ce facteur devrait également être pris en considération lorsque le tribunal envisage d'accorder une exemption. Cependant, Brendan Brammall a décrit avec justesse une règle stricte selon laquelle la priorité doit être accordée à l'équité à laquelle le gouvernement a droit [TRADUCTION] « plutôt qu'à tous les motifs faisant contrepoids, comme l'octroi d'une réparation efficace » (« A Comment on *Doucet-Boudreau v. Nova Scotia (Minister of Education)* and *R. v. Demers* » (2006), 64 *U.T. Fac. L. Rev.* 113, p. 117).

[147] À mon avis, lorsque l'effet d'une déclaration est suspendu, il sera souvent convenable et juste d'accorder une réparation individuelle au demandeur. En effet, l'importance de protéger les droits constitutionnels milite fortement en faveur de l'octroi d'une réparation individuelle. Le souci de défendre des droits individuels par l'octroi de réparations efficaces remonte à Blackstone et Dicey, et il reste d'actualité (voir K. Roach, « Dialogic remedies » (2019), 17 *I CON* 860, p. 862-865).

[148] Exempter seulement le demandeur de l'application d'une suspension peut sembler injuste à première vue (voir, dans le contexte des réparations prospectives, Choudhry et Roach, p. 223, note 65, citant *Harper c. Virginia Department of Taxation*, 509 U.S. 86 (1993); *Reynoldsville Casket Co. c. Hyde*, 514 U.S. 749 (1995)). Or, le demandeur ne se trouve pas dans la même situation que les autres personnes assujetties à la loi contestée sous un rapport clé : le demandeur qui a gain de cause dans sa contestation constitutionnelle a servi l'intérêt du public en faisant en sorte qu'une loi inconstitutionnelle soit invalidée. En effet, le demandeur a exercé le « droit des citoyens au respect de la constitution par le Parlement » (*Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138, p. 163). Comme l'a

[151] Second, courts may also have a compelling reason to refrain from granting an individual exemption where practical considerations like judicial economy make it inappropriate to do so. For instance, if a large group or class of claimants comes forward, it may not be practical — or even possible — to conduct the individual assessments necessary to grant them all individual exemptions.

[152] Ultimately, the public is well served by encouraging litigation that furthers the public interest by uncovering unconstitutional laws. Claimants, unlike others similarly situated, invest time and resources to pursue matters in the public interest — and those investments can pay dividends for others directly affected, especially those without the means to challenge the law themselves. Thus, if an exemption is otherwise appropriate and just, they should be exempted from suspensions in the absence of a compelling reason not to. Exemptions from suspensions will often be necessary to balance the interests of the litigant, the broader public, and the legislature.

(6) General Remedial Principles for Legislation That Violates the *Charter*

[153] As I have explained, running through this Court's remedial practice — from determining the form and breadth of remedies involving legislation, to suspending the effect of those remedies, to exempting litigants from suspensions — are recurring touchstones. These guide the principled discretion that this Court exercises when granting remedies for legislation that violates the *Charter*.

[154] Safeguarding rights lies at the core of that remedial approach. Section 52(1) calls for courts to invalidate any legislation to the extent it violates the

[151] Deuxièmement, le tribunal peut aussi avoir une raison impérieuse de ne pas accorder d'exemption individuelle s'il est inopportun de le faire en raison de considérations pratiques comme l'économie des ressources judiciaires. Par exemple, si une catégorie ou un groupe important de demandeurs se pourvoit en justice, il ne sera peut-être pas pratique — ni même possible — de procéder aux évaluations individuelles nécessaires pour accorder des exemptions à chacun d'eux.

[152] En fin de compte, on sert bien le public en encourageant le recours aux tribunaux qui favorise l'intérêt public en mettant au jour l'inconstitutionnalité d'une loi. Les demandeurs consacrent du temps et des ressources pour intenter des actions dans l'intérêt public, contrairement aux autres personnes qui se trouvent dans une situation semblable — et le temps et les ressources qu'ils consacrent ainsi peuvent être profitables à d'autres personnes directement touchées, surtout celles qui n'ont pas les moyens de la contester elles-mêmes. Par conséquent, si, à tous autres égards, une exemption constitue une réparation convenable et juste, les demandeurs devraient être exemptés des suspensions s'il n'existe aucun motif impérieux de ne pas leur accorder une telle réparation. Il sera d'ailleurs souvent nécessaire d'exempter un demandeur d'une suspension pour mettre en balance les intérêts de ce dernier, du public en général et du législateur.

(6) Principes généraux en matière de réparation dans les cas où une loi viole la *Charte*

[153] Comme je l'ai expliqué, la détermination du type et de la portée des réparations qu'il convient d'accorder conformément à la loi, la suspension de l'effet de ces réparations et l'exemption des plaideurs de ces suspensions sont souvent les pierres de touche de la pratique de notre Cour en matière de réparation, lesquelles guident le pouvoir discrétionnaire fondé sur des principes qu'elle exerce au moment d'accorder des réparations dans les cas où une loi viole la *Charte*.

[154] La protection des droits se trouve au cœur de cette approche en matière de réparation. Le paragraphe 52(1) exige des tribunaux qu'ils déclarent

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Charter. The *Charter* "constrain[s] government action in conformity with certain individual rights and freedoms, the preservation of which [is] essential to the continuation of a democratic, functioning society in which the basic dignity of all is recognized" (*Richardson*, at para. 57). The fundamental principle that courts should provide meaningful remedies for the violation of constitutional rights (*Doucet-Boudreau*, at para. 25) shapes the form and breadth of the declaration, acts as a strong counterweight against suspending the effect of such a declaration, and weighs in favour of granting an individual remedy in tandem with a suspension.

[155] It is a defining feature of our society, reflected in s. 52(1) and required by the rule of law, that state laws and state action must comply with the Constitution (*SWUAV*, at para. 31; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 250; *Secession Reference*, at para. 72). That the public has an interest in the constitutional compliance of the laws that govern it can be seen throughout this Court's remedial decisions. Courts ensure that a remedy covers the full scope of *Charter* violations; while this plays an important rights-protecting function, it also serves the public interest, ensuring that the government acts in accordance with the law — "[c]ompliance with *Charter* standards is a foundational principle of good governance" (*Ward*, at para. 38). The importance of constitutional compliance weighs against suspension of the declaration, and in favour of an individual exemption from any suspension.

[156] Another aspect of the rule of law, reflected in s. 52(1)'s caution that laws are of no force or effect only "to the extent of the inconsistency" with the Constitution, is the entitlement to a positive order of laws that organizes society and protects it from harm. The public has an interest in preserving legislation duly enacted by its democratically elected

invalide toute disposition législative qui viole la *Charte*. L'objet de la *Charte* est de « veiller à ce que toute action gouvernementale soit conforme à certains droits et libertés individuels dont la protection est essentielle au maintien d'une société démocratique et fonctionnelle dans laquelle la dignité fondamentale de tous les individus est reconnue » (*Richardson*, par. 57). Le principe fondamental selon lequel les tribunaux devraient accorder des réparations lorsque des droits constitutionnels sont violés (*Doucet-Boudreau*, par. 25) oriente la détermination du type et de la portée de la déclaration, constitue un contrepoids important à la suspension de l'effet de cette déclaration, et milite en faveur de l'octroi d'une réparation individuelle en même temps qu'une suspension.

[155] L'une des caractéristiques déterminantes de notre société, qui trouve son expression au par. 52(1) et que requiert la primauté du droit, est le principe suivant lequel les lois et mesures étatiques doivent être conformes à la Constitution (*SWUAV*, par. 31; *Conseil canadien des Églises c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] 1 R.C.S. 236, p. 250; *Renvoi relatif à la sécession*, par. 72). Il ressort d'ailleurs des décisions de notre Cour en matière de réparation qu'il est dans l'intérêt du public que les lois qui le régissent soient conformes à la Constitution. Les tribunaux s'assurent qu'une réparation s'applique à la pleine portée des violations de la *Charte*; si cela joue un rôle important dans la protection des droits, cela sert également l'intérêt du public en veillant à ce que les actes de l'État soient conformes à la loi, puisque « [l]e respect des normes établies dans la *Charte* constitue un principe fondamental de bon gouvernement » (*Ward*, par. 38). L'importance de la conformité à la Constitution milite contre la suspension de l'effet d'une déclaration et en faveur d'une exemption individuelle de toute suspension.

[156] Un autre aspect de la primauté du droit exprimé au par. 52(1), qui dispose que la Constitution rend inopérantes les « dispositions incompatibles de toute autre règle de droit », est qu'il doit y avoir un ordre de droit positif qui régit la société et la protège. Il est dans l'intérêt du public de conserver des lois qui ont été dûment adoptées par les législatures

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legislatures, to the extent it is not unconstitutional. This is why courts will tailor remedies to retain constitutional aspects of an unconstitutional law where possible and will temporarily suspend the effect of a declaration when an immediate order would undermine the public interest by depriving the public of laws passed for its benefit. In contrast, concerns about legal instability may weigh against suspension.

démocratiquement élues du pays, pourvu que ces lois ne soient pas inconstitutionnelles. C'est pourquoi les tribunaux adaptent les réparations pour préserver, dans la mesure du possible, les aspects constitutionnels d'une loi inconstitutionnelle et pourquoi ils suspendent temporairement l'effet d'une déclaration lorsqu'une ordonnance avec effet immédiat risque de miner l'intérêt du public en le privant de lois qui ont été adoptées pour son bénéfice. Cependant, des préoccupations liées à l'instabilité juridique peuvent militer contre la suspension.

[157] Finally, running through this Court's remedial practice for unconstitutional legislation is respect for the role of the legislature coupled with an understanding of the duties of the judicial role. When determining the form and breadth of remedies, courts will preserve as much of the law as possible to respect the legislature's policy choices, following its discernible intention when doing so. But courts will not shrink from performing their duty to protect rights through s. 52(1) remedies, determining the full extent of inconsistencies with the Constitution and declaring legislation to be of no force or effect when necessary. Suspensions can be granted when the legislature's democratic role as policymaker would be so seriously undermined by an immediately effective declaration that it outweighs important countervailing principles. In such circumstances, if an exemption would undermine that role, it will weigh against an individual remedy.

[157] Enfin, le respect du rôle du législateur conjugué à la compréhension des fonctions des tribunaux est le fil conducteur de la pratique de notre Cour en ce qui concerne les réparations qu'il convient d'accorder en présence de lois inconstitutionnelles. Lorsque les tribunaux déterminent le type et la portée des réparations, ils conservent le plus de dispositions possible de la loi en cause afin de respecter les choix de politique du législateur, respectant ainsi son intention évidente. Toutefois, les tribunaux ne se dérobent pas à leur obligation de protéger les droits au moyen de réparations fondées sur le par. 52(1), et ils n'hésitent pas à déterminer l'étendue complète des incompatibilités avec la Constitution et à déclarer inopérantes des dispositions législatives lorsque cela est nécessaire. Les tribunaux peuvent également suspendre l'effet d'une déclaration lorsque le rôle démocratique du législateur en matière d'élaboration de politiques serait ébranlé à un point tel par une déclaration avec effet immédiat que cela l'emporte sur d'importants principes qui font contrepoids. Dans un tel cas, si une exemption mine ce rôle, cela militera contre l'octroi d'une réparation individuelle.

[158] As I have explained, these constitutional considerations, drawn from our constitutional text and the broader architecture of our constitutional order and the rule of law, have repeatedly arisen in this Court's decisions on s. 52(1) remedies for *Charter* violations and give rise to four foundational principles:

[158] Comme je l'ai expliqué, ces considérations constitutionnelles, qui se dégagent de notre Constitution ainsi que de l'architecture générale de notre ordre constitutionnel et de la primauté du droit, ont maintes fois été soulevées dans la jurisprudence de notre Cour au sujet des réparations accordées en vertu du par. 52(1) pour des violations de la *Charte* et ont donné naissance à quatre principes fondamentaux :

A. *Charter* rights should be safeguarded through effective remedies.

A. Les droits garantis par la *Charte* doivent être protégés par l'octroi de réparations efficaces.

B. The public has an interest in the constitutional compliance of legislation.

C. The public is entitled to the benefit of legislation.

D. Courts and legislatures play different institutional roles.

[159] In my view, these remedial principles provide the groundwork for meaningful remedies in different contexts. They provide guidance to courts and encourage them to transparently explain remedial results. They will not always lead to agreement on the correct outcome; their value is in transparency, helping those who disagree articulate their specific points of disagreement.

(7) Application to This Case

(a) *What Form and Breadth Should the Remedy Take?*

[160] The first step in determining the breadth and form of a s. 52(1) remedy is determining the extent of the law's inconsistency with the *Charter*, which is defined by the nature of the substantive rights violation.

[161] Here, *Christopher's Law* limits s. 15(1) of the *Charter* by requiring those found NCRMD to comply with the sex offender registry upon discharge without providing them with any opportunities for exemption and removal based on individualized assessment. It draws distinctions based on the enumerated ground of mental disability by extending opportunities for exemption and removal to those found guilty of a sexual offence but denying them to those found NCRMD. Those distinctions are discriminatory because they perpetuate the historical and enduring disadvantage experienced by persons with mental illnesses.

B. Il est dans l'intérêt du public que les lois soient conformes à la Constitution.

C. Le public a droit au bénéfice de la loi.

D. Les tribunaux et les législateurs jouent des rôles institutionnels différents.

[159] À mon avis, ces principes en matière de réparation jettent les bases de l'octroi de réparations utiles dans différents contextes. Ils guident les tribunaux et les encouragent à expliquer de façon transparente leurs décisions au chapitre des réparations. Ces principes ne débouchent pas toujours sur une entente quant à l'issue appropriée, mais leur valeur réside dans la transparence, ce qui aide les personnes en désaccord à exprimer clairement leurs points de vue.

(7) Application en l'espèce

a) *Quels devraient être le type et la portée de la réparation?*

[160] La première étape à suivre pour déterminer le type et la portée d'une réparation fondée sur le par. 52(1) consiste à établir dans quelle mesure la loi est incompatible avec la *Charte*, ce qui dépend de la nature de la violation de fond des droits.

[161] En l'espèce, la *Loi Christopher* restreint l'application du par. 15(1) de la *Charte* en exigeant que les personnes déclarées non responsables criminellement pour cause de troubles mentaux s'acquittent de l'obligation de s'inscrire au registre des délinquants sexuels après avoir obtenu une libération, sans leur donner la possibilité d'être dispensées de cette obligation et d'être retirées du registre à la suite d'une évaluation individuelle. Cette loi crée des distinctions fondées sur le motif énuméré de la déficience mentale en offrant aux personnes déclarées coupables d'une infraction sexuelle la possibilité d'être dispensées de l'obligation de s'inscrire au registre et d'être retirées de celui-ci, alors qu'une telle possibilité n'est pas offerte aux personnes déclarées non responsables criminellement pour cause de troubles mentaux. Ces distinctions sont discriminatoires parce qu'elles perpétuent le désavantage historique que continuent de subir les personnes souffrant de troubles mentaux.

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v.

Her Majesty The Queen *Respondent*

- and -

Kasra Mohsenipour *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Canada, Attorney General of Ontario and Attorney General of Quebec *Interveners*

Tamim Albashir *Appelant*

c.

Sa Majesté la Reine *Intimée*

- et -

Kasra Mohsenipour *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général du Canada, procureur général de l'Ontario et procureur général du Québec *Intervenants*

INDEXED AS: R. *v.* ALBASHIR

2021 SCC 48

File Nos.: 39277, 39278.

2021: May 14; 2021: November 19.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

RÉPERTORIÉ : R. *c.* ALBASHIR

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N[os] du greffe : 39277, 39278.

2021 : 14 mai; 2021 : 19 novembre.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et Kasirer.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Declaration of invalidity — Temporal nature of declaration of invalidity — Supreme Court of Canada in Bedford declaring void offence of living on avails of sex work and suspending declaration of invalidity for one year — Accused charged after expiry of suspension period for committing offence of living on avails of sex work while declaration suspended — Trial judge quashing charges on basis that offence was unconstitutional when committed — Court of Appeal holding that remedial legislation enacted by Parliament prior to expiry of suspension period pre-empted retroactive effect of declaration of invalidity — Whether provision prohibiting living on avails of sex work retroactively invalid such that it cannot ground conviction for offence committed prior to declaration taking effect — Canadian Charter of Rights and Freedoms,

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

Droit constitutionnel — Déclaration d'invalidité — Nature temporelle d'une déclaration d'invalidité — Cour suprême du Canada invalidant dans Bedford l'infraction consistant à vivre des produits du travail du sexe et suspendant l'effet de la déclaration d'invalidité pour une période d'un an — Accusés inculpés après l'expiration de la période de suspension d'avoir commis pendant cette période l'infraction consistant à vivre des produits du travail du sexe — Annulation des accusations par le juge du procès au motif que l'infraction était inconstitutionnelle au moment où elle a été commise — Conclusion de la Cour d'appel portant que la mesure législative corrective édictée par le Parlement avant l'expiration de la période de suspension prenait le pas sur l'effet rétroactif de la déclaration d'invalidité — La disposition interdisant de vivre des produits du travail du

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Fiona Émond, for the intervener the Attorney General of Quebec.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Martin and Kasirer JJ. was delivered by

[1] KARAKATSANIS J. — In *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, this Court provided a framework for identifying those exceptionally rare cases where a declaration of constitutional invalidity should be temporarily suspended to permit the legislature to respond. A suspended declaration is only justified where a compelling public interest, grounded in the Constitution, outweighs the harms of temporarily maintaining the unconstitutional law. This case requires us to determine the legal consequences of suspending declarations of invalidity of a criminal offence. In particular, can persons who commit that offence prior to the expiry of the suspension be convicted once the suspension expires and the declaration takes effect? The answer depends on whether the declaration (or any remedial legislation) has retroactive or purely prospective application.

[2] Retroactive declarations change the law for all time, both reaching into the past and affecting the future. Once the declaration takes effect, the law is deemed to have been invalid from the moment of its enactment. Conversely, when the declaration is purely prospective, the law was valid from its enactment but is invalid once the declaration takes effect.

[3] In *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, this Court found s. 212(1)(j) of the *Criminal Code*, R.S.C. 1985, c. C-46, which prohibited living on the avails of sex work, to be unconstitutionally overbroad because it criminalized non-exploitative actions that could

Fiona Émond, pour l'intervenant le procureur général du Québec.

Version française du jugement du juge en chef Wagner et des juges Abella, Moldaver, Karakatsanis, Côté, Martin et Kasirer rendu par

[1] LA JUGE KARAKATSANIS — Dans l'arrêt *Ontario (Procureur général) c. G*, 2020 CSC 38, [2020] 3 R.C.S. 629, notre Cour a établi un cadre permettant de reconnaître les cas exceptionnellement rares où il y a lieu de suspendre temporairement l'effet d'une déclaration d'invalidité constitutionnelle afin de permettre à la législature de répondre. Une déclaration avec effet suspendu n'est justifiée que si un intérêt public impérieux fondé sur la Constitution l'emporte sur les préjudices causés par le maintien, de façon temporaire, de la règle de droit inconstitutionnelle. Dans la présente affaire, nous devons déterminer les conséquences juridiques d'une suspension de l'effet d'une déclaration d'invalidité d'une infraction criminelle. Plus particulièrement, il faut se demander si les personnes qui commettent cette infraction avant l'expiration de la période de suspension peuvent être déclarées coupables une fois que cette période aura pris fin et que la déclaration prendra effet. La réponse à cette question dépend de celle de savoir si la déclaration (ou toute mesure législative corrective) est d'application rétroactive ou purement prospective, c'est-à-dire pour l'avenir uniquement.

[2] Les déclarations d'invalidité avec effet rétroactif modifient la règle de droit en cause pour toujours en s'appliquant tant dans le passé que dans le futur. Une fois que la déclaration prend effet, la règle de droit est réputée invalide à partir du moment de son édiction. À l'inverse, lorsque la déclaration a un effet purement prospectif, la règle de droit est valide à partir du moment de son édiction, mais est invalide dès la prise d'effet de la déclaration.

[3] Dans l'arrêt *Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101, la Cour a conclu que l'al. 212(1)j) du *Code criminel*, L.R.C. 1985, c. C-46, qui interdisait de vivre des produits du travail du sexe, était inconstitutionnel pour cause de portée excessive parce qu'il criminalisait

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remedy under s. 24(1). I must therefore reject the appellants' arguments.

Remedies Available Following a Prospective Declaration

[62] While s. 52(1) is the usual remedy against unconstitutional laws and s. 24(1) is "generally used" against unconstitutional acts, both can be combined to provide relief in cases where it is appropriate to do so: *Ferguson*, at paras. 59-60 and 63. A declaration under s. 52(1) provides general relief against the law, whereas an individual remedy under s. 24(1) — such as an exemption or a stay of proceedings — can mitigate the effects of that law or of actions taken under the law in specific cases. In *Ferguson*, this Court held that, while constitutional exemptions under s. 24(1) are not appropriate substitutes for s. 52(1) challenges to the unconstitutionality of legislation, s. 24(1) can be combined with s. 52(1) when additional relief is necessary to provide an effective remedy in a specific case: para. 63.

[63] Similarly, in *G*, this Court held that there was no rule against granting both a suspended s. 52(1) declaration and a retroactive s. 24(1) remedy. There are numerous examples in our jurisprudence of a personal constitutional remedy being granted during the period of suspension of a declaration under s. 52(1): see *Carter*, at paras. 5-6; *G*, at para. 182; *Martin*, at paras. 120-21; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472, at paras. 32-34; *Mackin*, at paras. 75-76; *Bain*, at pp. 105 and 165. In that sense, the practice of this Court has often been to apply the findings of unconstitutionality retroactively to the claimant before them, even when the temporal application of the declaration itself was suspended.

lorsqu'une déclaration fondée sur le par. 52(1) a un effet prospectif, une personne dont les droits garantis par la *Charte* ont été violés par la règle de droit déclarée inconstitutionnelle peut tout de même demander une réparation personnelle au titre du par. 24(1). Je dois donc rejeter les arguments des appelants.

Réparations qu'il est possible d'obtenir après le prononcé d'une déclaration avec effet prospectif

[62] Bien que le par. 52(1) prévoie la réparation habituelle à l'égard des règles de droit inconstitutionnelles et que l'on « a[it] généralement recours » au par. 24(1) pour des actes inconstitutionnels, il est possible de combiner les deux dispositions pour accorder une réparation dans certains cas où il convient de le faire : *Ferguson*, par. 59-60 et 63. Une déclaration fondée sur le par. 52(1) offre une réparation globale à l'égard de la règle de droit, tandis qu'une réparation individuelle fondée sur le par. 24(1) — comme une exemption ou un arrêt des procédures — peut, dans certains cas, atténuer les effets de cette règle ou d'actes commis en vertu de celle-ci. Dans l'arrêt *Ferguson*, notre Cour a conclu que, bien que les demandes d'exemptions constitutionnelles au titre du par. 24(1) ne se substituent pas adéquatement aux contestations relatives à l'inconstitutionnalité de dispositions législatives en application du par. 52(1), le par. 24(1) peut être combiné au par. 52(1) dans les cas où une réparation additionnelle est nécessaire pour accorder une mesure de redressement efficace dans une situation donnée : par. 63.

[63] De même, dans l'arrêt *G*, notre Cour a conclu qu'aucune règle n'interdit d'accorder à la fois une déclaration fondée sur le par. 52(1) avec effet suspendu et une réparation fondée sur le par. 24(1) avec effet rétroactif. Notre jurisprudence fournit de nombreux exemples d'octroi d'une réparation constitutionnelle personnelle pendant la période de suspension de l'effet d'une déclaration prononcée en vertu du par. 52(1) : voir *Carter*, par. 5-6; *G*, par. 182; *Martin*, par. 120-121; *R. c. Guignard*, 2002 CSC 14, [2002] 1 R.C.S. 472, par. 32-34; *Mackin*, par. 75-76; *Bain*, p. 105 et 165. En ce sens, notre Cour a souvent eu pour pratique d'appliquer de manière rétroactive les conclusions d'inconstitutionnalité au demandeur devant elle, et ce, même lorsque l'application dans le temps de la déclaration elle-même avait été suspendue.

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Bissonnette per Wagner CJ.
Found at **Tab 65, Volume 13** of
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prayer. The respondent burst in and, armed with a semi-automatic rifle and a pistol, opened fire on the worshippers. In less than two minutes, he caused the death of six innocent people, Khaled Belkacemi, Ibrahima and Mamadou Tanou Barry, Abdelkrim Hassane, Azzeddine Soufiane and Aboubaker Thabti, seriously injured five others and left the survivors of the killings, and the victims' loved ones, with deep and permanent psychological scars.

[12] On March 26, 2018, the respondent pleaded guilty to the 12 charges laid against him, including 6 counts of first degree murder, an indictable offence provided for in ss. 231(2) and 235 *Cr. C.* As a consequence, he was automatically sentenced to imprisonment for life. The Crown then asked the court to apply s. 745.51 *Cr. C.* and sentence the respondent to 6 consecutive parole ineligibility periods of 25 years, for a total of 150 years. The trial judge thus had to determine the length of the parole ineligibility period to be imposed on the respondent, and also had to rule on the constitutionality of s. 745.51 *Cr. C.*

B. *Quebec Superior Court, 2019 QCCS 354 (Huot J.)*

[13] In particularly detailed reasons, the trial judge held that s. 745.51 *Cr. C.* infringed ss. 12 and 7 of the *Charter* and that it could not be saved under s. 1. As a remedy for the unconstitutionality of the provision, he applied the technique of reading in and ordered the respondent to serve an ineligibility period of 40 years before applying for parole.

[14] Before ruling on the constitutionality of the impugned provision, the trial judge first asked [TRANSLATION] "whether there is a factual basis in this case to justify" such a constitutional analysis and concluded that there was (para. 472 (CanLII)). In his view, a certain parole ineligibility period had to be served consecutively having regard to the character of the respondent, the nature of the offences, the circumstances surrounding their commission, and the principles of sentencing. In this case, a period of

du soir. L'intimé y a fait irruption et, armé d'une carabine semi-automatique et d'un pistolet, il a fait feu en direction des fidèles. En moins de deux minutes, l'assaillant a provoqué la mort de six personnes innocentes, Khaled Belkacemi, Ibrahima et Mamadou Tanou Barry, Abdelkrim Hassane, Azzeddine Soufiane et Aboubaker Thabti, en plus d'en blesser grièvement cinq autres et de causer des séquelles psychologiques profondes et permanentes chez les survivants de la tuerie, ainsi que chez les proches des victimes.

[12] Le 26 mars 2018, l'intimé a plaidé coupable aux 12 chefs d'accusation portés contre lui, notamment 6 meurtres au premier degré, des actes criminels prévus au par. 231(2) et à l'art. 235 *C. cr.* En conséquence, il a écopé automatiquement d'une peine d'emprisonnement à perpétuité. Le ministère public a alors demandé au tribunal d'appliquer l'art. 745.51 *C. cr.* et de condamner l'intimé à 6 périodes consécutives d'inadmissibilité à la libération conditionnelle de 25 ans, pour un total de 150 ans. Il incombait donc au juge du procès de déterminer la durée de la période d'inadmissibilité à la libération conditionnelle à infliger à l'intimé, et de se prononcer sur la constitutionnalité de l'art. 745.51 *C. cr.*

B. *Cour supérieure du Québec, 2019 QCCS 354 (le juge Huot)*

[13] Dans une décision particulièrement étoffée, le premier juge conclut que l'art. 745.51 *C. cr.* viole les art. 12 et 7 de la *Charte* et qu'il ne peut être sauvegardé par l'article premier. Pour remédier à l'inconstitutionnalité de la disposition, le juge recourt à l'interprétation large et ordonne à l'intimé de purger un temps d'épreuve de 40 ans avant de demander la libération conditionnelle.

[14] Avant de se pencher sur la constitutionnalité de la disposition en litige, le premier juge se demande d'abord « s'il existe, en l'espèce, un fondement factuel justifiant » une telle analyse constitutionnelle et conclut par l'affirmative (par. 472 (CanLII)). De l'avis du juge, une certaine période d'inadmissibilité à la libération conditionnelle doit être purgée de façon consécutive, compte tenu du caractère de l'intimé, de la nature des infractions, des circonstances entourant leur perpétration et des principes de détermination de

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down an inconsistent provision immediately, strike it down and temporarily suspend the declaration of invalidity, resort to the technique of reading in or that of reading down, or apply the doctrine of severance (see pp. 695-700). In exercising its discretion to determine an appropriate remedy, a court will consider not only the principle of constitutional supremacy in s. 52(1) but also the principles of the rule of law and the separation of powers (*R. v. Albashir*, 2021 SCC 48, [2021] 3 S.C.R. 531, at paras. 30 and 34; *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460, at para. 61).

[124] The trial judge found that the technique of reading in was appropriate in the circumstances. He therefore interpreted the provision as authorizing courts to impose consecutive ineligibility periods whose length is discretionary, [TRANSLATION] "notwithstanding the requirements of section 745 for any additional murder" (para. 1211 (emphasis deleted)). Because that interpretation allowed him to opt for an additional period of less than 25 years, he ordered that the respondent serve a total ineligibility period of 40 years before applying for parole.

[125] In this regard, I agree with the Court of Appeal that the trial judge erred in applying the technique of reading in as a remedy (para. 154).

[126] The technique of reading in allows a court to extend the reach of a statute so that it includes what was wrongly excluded from it (*Schachter*, at p. 698; *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 113). For example, where a statute unconstitutionally excludes a group of individuals, a court may find that the statute includes the group rather than striking it down (*Schachter*, at pp. 699-700; see also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143). Under the second technique, reading down, a court limits the reach of a statute by declaring it to be of no force or effect to a precisely defined extent (*G*, at para. 113). Severance, in turn, allows a court to declare something

disposition incompatible, l'invalider et suspendre temporairement l'effet de la déclaration d'invalidité ou encore appliquer les techniques d'interprétation large (« *reading in* ») ou d'interprétation atténuée (« *reading down* ») ou encore la doctrine de la dissociation (voir p. 695-700). Lorsque les tribunaux se penchent sur la réparation convenable, ils prennent non seulement en considération le principe de la suprématie de la Constitution énoncé au par. 52(1), mais également ceux de la primauté du droit et de la séparation des pouvoirs dans l'exercice de leur pouvoir discrétionnaire de réparation (*R. c. Albashir*, 2021 CSC 48, [2021] 3 R.C.S. 531, par. 30 et 34; *R. c. Sullivan*, 2022 CSC 19, [2022] 1 R.C.S. 460, par. 61).

[124] Le juge de première instance a statué que le recours à la technique de l'interprétation large était approprié dans les circonstances. Il a en conséquence interprété la disposition comme ayant pour effet d'autoriser le tribunal à cumuler des périodes d'inadmissibilité dont la durée est discrétionnaire, c'est-à-dire « nonobstant les prescriptions de l'article 745 pour tout meurtre additionnel » (par. 1211 (soulignement omis)). Cette interprétation lui permettant d'opter pour une période additionnelle inférieure à 25 ans, il a ainsi ordonné que l'intimé purge un temps d'épreuve total de 40 ans avant de demander la libération conditionnelle.

[125] À cet égard, à l'instar de la Cour d'appel, je suis d'avis que le juge de première instance a fait erreur en optant pour l'interprétation large en tant que réparation (par. 154).

[126] La technique de l'interprétation large permet au tribunal d'élargir la portée d'un texte de loi pour que celui-ci inclue ce qui en a été exclu à tort (*Schachter*, p. 698; *Ontario (Procureur général) c. G*, 2020 CSC 38, [2020] 3 R.C.S. 629, par. 113). À titre d'exemple, lorsqu'un texte de loi exclut un groupe d'individus de manière inconstitutionnelle, plutôt que d'invalider ce texte, le tribunal peut considérer que celui-ci inclut ce groupe (*Schachter*, p. 699-700; voir aussi *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143). La seconde technique, soit l'interprétation atténuée, consiste pour un tribunal à limiter la portée d'un texte de loi en déclarant celui-ci inopérant dans une mesure qu'il définit avec précision (*G*, par. 113).

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"improperly included in the statute which can be severed and struck down" to be of no force or effect (*Schachter*, at p. 698; *G*, at para. 113).

[127] A court may apply these techniques only "in the clearest of cases", and to do so, it must be able to define the offending portion of the statute in a limited manner (*Schachter*, at p. 725; see also p. 697). In *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, McLachlin C.J. stated that these alternatives to striking down are appropriate when a court is confronted with a "law that is substantially constitutional and peripherally problematic" (para. 111). It follows that it is frequently not appropriate to use any of these techniques (*G*, at para. 114).

[128] These interpretive techniques must be applied in a manner that respects Parliament's role and is in keeping with the purpose of the statute in question. In *Schachter*, Lamer C.J. stated that "there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive" (p. 697). This note of caution also applies to reading in (p. 725). In every case, the court must ensure that the interpretation it proposes is as faithful as possible to the scheme enacted by Parliament, within the requirements of the Constitution (p. 700). As this Court stated in *Ferguson*, when a court opts for one of these techniques, "it does so on the assumption that had Parliament been aware of the provision's constitutional defect, it would likely have passed it with the alterations now being made by the court" (para. 51). Therefore, "[i]f it is not clear that Parliament would have passed the scheme with the modifications being considered by the court — or if it is probable that Parliament would *not* have passed the scheme with these modifications — then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere" (*Ferguson*, at para. 51 (emphasis in original); *G*, at para. 114). In such a context, striking down the unconstitutional provision is the least intrusive alternative (*Ferguson*, at paras. 51 and 65).

Pour ce qui est de la dissociation, cette technique permet au tribunal de déclarer inopérant un élément « que la loi inclut à tort et qui peut en être dissoci[é] et annul[é] » (*Schachter*, p. 698; *G*, par. 113).

[127] Le tribunal ne peut appliquer ces techniques que « dans les cas les plus clairs », et pour y recourir il doit être en mesure d'isoler la partie attentatoire du texte de loi (*Schachter*, p. 725; voir aussi p. 697). Dans l'arrêt *R. c. Sharpe*, 2001 CSC 2, [2001] 1 R.C.S. 45, la juge en chef McLachlin a indiqué que le recours à ces solutions de rechange à l'invalidation est approprié en présence d'une « disposition législative substantiellement constitutionnelle et marginalement problématique » (par. 111). Il s'ensuit que le recours à l'une ou l'autre de ces techniques n'est souvent pas approprié (*G*, par. 114).

[128] L'utilisation de ces techniques d'interprétation doit demeurer respectueuse du rôle du législateur et fidèle à l'objectif visé par le texte de loi en cause. Dans l'arrêt *Schachter*, le juge en chef Lamer a précisé que, « dans certains cas, la dissociation de la partie fautive sera plus attentatoire à l'objectif législatif que l'annulation possible des dispositions qui ne sont pas fautives » (p. 697). Cette mise en garde vaut également pour l'interprétation large (p. 725). Dans tous les cas, le tribunal doit s'assurer que l'interprétation qu'il propose est aussi fidèle que possible au texte de loi adopté par le législateur, le tout conformément aux exigences de la Constitution (p. 700). Comme l'a indiqué la Cour dans l'arrêt *Ferguson*, lorsque le tribunal choisit l'une de ces techniques, « il part du principe que, si le législateur avait su que la disposition était entachée d'un vice sur le plan constitutionnel, il l'aurait probablement édictée sous la forme modifiée que lui donne maintenant le tribunal » (par. 51). En conséquence, « [s]'il n'est pas clair que le législateur aurait édicté la disposition avec les modifications envisagées par le tribunal — ou s'il est probable qu'il *ne* l'aurait *pas* fait —, le tribunal empiéterait de façon injustifiée sur le domaine législatif en les introduisant » (*Ferguson*, par. 51 (en italique dans l'original); *G*, par. 114). Dans un tel contexte, l'invalidation de la disposition inconstitutionnelle représente la solution la moins attentatoire (*Ferguson*, par. 51 et 65).

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[129] In this case, the trial judge found that because the inconsistency of s. 745.51 *Cr. C.* with the Constitution [TRANSLATION] "does not in any way affect the core of this provision" (para. 1187), reading in was an appropriate way to remedy its unconstitutionality. In his view, reading into the impugned provision would advance Parliament's objectives, namely [TRANSLATION] "to promote proportionality, ensure that multiple murderers get their 'just deserts' for their crimes, reinforce the objective of denunciation and protect society" (para. 1172).

[130] I agree with the Court of Appeal that the trial judge overstepped the limits of his judicial functions. The impugned provision could not be saved through the technique of reading in. By broadening the discretion conferred on the courts, the trial judge undermined Parliament's objective. He failed to consider the fact that the imposition of consecutive 25-year ineligibility periods is directly related to Parliament's objective in enacting s. 745.51 *Cr. C.* In this regard, the words of the provision and the parliamentary debate are indicators that can shed light on the provision's purpose (see *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 81).

[131] First of all, the words of s. 745.51 *Cr. C.* are clear as regards the length of the ineligibility periods that a court may make consecutive: "At the time of the sentencing under section 745 . . . the judge who presided at the trial . . . may . . . by order, decide that the periods without eligibility for parole for each murder conviction are to be served consecutively". For first degree murder, these periods must be 25 years under s. 745(a) *Cr. C.*

[132] Second, the parliamentary debate, which is very instructive in this case, clearly shows that Parliament's intention was to authorize courts to make the ineligibility periods set out in s. 745 *Cr. C.* consecutive. For an offender convicted of more than one first degree murder, a court has no choice but to impose consecutive ineligibility periods in blocks

[129] En l'espèce, de l'avis du juge de première instance, comme l'incompatibilité constitutionnelle de l'art. 745.51 *C. cr.* « n'affecte en rien le cœur même de cette disposition » (par. 1187), le recours à l'interprétation large est approprié pour remédier à son inconstitutionnalité. Selon le premier juge, une interprétation large de la disposition contestée répond aux objectifs du législateur « [de] favoriser la proportionnalité, [de] s'assurer que les auteurs de meurtres multiples paient un "juste dû" pour leurs crimes, [de] renforcer l'objectif de dénonciation et [d']assurer la protection de la société » (par. 1172).

[130] Tout comme la Cour d'appel, je considère que le premier juge a outrepassé les limites de ses fonctions judiciaires. La disposition contestée ne pouvait être sauvegardée par l'application de la technique de l'interprétation large. En élargissant le pouvoir discrétionnaire conféré au tribunal, le premier juge est allé à l'encontre de l'objectif du législateur. De fait, il a omis de considérer que le cumul de périodes d'inadmissibilité de 25 ans est directement lié à l'objectif poursuivi par le législateur par l'édiction de l'art. 745.51 *C. cr.* À cet égard, le texte de loi de même que les débats parlementaires constituent des indices qui nous éclairent sur l'objet de la disposition (voir *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3, par. 81).

[131] En premier lieu, le texte de l'art. 745.51 *C. cr.* est clair en ce qui concerne la durée des périodes d'inadmissibilité susceptibles d'être cumulées par le tribunal : « Au moment de prononcer la peine conformément à l'article 745, le juge qui préside le procès [. . .] peut [. . .] ordonner que les périodes d'inadmissibilité à la libération conditionnelle pour chaque condamnation pour meurtre soient purgées consécutivement ». Pour un meurtre au premier degré, ces périodes sont forcément de 25 ans en vertu de l'al. 745a) *C. cr.*

[132] En deuxième lieu, les débats parlementaires, qui sont fort instructifs en l'espèce, illustrent clairement que l'intention du législateur était de permettre au tribunal de cumuler les périodes d'inadmissibilité prescrites à l'art. 745 *C. cr.* Dans le cas du contrevenant déclaré coupable de plus d'un meurtre au premier degré, le tribunal n'a d'autre choix que de procéder

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of 25 years (*House of Commons Debates*, vol. 145, No. 96, 3rd Sess., 40th Parl., November 15, 2010, at p. 5931; *House of Commons Debates*, vol. 145, No. 121, 3rd Sess., 40th Parl., February 1, 2011, at p. 7510). The interpretation urged by the trial judge was in fact specifically rejected by Parliament. An amendment to the bill had been proposed to give courts a discretion to determine the total length of the additional parole ineligibility period (*House of Commons Debates*, February 1, 2011, at p. 7515; see also House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 42, 3rd Sess., 40th Parl., December 9, 2010, at pp. 10-11). Despite that proposal, Parliament opted for ineligibility periods with a fixed length of 25 years each, leaving no room for tailoring by a court (Standing Senate Committee on Legal and Constitutional Affairs, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 22, 3rd Sess., 40th Parl., March 2, 2011, at pp. 10-11 and 23-24).

au cumul des périodes d'inadmissibilité par bonds de 25 ans (*Débats de la Chambre des communes*, vol. 145, nº 96, 3e sess., 40e lég., 15 novembre 2010, p. 5931; *Débats de la Chambre des communes*, vol. 145, nº 121, 3e sess., 40e lég., 1er février 2011, p. 7510). L'interprétation préconisée par le juge de première instance a d'ailleurs été expressément rejetée par le législateur. En effet, on avait proposé d'apporter au projet de loi un amendement qui aurait conféré au tribunal un pouvoir discrétionnaire dans la détermination de la durée totale de la période additionnelle d'inadmissibilité à la libération conditionnelle (*Débats de la Chambre des communes*, 1er février 2011, p. 7515; voir aussi Chambre des communes, Comité permanent de la justice et des droits de la personne, *Témoignages*, nº 42, 3e sess., 40e lég., 9 décembre 2010, p. 10-11). En dépit de cette proposition, le législateur a opté pour l'infliction de périodes d'inadmissibilité d'une durée fixe de 25 ans chacune, sans possibilité de modulation par le tribunal (Comité sénatorial permanent des Affaires juridiques et constitutionnelles, *Délibérations du Comité sénatorial permanent des Affaires juridiques et constitutionnelle*, nº 22, 3e sess., 40e lég., 2 mars 2011, p. 10-11 et 23-24).

[133] Accordingly, because it is impossible to conclude that Parliament would likely have passed the impugned provision with the modifications proposed by the trial judge, reading in was inappropriate. Parliament deliberately chose to exclude the approach adopted by the trial judge. By opting for reading in as a remedy, the trial judge thus made an inappropriate intrusion on Parliament's powers. In the circumstances, this Court has no choice but to declare s. 745.51 *Cr. C.* invalid.

[133] En conséquence, puisqu'il est impossible de conclure que le législateur aurait probablement adopté la disposition attaquée avec les modifications proposées par le premier juge, le recours à l'interprétation large était inapproprié. Le législateur a délibérément choisi d'exclure l'approche retenue par le juge de première instance. Ainsi, en optant pour la réparation que constitue l'interprétation large, le premier juge a empiété de façon injustifiée sur les attributions du législateur. Dans les circonstances, notre Cour n'a d'autre choix que de déclarer invalide l'art. 745.51 *C. cr.*

[134] With regard to the temporal scope of the declaration of invalidity, the declaration must have immediate effect given the seriousness of the infringement of the right of every individual not to be subjected to cruel and unusual punishment. To stop the continuing infringement of s. 12 of the *Charter*, this declaration with immediate effect must strike down the impugned provision retroactively to the date it was enacted in 2011.

[134] En ce qui concerne la portée temporelle de la déclaration d'invalidité, elle doit avoir un effet immédiat en raison de la gravité de la violation du droit de toute personne à la protection contre l'infliction d'une peine cruelle et inusitée. Afin de faire cesser la violation continue de l'art. 12 de la *Charte*, cette déclaration assortie d'une prise d'effet immédiate doit invalider rétroactivement la disposition contestée à compter de la date de l'adoption de celle-ci en 2011.

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SUPREME COURT OF CANADA

CITATION: R. *v.* Brunelle, 2024 SCC 3

APPEAL HEARD: February 8, 2023
JUDGMENT RENDERED: January 26, 2024
DOCKET: 39917

BETWEEN:

Daniel Brunelle, Siobol Chounlamountry, Simon Girard, Frédéric Thompson, Jonathan Verret-Casaubon, Jérémie Béliveau-Laliberté, Bernard Mailhot, Alexandre Bouchard, Yves Fernand Buonora, Denis Bilodeau, Carl Chevarie, Terrence Willard, Keven Faucher, Guillaume Fleurent, Éric Guerrier, Danny Guilbeault, Tammy Lamontagne, Olivier Lamothe, André Lauzier, Ambrose Mahoney, Yannick Manseau-Dufresne, Maxime Ménard, Louis-Philippe Noël, Éric Normandin, Robin Roy, Gail Denise Caron, Jérôme Fleury, Henry Bergeron, Alexandre Livernois-Grenier, Laurent Michel and Shanny Plante
Appellants

and

His Majesty The King
Respondent

- and -

Director of Public Prosecutions, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Alberta, Criminal Lawyers' Association (Ontario), Association québécoise des avocats et avocates de la défense and Association des avocats de la défense de Montréal-Laval-Longueuil
Interveners

OFFICIAL ENGLISH TRANSLATION: Reasons of O'Bonsawin J.

CORAM: Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 124)	O'Bonsawin J. (Wagner C.J. and Karakatsanis, Martin, Kasirer and Jamal JJ. concurring)
CONCURRING REASONS: (paras. 125 to 130)	Rowe J.

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D. Could the Crown raise, before the Court of Appeal, the Superior Court judge's failure to consider the particular circumstances of the arrest of each appellant in groups 2, 3 and 4 after consenting to judgment?

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In my view, the four questions must be answered in the affirmative.

V. Analysis

[27] The law on abuse of process is well settled. The "key point" is that abuse of process "refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system" (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 50). As the preceding passage suggests, two types of state conduct meet the threshold for establishing abuse of process: conduct that compromises trial fairness ("main category") and conduct that, without necessarily threatening the fairness of the accused's trial, nevertheless undermines the integrity of the justice system ("residual category") (*Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 89; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 55; *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, at para. 36; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31; see also *Brind'Amour v. R.*, 2014 QCCA 33, at para. 53).

[28] While there is no actual "right against abuse of process" in the *Charter*, different guarantees will be engaged depending on the circumstances (*R. v. O'Connor*,

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[1995] 4 S.C.R. 411, at para. 73). Abuse of process in the main category engages the *Charter* provisions aimed primarily at protecting trial fairness for accused persons, namely ss. 8 to 14, as well as the principles of fundamental justice set out in s. 7. Abuse of process in the residual category, on the other hand, engages only the principles of fundamental justice in s. 7, which protect accused persons from any state conduct that, while not caught by ss. 8 to 14, is nevertheless unfair or vexatious to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the justice system (*O'Connor*, at para. 73; *Tobiass*, at para. 89; *Regan*, at para. 50; *Nixon*, at para. 41; *Babos*, at para. 31).

[29] When abuse of process is found in either category and a *Charter* guarantee has been infringed, s. 24(1) of the *Charter* gives a court of competent jurisdiction the power to grant "such remedy as [it] considers appropriate and just in the circumstances". A wide range of remedies is available to the court (see, e.g., *O'Connor*, at para. 77). However, a stay of proceedings is by far the remedy most sought by victims of abuse of process. Since it has been characterized as the "ultimate remedy" (*Tobiass*, at para. 86), a stay of proceedings will be ordered only where the situation meets the high threshold of being one of the "clearest of cases" (*O'Connor*, at para. 69). This requires three conditions to be met:

(1) there must be prejudice to the accused's right to a fair trial or to the integrity of the justice system that "will be manifested, perpetuated or

aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54; *Babos*, at para. 32);

(2) there must be no alternative remedy capable of redressing the prejudice (*Regan*, at para. 54; *Babos*, at para. 32);

(3) where there is still uncertainty over whether a stay of proceedings is warranted after steps 1 and 2, the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*Regan*, at para. 57; *Babos*, at para. 32).

[30] This legal framework has been refined by this Court over a period of several decades and has been applied in a variety of circumstances. Even so, this is the first time an appeal to the Court has raised the question of how the law on abuse of process in the residual category applies to a group of accused persons, all of whom apply for a stay of proceedings on the ground that an accumulation of infringements of *Charter* rights, of which several but not all of them were the victims, causes prejudice to the integrity of the justice system.

[31] Indeed, all of the appellants applied for a stay of proceedings under s. 24(1) of the *Charter* on the basis that the police investigation and operation that led to the court proceedings against them were vitiated by an abuse of process in the residual

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[111] The question of whether the same holds true for the motion brought by the appellants in groups 2, 3 and 4 will be discussed below. Before answering this question, I consider it necessary to point out another error made by the Superior Court judge at the stage of determining the appropriate remedy for the appellants in group 1, in case it is held again, after the new hearing on the motion, that the threshold for establishing abuse of process in the residual category is met.

C. *Did the Superior Court Judge Err in Entering a Stay of Proceedings for All of the Appellants?*

[112] A stay of proceedings has been characterized as the "ultimate remedy" (*Tobiass*, at para. 86) because of its finality:

> It is ultimate in the sense that it is final. Charges that are stayed may never be prosecuted; an alleged victim will never get his or her day in court; society will never have the matter resolved by a trier of fact.
>
> (*Regan*, at para. 53)

[113] For these reasons, and as I noted above, this drastic remedy will be granted only where the situation meets the high threshold of being one of the "clearest of cases" (*O'Connor*, at para. 69). This requires the following three conditions to be met:

> (1) there must be prejudice to the accused's right to a fair trial or to the integrity of the justice system that "will be manifested, perpetuated or

aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54; *Babos*, at para. 32);

(2) there must be no alternative remedy capable of redressing the prejudice (*Regan*, at para. 54; *Babos*, at para. 32);

(3) where there is still uncertainty over whether a stay of proceedings is warranted after steps 1 and 2, the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*Regan*, at para. 57; *Babos*, at para. 32).

[114] These conditions are cumulative, and none of them is optional. With respect, I am of the view that the Superior Court judge failed to ensure that the second condition was met in this case.

[115] The motion brought by the appellants in group 1 specifically sought an order excluding an entire list of evidence if a stay of proceedings was not obtained for all of them (A.R., vol. I, at pp. 158-59; A.R., vol. XI, at p. 169; A.R., vol. XII, at p. 1; see also A.R., vol. XX, at pp. 18-20).

[116] Yet the Superior Court judge never mentioned this alternative to a stay of proceedings in his analysis at the stage of determining the appropriate remedy (Sup.

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Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984), 62 *Can. Bar Rev.* 517, at pp. 535 and 552-67).

(3) Remedies for Breaches of *Charter* Rights

[31] The *Charter* guarantees the rights and freedoms of all Canadians and provides remedies for their breach. Granting remedies is the courts' "most meaningful function under the *Charter*" (*Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196).

[32] It is well accepted that the need for a purposive and generous approach to *Charter* interpretation "holds equally true for *Charter* remedies as for *Charter* rights" (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 24). Courts have a duty to determine the appropriate constitutional remedy for a *Charter* violation and to ensure that the remedy is commensurate with the extent of the violation (*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 46). This appeal is concerned with declarations of unconstitutionality under s. 52(1) of the *Constitution Act, 1982* and damages under s. 24(1) of the *Charter*.

[33] Section 52(1) provides that the "Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".

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[34] A declaration of invalidity under s. 52(1) is the "first and most important remedy" when dealing with unconstitutional legislation (*Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, at para. 1). Section 52(1) establishes the supremacy of the Constitution and empowers courts to declare legislation "of no force or effect" in part or in full. This remedy allows courts to protect *Charter* rights while respecting the distinct role of the legislature in our constitutional order (*Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 715; *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at paras. 84-99).

[35] Section 24(1) provides that anyone whose *Charter* rights or freedoms have been infringed or denied may apply for "such remedy as the court considers appropriate and just in the circumstances".

[36] Section 24(1) provides a "personal" or "individual" remedy in the sense that it is specific to the violation of the applicant's rights (*R. v. Albashir*, 2021 SCC 48, at para. 33; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 61). It must be remembered, however, that it is a "unique public law remedy" against the state that should not be assimilated to the principles of private law remedies (*Ward*, at paras. 22 and 31; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181, at paras. 26-27).

[37] Like other *Charter* provisions, s. 24(1) must be interpreted generously and purposively (*Doucet-Boudreau*, at para. 24). It must be construed "in a manner that best ensures the attainment of its objects" and, more generally, benefits from the principle of statutory interpretation that remedial statutes should receive a "large and liberal"

interpretation (*R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 ("*Dunedin*"), at para. 18).

[38] The remedial discretion afforded to courts under s. 24(1) is broad. This Court has stated that "the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights" (*Dunedin*, at para. 18), and that it "is difficult to imagine language which could give the court a wider and less fettered discretion" (*Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965).

[39] The broad discretion afforded under s. 24(1) and a purposive approach to remedies combine to give meaning to the idea that *Charter* rights are only as meaningful as the remedies provided for their breach. In this way, s. 24(1) is "a cornerstone upon which the rights and freedoms guaranteed by the *Charter* are founded, and a critical means by which they are realized and preserved" (*Dunedin*, at para. 20).

[40] In *Doucet-Boudreau*, the Court noted that s. 24 must be allowed to evolve to meet the different contexts in which *Charter* violations occur, and must remain flexible and responsive to the needs of a given case (para. 59). In general terms, the Court explained that a just and appropriate remedy under s. 24(1) will: (1) meaningfully vindicate the claimant's rights and freedoms; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which

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vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made (paras. 55-58).

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(4) Damages as a Section 24(1) Remedy

[41] An award of damages against the state for exceeding its legal powers has long been recognized as an important requirement of the rule of law (K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at § 11:1, citing *Roncarelli v. Duplessis*, [1959] S.C.R. 121; see also W. H. Charles, *Understanding Charter Damages: The Judicial Evolution of a Charter Remedy* (2016)).

[42] In *Ward*, this Court set out a four-step test for determining whether damages are an appropriate and just remedy:

1. Has a *Charter* right been breached?

2. Would damages fulfill one or more of the related functions of compensation, vindicating the right, or deterring future breaches?

3. Has the state demonstrated that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust?

4. What is the appropriate quantum of damages?

[43] Canada's argument for absolute immunity to a claim for damages rests on two propositions that implicate the countervailing factors considered at the third step.

[44] First, Canada relies on the availability of an alternative remedy. Canada asserts that the availability of a declaration of invalidity under s. 52(1) will always render damages inappropriate and unjust. Canada asserts that damages will never be appropriate for the enactment of legislation subsequently declared unconstitutional because the declaration of unconstitutionality will always be sufficient. Canada submits that judicial review of a decision under the invalid law may also be appropriate in certain cases.

[45] While there is a general presumption against combining remedies under ss. 24(1) and 52(1) (*Schachter*, at p. 720; *Mackin*, at paras. 78-81), there is no categorical restriction. This Court has instead adopted a functional and flexible approach to combining remedies that is driven by principled and purposive considerations (*Ferguson*, at para. 53; *G*, at para. 147; Roach, *Constitutional Remedies*, at §§ 3:8-3:18). It is true that the existence of an alternative remedy is a countervailing consideration (*Ward*, at para. 33). However, the concern with alternative remedies is to avoid duplication and double recovery (para. 35; *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184, 149 O.R. (3d) 705, at para. 43). Provided an award of *Charter* damages is not duplicative, the potential to combine declarations and damages must remain available in situations where a declaration would fail to satisfy the functional need for compensation, vindication or to meaningfully deter future breaches

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(*Albashir*, at paras. 61-67; *Ward*, at para. 56; see also P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 40:13). In some cases, a declaration of invalidity alone may be an insufficient and even hollow remedy. The availability of a declaration under s. 52(1) cannot absolutely displace a claim for damages under s. 24(1). The same is true for the availability of judicial review for a decision under the invalid law.

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[46] The second countervailing consideration that Canada raises in support of absolute immunity are concerns for good governance. Canada submits that *Charter* damages would interfere with Parliament's law-making functions, impeding the state's ability to govern effectively. While this Court has held that good governance concerns may defeat an award of damages, we have also cautioned that the mere suggestion that damages will have a chilling effect on government is not sufficient to defeat the applicant's functional entitlement to *Charter* damages established at steps one and two of the four-step test (*Ward*, at para. 38). Indeed, damages may promote good governance by encouraging constitutional compliance and deterring *Charter* breaches. Canada nonetheless submits that constitutional principles — that ground those good governance concerns — require that there be an absolute bar to *Charter* damages for the enactment of unconstitutional legislation.

(5) Constitutional Principles

[47] Canada argues that anything less than absolute immunity is inconsistent with three longstanding and foundational constitutional principles: parliamentary

place within 10 working days of laying of the charge" (s. 30). This suggests that inmate discipline in federal penitentiaries has not become unduly burdened by the use of a standard of proof beyond a reasonable doubt.

[97] As a result, s. 68 of the *Regulations* fails the minimal impairment test and is not saved by s. 1 of the *Charter*.

V. Conclusion

[98] When a person is charged with an offence punishable by disciplinary segregation or loss of earned remission, ss. 7 and 11(d) of the *Charter* require that the offence be proven beyond a reasonable doubt. To the extent that s. 68 of the *Regulations* permits the imposition of these penalties for an inmate disciplinary offence on a lower standard of proof, it is inconsistent with the Constitution and must therefore be declared to be of no force or effect. This declaration must be effective immediately, given that the AGS has not demonstrated that "an immediately effective declaration would endanger a compelling public interest" (*Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 139).

[99] I would allow the appeal, set aside the judgments below, and declare s. 68 of the *Regulations* to be of no force or effect under s. 52 of the *Constitution Act, 1982*, with costs throughout. JHS seeks special costs, but such costs are exceptional and the circumstances do not, in my view, warrant exercising the Court's discretion to award them.

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