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THE COMPETITION TRIBUNAL

CT-2024-010

OTTAWA, ONT.

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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

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 (Respondent)

- and -

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents (Applicants)

RESPONDENT'S COMPENDIUM
(Google's Constitutional Challenge)

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TAB 1

Legal Rights

Life, liberty and security of person

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

Search or seizure

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

Detention or imprisonment

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

Arrest or detention

10 Everyone has the right on arrest or detention

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

Proceedings in criminal and penal matters

11 Any person charged with an offence has the right

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

Garanties juridiques

Vie, liberté et sécurité

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

Fouilles, perquisitions ou saisies

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

Détention ou emprisonnement

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

Arrestation ou détention

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

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

Affaires criminelles et pénales

11 Tout inculpé a le droit :

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

constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

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

Self-crimination

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

Interpreter

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

Equality Rights

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

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

Affirmative action programs

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

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

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

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

Cruauté

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

Témoignage incriminant

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

Interprète

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

Droits à l'égalité

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

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

Programmes de promotion sociale

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

TAB 2



CANADA

CONSOLIDATION

CODIFICATION

Canadian Bill of Rights

Déclaration canadienne des droits

S.C. 1960, c. 44

S.C. 1960, ch. 44

Current to September 1, 2025

À jour au 1 septembre 2025

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

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

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press.

Construction of law

2 Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

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

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

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

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

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

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

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

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

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

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

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

c) la liberté de religion;

d) la liberté de parole;

e) la liberté de réunion et d'association;

f) la liberté de la presse.

Interprétation de la législation

2 Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

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

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

c) privant une personne arrêtée ou détenue

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

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

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

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

e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

TAB 3



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

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

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

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

Short Title

Titre abrégé

Short title

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

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

Titre abrégé

1 *Loi sur la concurrence.*

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

PART I

PARTIE I

Purpose and Interpretation

Objet et définitions

Purpose

Objet

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

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

Objet

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

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

Interpretation

Définitions

Definitions

2 (1) In this Act,

article means real and personal property of every description including

(a) money,

Définitions

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

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

PART II

Administration

Commissioner of Competition

7 (1) The Governor in Council may appoint an officer to be known as the Commissioner of Competition, who shall be responsible for

(a) the administration and enforcement of this Act; and

(b) the administration and enforcement of the *Consumer Packaging and Labelling Act*, the *Precious Metals Marking Act* and the *Textile Labelling Act*.

(c) [Repealed, 2012, c. 24, s. 79]

(d) [Repealed, 2012, c. 24, s. 79]

Oath of office

(2) The Commissioner shall, before taking up the duties of the Commissioner, take and subscribe, before the Clerk of the Privy Council, an oath or solemn affirmation, which shall be filed in the office of the Clerk, in the following form:

I do solemnly swear (or affirm) that I will faithfully, truly and impartially, and to the best of my judgment, skill and ability, execute the powers and trusts reposed in me as Commissioner of Competition. *(In the case where an oath is taken add "So help me God".)*

Salary

(3) The Commissioner shall be paid such salary as may be from time to time fixed and allowed by the Governor in Council.

R.S., 1985, c. C-34, s. 7; 1999, c. 2, ss. 4, 37; 2012, c. 24, s. 79.

Deputy Commissioners

8 (1) One or more persons may be appointed Deputy Commissioners of Competition in the manner authorized by law.

Powers of Deputy

(2) The Governor in Council may authorize a Deputy Commissioner to exercise the powers and perform the duties of the Commissioner whenever the Commissioner is absent or unable to act or whenever there is a vacancy in the office of Commissioner.

Powers of other persons

(3) The Governor in Council may authorize any person to exercise the powers and perform the duties of the Commissioner whenever the Commissioner and the Deputy Commissioners are absent or unable to act or, if one or

PARTIE II

Application

Commissaire de la concurrence

7 (1) Le commissaire de la concurrence est nommé par le gouverneur en conseil; il est chargé :

a) d'assurer et de contrôler l'application de la présente loi;

b) d'assurer et de contrôler l'application de la *Loi sur l'emballage et l'étiquetage des produits de consommation*, de la *Loi sur le poinçonnage des métaux précieux* et de la *Loi sur l'étiquetage des textiles*.

c) [Abrogé, 2012, ch. 24, art. 79]

d) [Abrogé, 2012, ch. 24, art. 79]

Serment professionnel

(2) Préalablement à son entrée en fonctions, le commissaire prête et souscrit ou fait, selon le cas, le serment ou l'affirmation solennelle, tels qu'ils sont formulés ci-après, devant le greffier du Conseil privé, au bureau duquel il est déposé :

Je jure d'exercer (ou affirme solennellement que j'exercerai) avec fidélité, sincérité et impartialité, et au mieux de mon jugement, de mon habileté et de ma capacité, les fonctions et attributions qui me sont dévolues en ma qualité de commissaire de la concurrence. *(Ajouter, en cas de prestation de serment : « Ainsi Dieu me soit en aide ».)*

Traitement

(3) Le commissaire reçoit le traitement fixé par le gouverneur en conseil.

L.R. (1985), ch. C-34, art. 7; 1999, ch. 2, art. 4 et 37; 2012, ch. 24, art. 79.

Sous-commissaires

8 (1) Le ou les sous-commissaires de la concurrence sont nommés de la manière autorisée par la loi.

Pouvoirs du sous-commissaire

(2) Le gouverneur en conseil peut autoriser un sous-commissaire à exercer les pouvoirs et fonctions du commissaire en cas d'absence ou d'empêchement de celui-ci ou de vacance de son poste.

Autres intérimaires

(3) Le gouverneur en conseil peut autoriser toute autre personne à exercer les pouvoirs et fonctions du commissaire en cas d'absence ou d'empêchement de celui-ci et des sous-commissaires ou de vacance de leurs postes.

Competition

PART VII.1 Deceptive Marketing Practices
Reviewable Matters
Sections 74.08-74.1

Concurrence

PARTIE VII.1 Pratiques commerciales trompeuses
Comportement susceptible d'examen
Articles 74.08-74.1

Civil rights not affected

74.08 Except as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of a civil right of action.

1999, c. 2, s. 22.

Droits civils non atteints

74.08 Sauf disposition contraire de la présente partie, celle-ci n'a pas pour effet de priver une personne d'un droit d'action au civil.

1999, ch. 2, art. 22.

Administrative Remedies**Definition of court**

74.09 In sections 74.1 to 74.14 and 74.18, **court** means

(a) in respect of an application by the Commissioner, the Tribunal, the Federal Court or the superior court of a province; and

(b) in respect of an application made by a person granted leave under section 103.1, the Tribunal.

1999, c. 2, s. 22; 2002, c. 8, s. 183; 2024, c. 15, s. 238.

Définition de tribunal

74.09 Aux articles 74.1 à 74.14 et 74.18, **tribunal** s'entend :

a) s'agissant d'une demande du commissaire, du Tribunal, de la Cour fédérale ou de la cour supérieure d'une province;

b) s'agissant d'une demande d'une personne autorisée en vertu de l'article 103.1, du Tribunal.

1999, ch. 2, art. 22; 2002, ch. 8, art. 183; 2024, ch. 15, art. 238.

Determination of reviewable conduct and judicial order

74.1 (1) If, on application by the Commissioner or a person granted leave under section 103.1, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;

(c) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding

(i) in the case of an individual, the greater of

Décision et ordonnance

74.1 (1) Le tribunal qui conclut, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, qu'une personne a ou a eu un comportement susceptible d'examen visé à la présente partie peut ordonner à celle-ci :

a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;

b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :

(i) l'énoncé des éléments du comportement susceptible d'examen,

(ii) la période et le secteur géographique auxquels le comportement est afférent,

(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;

c) de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale :

(i) dans le cas d'une personne physique, correspondant au plus élevé des montants suivants :

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PARTIE VII.1 Pratiques commerciales trompeuses
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Article 74.1

(A) \$750,000 and, for each subsequent order, \$1,000,000, and

(B) three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined, or

(ii) in the case of a corporation, the greater of

(A) \$10,000,000 and, for each subsequent order, \$15,000,000, and

(B) three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues; and

(d) in the case of conduct that is reviewable under paragraph 74.01(1)(a), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate.

Duration of order

(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.

Saving

(3) No order may be made against a person under paragraph (1)(b), (c) or (d) if the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

Purpose of order

(4) The terms of an order made against a person under paragraph (1)(b), (c) or (d) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

Aggravating or mitigating factors

(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

(a) the reach of the conduct within the relevant geographic market;

(A) 750 000 \$ pour la première ordonnance et 1 000 000 \$ pour toute ordonnance subséquente,

(B) trois fois la valeur du bénéfice tiré du comportement trompeur, si ce montant peut être déterminé raisonnablement,

(ii) dans le cas d'une personne morale, correspondant au plus élevé des montants suivants :

(A) 10 000 000 \$ pour la première ordonnance et 15 000 000 \$ pour toute ordonnance subséquente,

(B) trois fois la valeur du bénéfice tiré du comportement trompeur ou, si ce montant ne peut pas être déterminé raisonnablement, trois pour cent des recettes globales brutes annuelles de la personne morale;

d) s'agissant du comportement visé à l'alinéa 74.01(1)a), de payer aux personnes auxquelles les produits visés par le comportement ont été vendus — sauf les grossistes, détaillants ou autres distributeurs, dans la mesure où ils ont revendu ou distribué les produits — une somme — ne pouvant excéder la somme totale payée au contrevenant pour ces produits — devant être répartie entre elles de la manière qu'il estime indiquée.

Durée d'application

(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.

Disculpation

(3) L'ordonnance prévue aux alinéas (1)b), c) ou d) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher le comportement reproché.

But de l'ordonnance

(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b), c) ou d) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non pas à le punir.

Circonstances aggravantes ou atténuantes

(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

a) la portée du comportement sur le marché géographique pertinent;

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- (b)** the frequency and duration of the conduct;
- (c)** the vulnerability of the class of persons likely to be adversely affected by the conduct;
- (d)** the materiality of any representation;
- (e)** the likelihood of self-correction in the relevant geographic market;
- (f)** the effect on competition in the relevant market;
- (g)** the gross revenue from sales affected by the conduct;
- (h)** the financial position of the person against whom the order is made;
- (i)** the history of compliance with this Act by the person against whom the order is made;
- (j)** any decision of the court in relation to an application for an order under paragraph (1)(d);
- (k)** any other amounts paid or ordered to be paid by the person against whom the order is made as a refund or as restitution or other compensation in respect of the conduct; and
- (l)** any other relevant factor.

Meaning of subsequent order

(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b), (b.1) or (c), subsection 74.01(2) or (3) or section 74.011, 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

- (a)** an order was previously made against the person under this section in respect of conduct reviewable under the same provision;
- (b)** the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;
- (c)** in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a) or section 74.011, the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or

- b)** la fréquence et la durée du comportement;
- c)** la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;
- d)** l'importance des indications;
- e)** la possibilité d'un redressement de la situation sur le marché géographique pertinent;
- f)** l'effet sur la concurrence dans le marché pertinent;
- g)** le revenu brut provenant des ventes sur lesquelles le comportement a eu une incidence;
- h)** la situation financière de la personne visée par l'ordonnance;
- i)** le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;
- j)** toute décision du tribunal à l'égard d'une demande d'ordonnance présentée au titre de l'alinéa (1)d);
- k)** toute somme déjà payée par la personne visée par l'ordonnance ou à payer par elle en vertu d'une ordonnance, à titre de remboursement, de restitution ou de toute autre forme de dédommagement à l'égard du comportement;
- l)** tout autre élément pertinent.

Sens de l'ordonnance subséquente

(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b), b.1) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.011, 74.02, 74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants :

- a)** une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;
- b)** la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;
- c)** dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a) ou à l'article 74.011, la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à

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(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part.

Amounts already paid

(7) In determining an amount to be paid under paragraph (1)(d), the court shall take into account any other amounts paid or ordered to be paid by the person against whom the order is made as a refund or as restitution or other compensation in respect of the products.

Implementation of the order

(8) The court may specify in an order made under paragraph (1)(d) any terms that it considers necessary for the order's implementation, including terms

- (a) specifying how the payment is to be administered;
- (b) respecting the appointment of an administrator to administer the payment and specifying the terms of administration;
- (c) requiring the person against whom the order is made to pay the administrative costs related to the payment as well as the fees to be paid to an administrator;
- (d) requiring that potential claimants be notified in the time and manner specified by the court;
- (e) specifying the time and manner for making claims;
- (f) specifying the conditions for the eligibility of claimants, including conditions relating to the return of the products to the person against whom the order is made; and
- (g) providing for the manner in which, and the terms on which, any amount of the payment that remains unclaimed or undistributed is to be dealt with.

Variation of terms

(9) On application by the Commissioner or the person against whom the order is made, the court may vary any term that is specified under subsection (8).

l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;

d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie.

Sommes déjà payées

(7) Dans la détermination de la somme à payer au titre de l'alinéa (1)d), le tribunal tient compte de toute somme déjà payée par le contrevenant ou à payer par lui en vertu d'une ordonnance, à titre de remboursement, de restitution ou de toute autre forme de dédommagement à l'égard des produits.

Exécution de l'ordonnance

(8) Le tribunal peut, dans l'ordonnance rendue au titre de l'alinéa (1)d), préciser les conditions qu'il estime nécessaires à son exécution, notamment :

- a) prévoir comment la somme à payer doit être administrée;
- b) nommer un administrateur chargé d'administrer cette somme et préciser les modalités d'administration;
- c) mettre à la charge du contrevenant les frais d'administration de la somme ainsi que les honoraires de l'administrateur;
- d) exiger que les réclamants éventuels soient avisés selon les modalités de forme et de temps qu'il précise;
- e) préciser les modalités de forme et de temps quant à la présentation de toute réclamation;
- f) établir les critères d'admissibilité des réclamants, notamment toute exigence relative au retour des produits au contrevenant;
- g) prévoir la manière dont la somme éventuellement non réclamée ou non distribuée doit être traitée et les conditions afférentes.

Modification des conditions

(9) Le tribunal peut, sur demande du commissaire ou de la personne visée par l'ordonnance, modifier les conditions qu'il a précisées en vertu du paragraphe (8).

Competition

PART VIII Matters Reviewable by Tribunal
Restrictive Trade Practices
Abuse of Dominant Position
Sections 78-79

Concurrence

PARTIE VIII Affaires que le Tribunal peut examiner
Pratiques restrictives du commerce
Abus de position dominante
Articles 78-79

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

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

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

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

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

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

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

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

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

Prohibition if abuse of dominant position

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

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

(b) conduct

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

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

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

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

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

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

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

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

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

(2) [Abrogé, 2009, ch. 2, art. 427]

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

Ordonnance d'interdiction : abus de position dominante

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

a) une pratique d'agissements anti-concurrentiels;

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

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

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

Additional or alternative order

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

Limitation

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

Administrative monetary penalty

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

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

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

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

Ordonnance supplémentaire ou substitutive

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

Restriction

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

Sanction administrative pécuniaire

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

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

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

Aggravating or mitigating factors

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

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

Purpose of order

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

Factors to be considered

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

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

Additional order — person granted leave

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

Facteurs à prendre en compte

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

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

But de la sanction

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

Facteurs à considérer

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

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

Ordonnance additionnelle — personne autorisée

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

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

Implementation of the order

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

Exception

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

Limitation period

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

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

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

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

Inferences

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

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

Exécution de l'ordonnance

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

Exception

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

Prescription

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

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

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

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

Application

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

TAB 4

Schedule “B” – Criminal Code Provisions

Purpose

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,
 - (ii) evidence that the offender, in committing the offence, abused the offender’s intimate partner or a member of the victim or the offender’s family,
 - (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
 - (ii.2) evidence that the offender involved a person under the age of 18 years in the commission of the offence,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

(iii.2) evidence that the offence was committed against a person who, in the performance of their duties and functions, was providing health services, including personal care services,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,

(v) evidence that the offence was a terrorism offence,

(vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the Corrections and Conditional Release Act, and

(vii) evidence that the commission of the offence had the effect of impeding another person from obtaining health services, including personal care services,

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Additional factors

718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors:

(a) any advantage realized by the organization as a result of the offence;

(b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;

(c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;

(d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;

(e) the cost to public authorities of the investigation and prosecution of the offence;

(f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;

(g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;

(h) any penalty imposed by the organization on a representative for their role in the commission of the offence;

(i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and

(j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

Degrees of punishment

718.3 (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.

Discretion respecting punishment

(2) Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

Imprisonment in default where term not specified

(3) Where an accused is convicted of an offence punishable with both fine and imprisonment and a term of imprisonment in default of payment of the fine is not specified in the enactment that prescribes the punishment to be imposed, the imprisonment that may be imposed in default of payment shall not exceed the term of imprisonment that is prescribed in respect of the offence.

Cumulative punishments

(4) The court that sentences an accused shall consider directing

(a) that the term of imprisonment that it imposes be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing; and

(b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when

(i) the offences do not arise out of the same event or series of events,

(ii) one of the offences was committed while the accused was on judicial interim release, including pending the determination of an appeal, or

(iii) one of the offences was committed while the accused was fleeing from a peace officer.

Cumulative punishments — fines

(5) For the purposes of subsection (4), a term of imprisonment includes imprisonment that results from the operation of subsection 734(4).

Cumulative punishments — youth

(6) For the purposes of subsection (4), a sentence of imprisonment includes

(a) a disposition made under paragraph 20(1)(k) or (k.1) of the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985;

(b) a youth sentence imposed under paragraph 42(2)(n), (o), (q) or (r) of the Youth Criminal Justice Act; and

(c) a sentence that results from the operation of subsection 743.5(1) or (2).

Cumulative punishments — sexual offences against children

(7) When a court sentences an accused at the same time for more than one sexual offence committed against a child, the court shall direct

(a) that a sentence of imprisonment it imposes for an offence under section 163.1 be served consecutively to a sentence of imprisonment it imposes for a sexual offence under another section of this Act committed against a child; and

(b) that a sentence of imprisonment it imposes for a sexual offence committed against a child, other than an offence under section 163.1, be served consecutively to a sentence of imprisonment it imposes for a sexual offence committed against another child other than an offence under section 163.1.

Maximum penalty — intimate partner

(8) If an accused is convicted of an indictable offence in the commission of which violence was used, threatened or attempted against an intimate partner and the accused has been previously convicted of an offence in the commission of which violence was used, threatened or attempted against an intimate partner, the court may impose a term of imprisonment that is more than the maximum term of imprisonment provided for that offence but not more than

- (a) five years, if the maximum term of imprisonment for the offence is two years or more but less than five years;
- (b) 10 years, if the maximum term of imprisonment for the offence is five years or more but less than 10 years;
- (c) 14 years, if the maximum term of imprisonment for the offence is 10 years or more but less than 14 years; or
- (d) life, if the maximum term of imprisonment for the offence is 14 years or more and up to imprisonment for life.

TAB 5

FILED / PRODUIT

Date: November 28, 2024

CT- 2024-010

Sarah Sharp-Smith for / pour
REGISTRAR / REGISTRAIRE

CT-2024-

OTTAWA, ONT.

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THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

NOTICE OF APPLICATION

TAKE NOTICE that the Applicant, the Commissioner of Competition (the “**Commissioner**”), will make an application to the Competition Tribunal (the “**Tribunal**”) pursuant to section 79 of the *Competition Act* (the “**Act**”) for an order pursuant to subsection 79 of the Act for:

- a) an order pursuant to subsections 79(1), 79(2) and 79(3.1) of the Act:
 - a. requiring Google Canada Corporation and Google LLC (collectively, “**Google**”) to divest Google’s publisher ad server, DFP, and Google’s ad exchange, AdX, along with any additional structural relief as needed to restore competition and overcome the effects of Google’s anti-competitive practice in Canada;
 - b. otherwise, prohibiting Google from continuing to engage in the anti-competitive practice described herein and from engaging in any other practices with the same purpose and effect in Canada; and
 - c. requiring Google to pay an administrative monetary penalty in such an amount as the Tribunal decides is appropriate~~directing Google to pay an administrative monetary penalty equal to three times the value of the benefit derived from Google’s anti-competitive practice, or if that amount cannot be reasonably determined, 3% of Google’s worldwide gross revenues;~~
- b) directing Google to pay costs; and
- c) such other relief as the Tribunal may consider appropriate.

AND TAKE NOTICE that the timing and place of hearing of this matter shall be fixed in accordance with the practice of the Tribunal;

AND TAKE FURTHER NOTICE that the Applicant has attached hereto as Schedule “A” a concise statement of the economic theory of the case.

TAB 6

Julie Guindon *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Attorney General of Ontario,
Attorney General of Quebec,
Chartered Professional Accountants Canada
and Canadian Constitution
Foundation** *Interveners***INDEXED AS: GUINDON v. CANADA****2015 SCC 41**

File No.: 35519.

2014: December 5; 2015: July 31.

Present: Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis, Wagner and Gascon JJ.**ON APPEAL FROM THE FEDERAL COURT OF
APPEAL**

Constitutional law — Charter of Rights — Income tax — Penalty for misrepresentation — Individual assessed for penalties under s. 163.2 of Income Tax Act, which imposes monetary penalties on every person who makes false statement that could be used by another person for purpose of Act — Whether proceeding under s. 163.2 is criminal in nature or leads to imposition of true penal consequences — Whether individual assessed for penalties is person “charged with an offence” within meaning of s. 11 of Canadian Charter of Rights and Freedoms — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 163.2.

Constitutional law — Courts — Procedure — Notice of constitutional question given to attorneys general in this Court but not in courts below — Whether this Court should exercise its discretion to address merits of constitutional issue — Tax Court of Canada Act, R.S.C. 1985, c. T-2, s. 19.2.

Julie Guindon *Appelante*

c.

Sa Majesté la Reine *Intimée*

et

**Procureur général de l’Ontario,
procureure générale du Québec,
Comptables professionnels agréés du Canada
et Canadian Constitution
Foundation** *Intervenants***RÉPERTORIÉ : GUINDON c. CANADA****2015 CSC 41**

N° du greffe : 35519.

2014 : 5 décembre; 2015 : 31 juillet.

Présents : Les juges Abella, Rothstein, Cromwell,
Moldaver, Karakatsanis, Wagner et Gascon.**EN APPEL DE LA COUR D’APPEL FÉDÉRALE**

Droit constitutionnel — Charte des droits — Impôt sur le revenu — Pénalité pour faux énoncé — Cotisation établie à l’égard d’un particulier suivant l’art. 163.2 de la Loi de l’impôt sur le revenu, lequel rend passible d’une sanction pécuniaire toute personne qui fait un faux énoncé qu’un tiers pourrait utiliser dans le cadre de l’application de la Loi — La procédure qui découle de cet article est-elle de nature criminelle ou entraîne-t-elle de véritables conséquences pénales? — La personne qui se voit infliger une pénalité est-elle « inculpée » au sens de l’art. 11 de la Charte canadienne des droits et libertés? — Loi de l’impôt sur le revenu, L.R.C. 1985, c. 1 (5^e suppl.), art. 163.2.

Droit constitutionnel — Tribunaux — Procédure — Avis de question constitutionnelle donné aux procureurs généraux dans l’instance devant la Cour, mais non dans les instances précédentes — Y a-t-il lieu que la Cour exerce le pouvoir discrétionnaire qui lui permet de connaître de la question constitutionnelle sur le fond? — Loi sur la Cour canadienne de l’impôt, L.R.C. 1985, c. T-2, art. 19.2.

Proceedings have a criminal purpose when they seek to bring the subject of the proceedings “to account to society” for conduct “violating the public interest”: *Shubley*, at p. 20.

[46] A “true penal consequence” is “imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within [a] limited sphere of activity”: *Wigglesworth*, at p. 561; see also *Martineau*, at para. 57. There is inevitably some overlap between the analysis of the purpose of the scheme and the purpose of the sanction, but the jurisprudence has looked at both separately to the extent that is possible, recognizing that the proceeding will be an offence for s. 11 purposes if it meets either branch of the test, and that situations in which a proceeding meets one but not both branches will be rare: *ibid.*

[47] We will elaborate these principles further as we apply them to the provision in issue here. But first we turn to consider some of the criticisms of this approach to the analysis.

(3) Criticisms of the *Wigglesworth/Martineau* Tests

[48] The *Wigglesworth/Martineau* tests have been subject to criticism. It has been said that the distinction between the criminal in nature and true penal consequence tests is unclear, the reasoning is circular, or the tests cannot properly account for the particular context of modern administrative monetary penalties. (See, e.g., D. McLeod, “Facing the Consequences: Should the *Charter* Apply to Administrative Proceedings Involving Monetary Penalties?” (2012), 30 *N.J.C.L.* 59; factum of the intervenor the Canadian Constitution Foundation (“CCF”); S. Aylward and L. Ritacca, “In Defence of Administrative Law: Procedural Fairness for Administrative Monetary Penalties” (2015), 28 *C.J.A.L.P.* 35.)

procédure a un objectif criminel lorsqu’elle vise à amener la personne en cause « à rendre compte à la société » d’une conduite « contraire à l’intérêt public » (*Shubley*, p. 20).

[46] Une « véritable conséquence pénale » s’entend de « l’emprisonnement ou [de l’]amende qui par son importance semblerait imposée dans le but de réparer le tort causé à la société en général plutôt que pour maintenir la discipline à l’intérieur d’une sphère d’activité limitée » (*Wigglesworth*, p. 561; voir aussi *Martineau*, par. 57). Il existe inévitablement un certain chevauchement entre le régime et la sanction lorsqu’il s’agit d’analyser leur objet respectif, mais les tribunaux ont examiné les deux séparément dans la mesure du possible et reconnu que la procédure est pénale pour l’application de l’art. 11 lorsqu’elle satisfait à l’un ou l’autre des volets du critère, et que rares sont les situations dans lesquelles il est satisfait à l’un mais non aux deux volets (*ibid.*).

[47] Nous reviendrons plus en détail sur ces principes lorsque nous les appliquerons à la disposition considérée en l’espèce. Examinons d’abord certaines des critiques de cette démarche analytique.

(3) Critiques des critères issus des arrêts *Wigglesworth* et *Martineau*

[48] Les critères issus des arrêts *Wigglesworth* et *Martineau* ont fait l’objet de critiques. D’aucuns ont dit que la distinction entre le critère de la nature criminelle et celui de la véritable conséquence pénale n’était pas claire, que le raisonnement était circulaire ou que les critères ne permettaient pas de bien tenir compte du contexte particulier des sanctions pécuniaires administratives qui sont infligées de nos jours. (Voir p. ex. D. McLeod, « Facing the Consequences : Should the *Charter* Apply to Administrative Proceedings Involving Monetary Penalties? » (2012), 30 *R.N.D.C.* 59; mémoire de l’intervenante Canadian Constitution Foundation (« CCF »); S. Aylward et L. Ritacca, « In Defence of Administrative Law : Procedural Fairness for Administrative Monetary Penalties » (2015), 28 *R.C.D.A.P.* 35.)

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

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

(4) Is the Proceeding Under Section 163.2 “Criminal in Nature”?

(a) *Principles*

[51] The criminal in nature test asks whether the proceedings by which a penalty is imposed are criminal. The test is not concerned with the nature of the underlying act. As Wilson J. stated in *Wigglesworth*, the test is whether a matter “fall[s] within s. 11 . . . because by its very nature it is a criminal proceeding”: p. 559 (emphasis added). This was confirmed in *Shubley*, at pp. 18-19, where McLachlin J. (as she then was) stated explicitly: “The question of whether proceedings are criminal in nature is concerned not with the nature of the act

[49] Lorsque l’on considère que le critère de la nature criminelle ne s’intéresse qu’à la procédure, la fonction propre à chacun des critères devient évidente. Le critère de la nature criminelle permet de circonscrire les dispositions qui sont de nature criminelle du fait que le Parlement ou la législature a établi une procédure dont les attributs et l’objet montrent que la sanction est infligée à l’issue d’une procédure de nature criminelle. Par contre, le critère de la véritable conséquence pénale consiste à se demander si une disposition d’apparence administrative ou réglementaire donne néanmoins droit aux protections de l’art. 11 de la *Charte* parce que son application peut entraîner une conséquence pénale. Un certain chevauchement est inévitable, mais il importe de prendre en compte toutes les considérations pertinentes et de se rappeler que les deux volets du critère ne conduisent que rarement à des conclusions différentes (comme dans *Wigglesworth*).

[50] De plus, l’analyse n’est pas circulaire : les deux critères appellent des questions distinctes qui apprécient les deux manières différentes dont une disposition pourrait créer une infraction criminelle pour l’application de l’art. 11. Le critère de la nature criminelle s’attache au processus, alors que celui de la conséquence pénale se focalise sur l’effet possible de la disposition sur la personne visée par la procédure.

(4) La procédure prévue à l’art. 163.2 est-elle « de nature criminelle »?

a) *Principles*

[51] Pour appliquer le critère de la nature criminelle il faut se demander si la procédure par laquelle une sanction est infligée est criminelle, peu importe la nature de l’acte sous-jacent. Comme le dit la juge Wilson dans l’arrêt *Wigglesworth*, la question est celle de savoir si l’affaire « rel[ève] de l’art. 11 [. . .] parce que, de par sa nature même, il s’agit d’une procédure criminelle » (p. 559 (nous soulignons)). La Cour le confirme dans l’arrêt *Shubley*, p. 18-19, où la juge McLachlin (maintenant Juge en chef) affirme sans ambages que « [l]a

[72] While some regulatory penalties are imposed without consideration of the person's state of mind, in other cases it is rational that the state would only wish to impose a penalty on those who engage in misconduct knowingly, recklessly, or with a particular intention. Providing a due diligence defence or including a mental element as a component of the penalty does not detract from the administrative nature of the penalty. (See the Federal Court of Appeal's reasons, at para. 48.)

(c) *Conclusion on the "Criminal in Nature" Test*

[73] We conclude that the s. 163.2 process is not criminal in nature.

(5) The True Penal Consequence Test

(a) Introduction

[74] As we have explained, the preparer penalty is designed to apply when an individual engages in conduct such as preparing a fraudulent tax return, conduct which undermines the self-reporting and self-assessing scheme which depends on honesty and diligence of taxpayers and those whom they engage to assist them. For the reasons that follow, we conclude that the penalty is not a true penal consequence.

(b) *Principles*

[75] Administrative monetary penalties are designed as sanctions to be imposed through an administrative process. They are not imposed in a criminal proceeding. Thus, the issue of whether a person who is the subject of an ostensibly administrative regime is in reality "charged with an offence" is addressed by the second *Wigglesworth/Martineau* test: Does the sanction impose a true penal consequence? *Wigglesworth* teaches that a true penal consequence is imprisonment or a fine which, having regard to its magnitude and other relevant

[72] Bien que, dans certains cas, une sanction réglementaire soit infligée sans que l'état d'esprit de la personne ne soit pris en compte, dans d'autres, il est logique que l'État ne veuille infliger une sanction qu'à celui qui, par insouciance ou animé d'une intention particulière, accomplit un acte fautif. La possibilité d'invoquer la diligence raisonnable en défense ou l'exigence d'un élément moral n'enlève rien à la nature administrative de la sanction. (Voir les motifs de la Cour d'appel fédérale, par. 48.)

c) *Conclusion sur le critère de la « nature criminelle »*

[73] Nous concluons que le processus correspondant à l'art. 163.2 n'est pas de nature criminelle.

(5) Le critère de la véritable conséquence pénale

a) Introduction

[74] Comme nous l'expliquons précédemment, la pénalité du spécialiste en déclarations est censée s'appliquer à la personne qui, par exemple, établit une déclaration de revenus frauduleuse et nuit ainsi au régime d'autodéclaration et d'autocotisation dont le bon fonctionnement repose sur l'honnêteté et la diligence des contribuables et de ceux dont ils retiennent les services pour les aider. Pour les motifs qui suivent, nous concluons que la pénalité ne constitue pas une véritable conséquence pénale.

b) *Principes*

[75] Les sanctions pécuniaires administratives sont des sanctions conçues pour être infligées à l'issue d'un processus administratif. Elles ne font pas suite à une procédure criminelle. Ainsi, pour savoir si la personne qui fait officiellement l'objet d'une mesure administrative est en réalité « inculpé[e] », le critère à utiliser est le second dégagé dans les arrêts *Wigglesworth* et *Martineau* : la sanction impose-t-elle une véritable conséquence pénale? Selon l'arrêt *Wigglesworth*, la véritable conséquence pénale s'entend de la peine d'emprisonnement ou

factors, is imposed to redress the wrong done to society at large rather than simply to secure compliance: see p. 561.

[76] Imprisonment is always a true penal consequence. A provision that includes the possibility of imprisonment will be criminal no matter the actual sanction imposed: see *Wigglesworth*, at p. 562. A monetary penalty may or may not be a true penal consequence. It will be so when it is, in purpose or effect, punitive. Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty: see, e.g., *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176, 333 D.L.R. (4th) 1, at paras. 76-77.

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

(c) *An Upper Limit on Administrative Penalties?*

[78] Ms. Guindon and the intervener the Canadian Constitution Foundation suggest that there should be an upper limit on the amount of an administrative monetary penalty. Citing the Ontario

de l'amende qui, compte tenu de son importance et d'autres considérations pertinentes, est infligée dans le but de réparer le tort causé à la société en général plutôt que d'assurer l'observation de la loi (voir p. 561).

[76] L'emprisonnement constitue toujours une véritable conséquence pénale. La disposition qui prévoit la possibilité d'un emprisonnement est de nature criminelle, peu importe la sanction réellement imposée (voir *Wigglesworth*, p. 562). Une sanction pécuniaire peut ou non constituer une véritable conséquence pénale. C'est le cas lorsque, par son objet ou son effet, elle est punitive. Pour le savoir, il faut tenir compte de choses comme le montant de l'amende, son destinataire, le fait que son importance tient à des considérations réglementaires plutôt qu'à des principes de détermination de la peine en matière criminelle, et le fait que la sanction stigmatise ou non (voir p. ex. *Canada (Procureur général) c. United States Steel Corp.*, 2011 CAF 176, par. 76-77 (CanLII)).

[77] L'importance de la sanction n'est pas déterminante en soi. Toutefois, lorsque le montant en cause est disproportionné à celui qui permet d'atteindre les objectifs de la réglementation, il y a lieu de penser qu'il s'agit d'une véritable conséquence pénale, de sorte que la disposition emporte l'application de l'art. 11 de la *Charte*. Cela ne veut pas dire qu'une pénalité d'un montant très élevé ne puisse être infligée à titre de sanction pécuniaire administrative. Il arrive en effet parfois qu'une pénalité d'un montant substantiel soit nécessaire pour décourager l'inobservation d'un régime administratif (voir *Rowan c. Ontario Securities Commission*, 2012 ONCA 208, 110 O.R. (3d) 492, par. 49). Le montant de la pénalité doit refléter l'objectif de décourager l'inobservation du régime administratif ou de réglementation.

c) *L'application d'un plafond à la pénalité administrative?*

[78] M^{me} Guindon et l'intervenante Canadian Constitution Foundation laissent entendre que le montant d'une sanction administrative pécuniaire devrait être plafonné. Citant le par. 54 de

Court of Appeal decision in *Rowan*, at para. 54, which considered the imposition of an administrative penalty under the Ontario *Securities Act*, Ms. Guindon submits that the maximum amount that can be imposed under an administrative monetary penalty should be one fifth of the penalty which can be imposed by criminal prosecution. The CCF submits that there should be a monetary threshold beyond which administrative penalties are presumed to be criminal, suggesting \$10,000 for an individual and \$100,000 for a corporation: I.F., at para. 32.

[79] We cannot agree with these approaches. First, the one-to-five ratio suggested by Ms. Guindon is not a general standard. She derives the proposed rule from the Ontario Court of Appeal's decision in *Rowan*, yet in that decision, the court merely recognized the ratio between a particular administrative monetary penalty in the Ontario *Securities Act* and the maximum criminal penalty that could apply for the same misconduct: see *Securities Act*, ss. 122(1) and 127(1)9; *Rowan*, at para. 54. The Court of Appeal did not find that this was a general rule applicable to all administrative monetary penalties or that this was the only relevant consideration. Second, and most fundamentally, an arbitrary upper limit on administrative monetary penalties could undermine their goal: to deter actions which do not comply with the administrative regime. The analysis must ask whether the amount of the penalty, considered with the other relevant factors, is in keeping with the nature of the misconduct and the penalty necessary to serve regulatory purposes, such as promoting compliance and deterring non-compliance, not focus on an arbitrary threshold which may bear no relation to the particular administrative regime and policy goals: see *United States Steel Corp.*, at para. 74.

[80] Some statutes prescribe very high administrative monetary penalties, at times over a million dollars, and these have been upheld where it is demonstrated that the penalty serves regulatory purposes. In some cases, sizable penalties are

l'arrêt *Rowan* de la Cour d'appel de l'Ontario, qui porte sur une pénalité administrative infligée sous le régime de la *Loi sur les valeurs mobilières* de l'Ontario, M^{me} Guindon soutient que le montant maximum d'une sanction pécuniaire administrative devrait correspondre au cinquième de l'amende susceptible d'être infligée à l'issue d'une poursuite criminelle. La CCF préconise pour sa part l'établissement d'un plafond au-delà duquel une pénalité administrative serait présumée être de nature criminelle, et elle propose de fixer ce plafond à 10 000 \$ pour un particulier et à 100 000 \$ pour une personne morale (mémoire, par. 32).

[79] Nous ne pouvons souscrire à ces approches. Premièrement, la fraction d'un cinquième que propose M^{me} Guindon en se fondant sur l'arrêt *Rowan* de la Cour d'appel de l'Ontario ne constitue pas une norme générale. Dans cet arrêt, la Cour d'appel reconnaît simplement l'existence d'un rapport entre une sanction pécuniaire administrative prévue par la *Loi sur les valeurs mobilières* de l'Ontario et la peine maximale susceptible d'être infligée au pénal pour les mêmes actes (voir la *Loi sur les valeurs mobilières*, par. 122(1) et 127(1)9; *Rowan*, par. 54). La Cour d'appel ne voit pas là une règle générale applicable à toute sanction pécuniaire administrative, ni la seule considération pertinente. Deuxièmement, et plus fondamentalement, plafonner les sanctions pécuniaires administratives pourrait aller à l'encontre de leur objectif, à savoir décourager l'inobservation du régime administratif. Il faut se demander si le montant de la pénalité, compte tenu des autres considérations pertinentes, est compatible avec la nature de l'acte fautif et si la pénalité est nécessaire à la réalisation des objectifs de la réglementation que sont par exemple la promotion de l'observation de la loi et la prévention de son inobservation, et non fixer une limite arbitraire pouvant n'avoir aucun lien avec le régime administratif en cause et ses objectifs généraux (voir *United States Steel Corp.*, par. 74).

[80] Quelques lois prévoient des sanctions pécuniaires administratives d'un montant très élevé, parfois plus d'un million de dollars, que les tribunaux confirment lorsqu'il est établi qu'elles servent les fins de la réglementation. Dans certains cas, leur

necessary so the penalty is not simply considered a cost of doing business: see the Federal Court of Appeal's reasons, at para. 47. For example, an administrative penalty of \$1 million per infraction in the *Alberta Securities Act*, R.S.A. 2000, c. S-4, was upheld in *Lavallee v. Alberta Securities Commission*, 2010 ABCA 48, 474 A.R. 295. The Federal Court of Appeal upheld a provision of the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.), which allowed for penalties of up to \$10,000 per day for failure to comply with a ministerial directive: see *United States Steel Corp.* The Ontario Superior Court found that a \$10 million administrative monetary penalty in the *Competition Act* for deceptive marketing practices did not engage s. 11 of the *Charter: Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5315, 288 C.R.R. (2d) 297. The Ontario Court of Appeal in *Rowan*, noting that the amount of the penalty is determined by regulatory considerations distinct from the principles of criminal liability and sentencing, that no criminal record results and the proceeds are used for the benefit of third parties, stated that

[p]enalties of up to \$1 million per infraction are, in my view, entirely in keeping with the Commission's mandate to regulate the capital markets where enormous sums of money are involved and where substantial penalties are necessary to remove economic incentives for non-compliance with market rules. [para. 49]

[81] In all of these cases, the courts found that high administrative monetary penalties were required to encourage compliance with the administrative regime. The relevant question is not the amount of the penalty in absolute terms, it is whether the amount serves regulatory rather than penal purposes.

(d) *Application*

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

montant doit être assez important afin qu'elles ne soient pas simplement considérées comme un coût de fonctionnement (voir les motifs de la Cour d'appel fédérale, par. 47). Par exemple, une sanction administrative d'un million de dollars par infraction prévue par la *Securities Act* de l'Alberta, R.S.A. 2000, c. S-4, est confirmée dans l'arrêt *Lavallee c. Alberta Securities Commission*, 2010 ABCA 48, 474 A.R. 295. Dans *United States Steel Corp.*, la Cour d'appel fédérale confirme une disposition de la *Loi sur l'investissement Canada*, L.R.C. 1985, c. 28 (1^{er} suppl.), qui prévoit des pénalités allant jusqu'à 10 000 \$ par jour en cas d'omission de se conformer à une directive ministérielle. Dans *Canada (Commissioner of Competition) c. Chatr Wireless Inc.*, 2013 ONSC 5315, 288 C.R.R. (2d) 297, la Cour supérieure de justice de l'Ontario conclut que la sanction pécuniaire administrative de 10 millions de dollars prévue par la *Loi sur la concurrence* pour pratiques commerciales trompeuses n'emporte pas l'application de l'art. 11 de la *Charte*. Dans l'arrêt *Rowan*, faisant remarquer que le montant de la sanction est fixé en fonction de considérations de réglementation distinctes des principes de la responsabilité criminelle et de la détermination de la peine, qu'aucun casier judiciaire n'en résulte et que les sommes sont perçues au bénéfice de tiers, la Cour d'appel de l'Ontario déclare ce qui suit :

[TRADUCTION] Les sanctions allant jusqu'à un million de dollars par infraction sont, à mon avis, entièrement compatibles avec le mandat de la Commission qui consiste à réguler les marchés financiers où circulent des sommes considérables, de sorte que des sanctions substantielles s'imposent pour supprimer l'incitation financière à l'inobservation des règles. [par. 49]

[81] Dans toutes ces affaires, les cours concluent que des sanctions pécuniaires administratives d'un montant élevé sont nécessaires pour inciter à l'observation du régime administratif. Le débat ne porte pas sur leur montant dans l'absolu, mais bien sur la question de savoir si l'objectif qui sous-tend la fixation de leur montant est réglementaire ou pénal.

d) *Application*

[82] L'article 163.2 de la *LIR* n'impose aucune « véritable conséquence pénale ».

[83] Considering first the purpose of the penalty, s. 163.2 was enacted in 2000 to discourage individuals from making false statements on behalf of others or from counselling others to make false statements: see the Tax Court's reasons, at paras. 36-37. Thus its purpose is to promote compliance with the scheme. The fact that the penalty is intended to have a deterrent effect does not take it out of the realm of administrative penalties. As Fish J. pointed out in *Martineau*, penalties which are clearly not penal in nature, such as damages imposed in relation to civil liability and penalties imposed in disciplinary proceedings, have deterrent aspects: see para. 38.

[84] The magnitude of penalties under s. 163.2(4) is directly tied to the objective of deterring non-compliance with the *ITA*. The amount is calculated pursuant to s. 163.2(5) and takes into account the penalty to which the other person (for whom or to whom the violator has made the false statement) would be liable in addition to the violator's gross compensation in respect of the false statement. These factors speak to the magnitude of the tax that could potentially be avoided and the violator's personal gain, both of which are relevant in deterring such misconduct. The amount is fixed without regard to other general criminal sentencing principles and no stigma comparable to that attached to a criminal conviction flows from the imposition of the penalty.

[85] Ms. Guindon was assessed a penalty of \$546,747. This amount is very high for an individual. However, in the circumstances it does not constitute a true penal consequence: the Tax Court found that there were 135 violations (see paras. 1 and 112). In addition, that court found that Ms. Guindon was dishonest in her initial legal opinion when she stated that she had reviewed the supporting documents. She then compounded this dishonesty by signing charitable receipts that she should reasonably have known were tainted by her own failure to verify the legal basis of the program: paras. 107-9. Such dishonesty cannot be countenanced in a self-reporting system. As noted by the Federal Court of Appeal, "[s]ometimes administrative penalties must be large in order

[83] Examinons d'abord l'objectif de la pénalité. L'article 163.2 a été édicté en 2000 pour dissuader toute personne de faire un faux énoncé pour le compte d'autrui ou de conseiller à une autre personne d'en faire un (voir les motifs de la Cour de l'impôt, par. 36-37). Il vise donc à promouvoir l'observation du régime. Même si la pénalité se veut dissuasive, sa nature demeure administrative. Comme le signale le juge Fish dans l'arrêt *Martineau*, les sanctions qui ne sont manifestement pas de nature pénale, tels les dommages-intérêts pour responsabilité civile et les sanctions disciplinaires, ont un effet dissuasif (voir par. 38).

[84] L'importance de la pénalité prévue au par. 163.2(4) est directement liée à l'objectif de décourager l'inobservation de la *LIR*. Son montant est calculé en application du par. 163.2(5), et il est tenu en compte de la pénalité à laquelle l'autre personne (celle pour qui ou à qui est fait le faux énoncé) serait tenue en plus de la rétribution brute du contrevenant pour le faux énoncé. Ces éléments témoignent de l'importance de l'impôt susceptible d'être évité et du gain personnel obtenu par le contrevenant, les deux devant être pris en compte pour décourager un tel acte fautif. Le montant de la pénalité est fixé sans égard aux principes généraux de détermination de la peine en matière criminelle et il n'en résulte aucune stigmatisation comparable à celle découlant d'une déclaration de culpabilité au pénal.

[85] M^{me} Guindon s'est vu infliger une pénalité de 546 747 \$, ce qui représente une somme très élevée dans le cas d'un particulier. Toutefois, dans les circonstances, il ne s'agit pas d'une véritable conséquence pénale. La Cour de l'impôt relève 135 contraventions (voir par. 1 et 112) et elle conclut que M^{me} Guindon a fait preuve de malhonnêteté dans sa première opinion juridique en y déclarant avoir examiné les documents à l'appui. M^{me} Guindon a ensuite ajouté à sa malhonnêteté en signant les reçus pour dons de bienfaisance dont elle aurait dû raisonnablement savoir qu'ils étaient viciés par son omission de vérifier le fondement juridique du programme (par. 107-109). Une telle malhonnêteté ne saurait être admise dans un système

to deter conduct detrimental to the administrative scheme and the policies furthered by it”: para. 46.

[86] The Tax Court found that Ms. Guindon wrote and endorsed a legal opinion that she knew was “flawed and misleading”: in the opinion, she stated that she had reviewed supporting material which had in fact never been provided to her (para. 105). Later, when she signed charitable tax receipts as part of the program, she chose to “rely on her own legal opinion which she knew to be incomplete”: para. 107. The Tax Court found that Ms. Guindon’s conduct was “indicative either of complete disregard of the law and whether it was complied with or not or of wilful blindness”: para. 108.

[87] We agree with the Federal Court of Appeal that a maximum penalty for a person making a false statement of \$100,000 plus the person’s gross compensation in relation to that statement

does not demonstrate a purpose extending beyond deterrence to denunciation and punishment of the offender for the “wrong done to society”: *Wigglesworth*, *supra*, at page 561. Rather, in light of the possibility of false statements going undetected, penalties of such magnitude are necessary to prevent them from being regarded as just “another cost of doing business”: *United States Steel Corp.*, *supra*, at paragraph 77. [para. 47]

[88] In this case, the penalty of \$546,747 assessed against Ms. Guindon does not impose a true penal consequence — the magnitude reflects the objective of deterring conduct of the type she engaged in. Although the penalty is paid ultimately into the Consolidated Revenue Fund, none of the other relevant considerations supports the view that this penalty is a true penal consequence.

(6) Conclusion

[89] We conclude that the proceeding under s. 163.2 is not criminal in nature and does not lead

d’autocotisation. Comme le fait remarquer la Cour d’appel fédérale, « [l]es pénalités administratives doivent parfois être élevées pour dissuader une conduite préjudiciable au régime administratif mis en place et aux politiques qu’il met en œuvre » (par. 46).

[86] La Cour de l’impôt conclut que M^{me} Guindon a rédigé et signé une opinion juridique qu’elle savait « lacunaire et trompeur[se] » car elle y affirmait avoir examiné des documents à l’appui qui, en réalité, ne lui avaient jamais été remis (par. 105). Plus tard, lorsqu’elle a signé les reçus fiscaux pour dons de bienfaisance dans le cadre du programme, elle a décidé de « se fier à s[a] propre [opinion] juridique qu’elle savait incompl[ète] » (par. 107). La Cour de l’impôt conclut que la conduite de M^{me} Guindon « témoigne d’une indifférence complète à l’égard de la loi et de la question de savoir si elle est respectée ou non, ou d’un aveuglement volontaire » (par. 108).

[87] Nous convenons avec la Cour d’appel fédérale que la pénalité maximale dont est passible l’auteur d’un faux énoncé, soit 100 000 \$ plus sa rétribution brute pour cet énoncé,

ne dénote pas un objectif de réprobation et de punition du contrevenant pour le « tort causé à la société » (*Wigglesworth*, précité, à la page 561). Il s’agit plutôt de prévoir des pénalités de nature à faire en sorte qu’elles « ne soient pas considérées comme une simple dépense d’affaire » (*United States Steel Corp.*, précité, au paragraphe 77), compte tenu du fait qu’il est possible que les faux énoncés passent inaperçus. [par. 47]

[88] En l’espèce, la pénalité de 546 747 \$ infligée à M^{me} Guindon ne constitue pas une véritable conséquence pénale, car son montant élevé reflète l’objectif de décourager des actes comme ceux qui ont été accomplis. La pénalité est certes versée au Trésor au bout du compte, mais aucune autre considération pertinente n’appuie l’idée qu’il s’agit d’une véritable conséquence pénale.

(6) Conclusion

[89] Nous concluons que la procédure découlant de l’art. 163.2 n’est pas de nature criminelle

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

[90] Finally, we note that even though s. 11 of the *Charter* is not engaged by s. 163.2 of the *ITA*, those against whom penalties are assessed are not left without recourse or protection. They have a full right of appeal to the Tax Court of Canada and, as the respondent pointed out in her factum, have access to other administrative remedies: R.F., at para. 99; see, e.g., *ITA*, s. 220(3.1).

IV. Proposed Disposition

[91] We would dismiss the appeal with costs.

The reasons of Abella, Karakatsanis and Wagner JJ. were delivered by

[92] ABELLA AND WAGNER JJ. — Legislatures across Canada have enacted mandatory provisions that require litigants who wish to challenge the constitutionality of a piece of legislation to give notice to the Attorneys General. This notice gives governments an opportunity to present evidence justifying the constitutionality of the law and permits all parties to challenge that evidence. The goal is for the court, in the public interest, to have the fullest and best evidence possible before deciding the issue so that a tested and thorough evidentiary record is available.

[93] The indispensable evidentiary role governments play in constitutional challenges was trenchantly described by Sopinka J. in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241:

et que nulle véritable conséquence pénale n’en résulte. Nous convenons avec le juge Stratas, qui s’exprime au nom de la Cour d’appel fédérale, que « se voir infliger une pénalité en application de l’article 163.2, ce n’est pas l’équivalent d’être “in-culpé”. Par conséquent, aucun des droits prévus à l’article 11 ne s’applique à une procédure découlant de l’article 163.2 » (par. 37).

[90] Enfin, nous faisons remarquer que même si l’art. 163.2 de la *LIR* n’emporte pas l’application de l’art. 11 de la *Charte*, celui qui se voit infliger une pénalité n’est pas sans recours ni protection. Il peut interjeter appel de plein droit à la Cour canadienne de l’impôt et, comme le signale l’intimée dans son mémoire, il dispose d’autres recours sur le plan administratif (m.i., par. 99; voir p. ex. *LIR*, par. 220(3.1)).

IV. Dispositif

[91] Nous sommes d’avis de rejeter le pourvoi avec dépens.

Version française des motifs des juges Abella, Karakatsanis et Wagner rendus par

[92] LES JUGES ABELLA ET WAGNER — Les législateurs ont, à la grandeur du Canada, adopté des dispositions obligatoires selon lesquelles tout plaideur désireux de contester la constitutionnalité d’une loi doit signifier un avis en ce sens aux procureurs généraux. Cet avis permet aux gouvernements de présenter des éléments de preuve qui étayent la constitutionnalité de la loi en cause et à toutes les parties de contester ces éléments de preuve. L’objectif derrière cette mesure est d’assurer que la cour saisie dispose, dans l’intérêt public, d’une preuve à la fois vérifiée et complète pour statuer à partir d’un dossier le plus complet et le plus fiable possible.

[93] Dans l’arrêt *Eaton c. Conseil scolaire du comté de Brant*, [1997] 1 R.C.S. 241, le juge Sopinka fait état avec aplomb du rôle indispensable des gouvernements en matière de preuve lorsque la constitutionnalité d’une disposition législative est contestée :

TAB 7

**SUPREME COURT OF CANADA**

CITATION: John Howard Society
of Saskatchewan v. Saskatchewan
(Attorney General), 2025 SCC 6

APPEAL HEARD: October 8 and
9, 2024

JUDGMENT RENDERED: March
14, 2025

DOCKET: 40608

BETWEEN:

John Howard Society of Saskatchewan
Appellant

and

Government of Saskatchewan (Attorney General for Saskatchewan)
Respondent

- and -

**Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Alberta,
Alberta Prison Justice Society,
Federation of Sovereign Indigenous Nations,
Aboriginal Legal Services Inc.,
British Columbia Civil Liberties Association,
Criminal Lawyers' Association (Ontario),
Queen's Prison Law Clinic,
Association des avocats.es carcéralistes du Québec,
Canadian Civil Liberties Association,
Canadian Prison Law Association and
West Coast Prison Justice Society**
Intervenors

[29] Under the criminal in nature test, the focus of the inquiry is not on the underlying acts that gave rise to the proceedings, but is instead on the purpose and features of the proceedings themselves (*Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737, at paras. 24 and 28-32; *Guindon*, at para. 45). The presence of analogues to the following features of a criminal trial may suggest that the proceedings at issue are criminal in nature: a charge, an information, an arrest, a summons, and a subsequent criminal record (*Martineau*, at para. 45; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 43). Proceedings may be criminal in nature even in circumstances where they have both a public accountability function and a private, disciplinary one (see *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 281). The purpose of the penalties may also inform the criminal in nature test, but its consideration is often reserved for the true penal consequence test to avoid “unnecessary repetition” (*Guindon*, at para. 52; see also para. 46).

[30] Importantly for our purposes, the true penal consequence test is “always” satisfied when there is the possibility of imprisonment (*Guindon*, at para. 76). Whether other sanctions, such as fines or monetary penalties, are true penal consequences depends on if they are punitive “in purpose or effect” (*ibid.*). A punitive purpose may be discerned if the sanction is determined by the principles of criminal sentencing rather than by regulatory considerations (*ibid.*; *Martineau*, at para. 62). A sanction’s effects may be considered punitive once they are “assessed relative to the conduct in question and the regulatory objective” at issue (*Goodwin*, at para. 46). Where the effects of a

sanction are “out of proportion” to what is required to achieve the regulatory purpose, the sanction will likely constitute a true penal consequence (*Guindon*, at para. 77).

[31] As I discuss below, the key question in this case is whether disciplinary segregation and loss of earned remission constitute forms of “imprisonment” under the true penal consequence test. When imprisonment is understood in a functional rather than a formalistic manner, this question must be answered in the affirmative.

(2) Legal Status of *Shubley*

[32] If *Shubley* remains a binding precedent, it must be concluded that disciplinary segregation and loss of earned remission are not true penal consequences. JHS argues that *Shubley* should be overturned for two reasons: (a) reliance on s. 7 of the *Charter* to provide inmates with procedural protections during disciplinary proceedings has proven unworkable; and (b) the legal foundations of *Shubley* have been eroded. I agree with JHS that *Shubley*’s application of the true penal consequence test should be overturned because it rests on eroded legal foundations. It is unnecessary to address the assertion of unworkability and the legal foundations of *Shubley*’s application of the criminal in nature test.

[33] The decision to depart from a precedent of this Court should not be taken lightly. This is because adherence to precedent furthers values such as the certainty and predictability of the law (*R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460, at para. 64). In some exceptional circumstances, however, a compelling reason will outweigh the

Canada (Public Safety and Emergency Preparedness) v. Chhina, 2019 SCC 29, [2019] 2 S.C.R. 467, at para. 19).

[44] This evolution in *habeas corpus* jurisprudence has, subsequent to *Shubley*, influenced the scope of the liberty interest protected by s. 7 of the *Charter*. For instance, in *Cunningham v. Canada*, [1993] 2 S.C.R. 143, this Court considered whether a retrospective change to the parole system violated s. 7. Relying on the reasoning in *Dumas*, this Court confirmed that an offender has an expectation of liberty based on the parole system at the time of sentencing and that a “substantial change” that thwarts this expectation can constitute a deprivation of liberty under s. 7 (p. 151; see also p. 150). In doing so, this Court explicitly rejected the formalistic argument that, once an inmate is incarcerated, there can be “no further impeachment of his liberty interest” (p. 148). This argument “oversimplifie[d] the concept of liberty” by seeking to preserve a rigid distinction between the sentence and conditions of imprisonment (*ibid.*).

[45] Changes to the conditions of imprisonment have also attracted constitutional scrutiny under s. 11(h) of the *Charter*. In *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, this Court held that some retrospective changes to the conditions of imprisonment can constitute a “punishment” in violation of s. 11(h)’s guarantee against double jeopardy, depending on the degree to which the changes thwart an inmate’s “settled expectation of liberty” (para. 60). In making this holding, the Court expanded the test for “punishment”, which had previously been limited to the “arsenal of sanctions” that may be imposed during the criminal

sentencing process (para. 50, quoting *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at paras. 62 and 65). It did so on the basis that, “from a functional rather than a formalistic perspective, the harshness of punishment has been increased” when there has been a substantial increase in the risk of additional incarceration as a result of retrospective changes to the conditions of imprisonment (para. 52; see also para. 63).

[46] *Whaling’s* embrace of a liberal and purposive interpretation of the *Charter* subsequently prompted this Court to reformulate the test for “punishment” under s. 11(h) and (i) “to carve out a clearer and more meaningful role for the consideration of the impact of a sanction” (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 41; see also paras. 36-40).

[47] A common thread running through these cases is that, when interpreting the scope of different *Charter* rights, including s. 11 rights, this Court has rejected formalistic interpretations that seek to preserve an inflexible distinction between the sentence and conditions of imprisonment. Instead, this Court has adopted a purposive method of constitutional interpretation that gives effective protection to the underlying interests that the *Charter* right at issue is intended to secure.

[48] Since the release of *Shubley*, this Court has never reaffirmed the idea that “imprisonment” under the true penal consequence test is limited to a formal sentence of imprisonment (see, e.g., *Martineau*, at para. 57; *Guindon*, at para. 76). In my view, this is because *Shubley’s* application of the true penal consequence test no longer fits within the broader landscape of this Court’s jurisprudence. It does not consider how

the concept of imprisonment, when understood functionally, is broad enough to encompass both substantial erosions to an inmate's residual liberties (i.e., disciplinary segregation) and extensions to an inmate's period of incarceration (i.e., loss of earned remission). It is now necessary to depart from the formalistic distinction between the sentence and conditions of imprisonment to ensure that s. 11's fundamental purpose of safeguarding liberty is robustly protected. For this reason, *Shubley*'s holding on the true penal consequence test should no longer be considered binding.

[49] In reaffirming this Court's commitment to purposive constitutional interpretation when interpreting the scope of s. 11, I emphasize that "it is important not to overshoot the actual purpose of the right or freedom in question" (*Big M Drug Mart Ltd.*, at p. 344). *Wigglesworth* exemplifies how a provision's purpose can perform this constraining function in constitutional interpretation, and it remains good law. In that case, the Court adopted a "somewhat narrow definition of the opening words of s. 11" to ensure that the substantive protections offered by s. 11 rights would not vary according to the type of proceeding at issue (p. 558). Such variation risked creating a lack of predictability and clarity in the development of s. 11 jurisprudence, which would undermine s. 11's objective of ensuring strong procedural protections for those who are charged with a criminal offence or who otherwise "may well suffer a deprivation of liberty" as a result of the prosecutorial power of the state (*ibid.*). For that reason, s. 11 was limited to the "most serious offences known to our law, i.e., criminal and penal matters" (*ibid.* (emphasis added)).

[50] As this Court recognized in *K.R.J.*, the true penal consequence test from *Wigglesworth* sets an “indisputably high bar” in order to give effect to s. 11’s purpose by limiting the number of offences outside the criminal context that trigger the most robust procedural protections in our legal system (para. 38). However, in setting this high bar, *Wigglesworth* did not suggest that the sanctions recognized as true penal consequences, such as imprisonment, must be understood formalistically. A formalistic interpretation of these sanctions erodes the acknowledgment in *Wigglesworth* that, where non-criminal offences may lead to the imposition of truly punitive consequences, s. 11 should apply to fulfil its liberty-protecting purpose. Adopting a formalistic understanding of sanctions recognized as true penal consequences risks undermining this purpose by allowing the label placed on such sanctions, rather than their impact on individual liberty, to govern the determination of whether s. 11 applies.

[51] I will now explain why major disciplinary offences in Saskatchewan may lead to the imposition of punishments that constitute a form of imprisonment, and therefore pass *Wigglesworth*’s true penal consequence test.

(3) Section 11 Is Engaged by Offences Punishable by Disciplinary Segregation or Loss of Earned Remission

(a) *Meaning of “Imprisonment”*

[52] The key question in this appeal is whether the punishments of disciplinary segregation and loss of earned remission constitute forms of “imprisonment”, thereby

civil collection mechanism in the customs context and *Guindon* concerned an administrative monetary penalty in the income tax realm, this guidance can still be used in other administrative and regulatory contexts, such as an inmate disciplinary process.

[152] In *Martineau*, Fish J. identified three criteria as helpful to consider under this prong: (1) the objectives of the legislation; (2) the purpose of the sanction; and (3) the process leading to the sanction (paras. 19-24). It is important to emphasize that the process is the focus of the analysis at this step, not the nature of the underlying act. Therefore, assessing whether the “traditional hallmarks” of a criminal proceeding exist in the impugned administrative proceeding can be helpful to this inquiry (*Guindon*, at para. 63; see also *Martineau*, at para. 45).

(b) *The True Penal Consequences Prong of the Test*

[153] While the criminal in nature prong involves an examination of the nature of the proceeding, the true penal consequences prong involves an examination of the purpose of the sanction in connection with its magnitude, although, as I explain below, the magnitude is not determinative. The purpose of the sanction remains the focus of the inquiry to preserve the dichotomy between a sanction within the criminal realm intended to serve the purposes of denunciation, punishment, and stigma for a wrong done to society at large and a sanction designed to maintain compliance (*Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at para. 44; *Wigglesworth*, at p. 561; *Guindon*, at paras. 83-85). Accordingly, penalties arising from criminal or quasi-criminal offences are by their nature penal because the purpose of

those sanctions is to promote public order and welfare within a public sphere of activity (*Martineau*, at para. 21). By contrast, sanctions of an administrative — private, internal, disciplinary — nature are not criminal (para. 22). Administrative and regulatory penalties and sanctions that do not seek to redress a wrong to society are not penal unless the *Wigglesworth* test is met.

[154] Differentiating the purposes of penalties is important in the determination of whether a sanction arising from a proceeding is a “true penal consequence”. In *Wigglesworth*, Wilson J. opted to use the phrase “true penal consequences” rather than merely “penal consequences”. That distinction was made to reinforce the high bar that must be met before an administrative or regulatory sanction can be deemed to be truly penal in nature. A sanction is truly penal in nature when “by its magnitude [it] would appear to be imposed for the purpose of redressing the wrong done to society at large rather than for the maintenance of internal discipline within the limited sphere of activity” (p. 561). If traditional criminal law sentencing principles, such as denunciation, retribution, or an assessment of moral blameworthiness, are at play — or if the sanction seems aimed at redressing a wrong to society — the sanction can be viewed as “truly penal in nature” (*R. v. Cross*, 2006 NSCA 30, 241 N.S.R. (2d) 349, at paras. 30-31; *R. v. Samji*, 2017 BCCA 415, 357 C.C.C. (3d) 436, at para. 51; *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCCA 79, 55 B.C.L.R. (5th) 1, at para. 142). If stigma is associated with the sanction, this will militate in favour of the sanction being classified as truly penal in nature (*Guindon*, at paras. 76, 84 and 89; *Whaling*, at para. 47; *Martineau*, at para. 64).

[155] In addition to the purpose, the magnitude of the sanction is relevant to the analysis, but not determinative (*Guindon*, at para. 77). Regard must be had to whether the magnitude of the sanction is determined by regulatory considerations rather than by principles of criminal sentencing (para. 76), and ultimately it will be a weighing exercise, taking into account the size and scope of a prospective sanction. To what extent a sanction’s magnitude impacts the analysis will depend on the facts of a given case.

[156] Our Court has previously recognized the high bar required to attract the application of s. 11 in non-criminal matters, as stated in *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 38:

... the “true penal consequence” test sets an indisputably high bar, it was developed to determine whether a person is nonetheless “charged with an offence” even if he or she is the subject of proceedings *outside* the criminal context. Within the criminal law context, the concerns motivating a narrow construction of “penal consequences” or “punishment” largely fall away. [Emphasis in original.]

[157] This underscores that the test seeks to preserve the narrow focus of s. 11 on procedural protections within the criminal law context. When it comes to conducting a s. 11 analysis, this backdrop is important to bear in mind. Similarly important to consider is distinguishing between a penalty that seeks to punish or denounce (truly penal in nature) and a penalty that aims to deter (non-penal, or administrative) (*Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176, 333 D.L.R. (4th) 1, at para. 74).

TAB 8

Roger R. Wigglesworth *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**The Attorney General of Canada, the
Attorney General for Ontario and the
Attorney General of Quebec** *Interveners*

INDEXED AS: R. v. WIGGLESWORTH

File No.: 18613.

1987: March 3, 4; 1987: November 19.

Present: Dickson C.J. and Beetz, Estey, McIntyre,
Lamer, Wilson and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
SASKATCHEWAN

Constitutional law — Charter of Rights — Criminal and penal proceedings — Double jeopardy — Police officer charged with common assault under Criminal Code and with major service offence under Royal Canadian Mounted Police Act for same misconduct — Whether or not conviction of major service offence precluded subsequent proceedings under the Criminal Code — Canadian Charter of Rights and Freedoms, ss. 11, 24(1) — Criminal Code, R.S.C. 1970, c. C-34, s. 245(1) — Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9, ss. 25(1), 36(1).

Criminal law — Defences — Charter of Rights — Criminal and penal proceedings — Double jeopardy — Police officer charged with common assault under Criminal Code and with major service offence under Royal Canadian Mounted Police Act for same misconduct — Whether or not conviction of major service offence precluded subsequent proceedings under the Criminal Code — Canadian Charter of Rights and Freedoms, ss. 11, 24(1) — Criminal Code, R.S.C. 1970, c. C-34, s. 245(1) — Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9, ss. 25(1), 36(1).

Appellant police officer committed a common assault, as defined in the *Criminal Code*, which was also a "major service offence" under the *Royal Canadian Mounted Police Act*. The major service offence was

Roger R. Wigglesworth *Appellant*

c.

Sa Majesté La Reine *Intimée*

a

et

**Le procureur général du Canada, le procureur
général de l'Ontario et le procureur général
du Québec** *Intervenants*

b

RÉPERTORIÉ: R. C. WIGGLESWORTH

N° du greffe: 18613.

1987: 3, 4 mars; 1987: 19 novembre.

c

Présents: Le juge en chef Dickson et les juges Beetz,
Estey, McIntyre, Lamer, Wilson et La Forest.

EN APPEL DE LA COUR D'APPEL DE LA
SASKATCHEWAN

d

Droit constitutionnel — Charte des droits — Affaires criminelles et pénales — Double péril — Policier accusé de voies de fait simples aux termes du Code criminel et d'une infraction majeure ressortissant au service aux termes de la Loi sur la Gendarmerie royale du Canada à l'égard de la même inconduite — La déclaration de culpabilité relativement à une infraction majeure ressortissant au service empêche-t-elle que des procédures ultérieures ne soient engagées aux termes du Code criminel? — Charte canadienne des droits et libertés, art. 11, 24(1) — Code criminel, S.R.C. 1970, chap. C-34, art. 245(1) — Loi sur la Gendarmerie royale du Canada, S.R.C. 1970, chap. R-9, art. 25(1), 36(1).

g

Droit criminel — Moyens de défense — Charte des droits — Affaires criminelles et pénales — Double péril — Policier accusé de voies de fait simples aux termes du Code criminel et d'une infraction majeure ressortissant au service aux termes de la Loi sur la Gendarmerie royale du Canada à l'égard de la même inconduite — La déclaration de culpabilité relativement à une infraction majeure ressortissant au service empêche-t-elle que des procédures ultérieures ne soient engagées aux termes du Code criminel? — Charte canadienne des droits et libertés, art. 11, 24(1) — Code criminel, S.R.C. 1970, chap. C-34, art. 245(1) — Loi sur la Gendarmerie royale du Canada, S.R.C. 1970, chap. R-9, art. 25(1), 36(1).

j

Le policier appelant a commis des voies de fait simples au sens du *Code criminel*, qui constituaient également une «infraction majeure ressortissant au service» au sens de la *Loi sur la Gendarmerie royale du Canada*.

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

There are many examples of offences which are criminal in nature but which carry relatively minor consequences following conviction. Proceedings in respect of these offences would nevertheless be subject to the protections of s. 11 of the *Charter*. It cannot be seriously contended that, just because a minor traffic offence leads to a very slight consequence, perhaps only a small fine, that offence does not fall within s. 11. It is a criminal or quasi-criminal proceeding. It is the sort of offence which by its very nature must fall within s. 11. I would agree, therefore, with the comments made by Linden J. in *Re McCutcheon and City of Toronto* (1983), 147 D.L.R. (3d) 193 (H.C.) In that case, the accused claimed the benefit of s. 11 following the alleged commission of a parking offence. At page 205 Linden J. said:

This provision of the Charter is available only to persons charged with an offence. On my reading of the by-laws and the legislation, the applicant is such a person, having been charged with offences when the summonses were issued against her.

There can be no question that parking infractions are "offences" as that word is used in s. 11 of the Charter. The respondents contend that these are not the types of transgressions against society s. 11 of the Charter is directed at, since there is virtually no stigma attached to

Bien qu'il soit facile de dire que ceux qui sont impliqués dans une affaire criminelle ou pénale doivent jouir des droits que garantit l'art. 11, il est difficile de formuler un critère précis qui doit être appliqué pour déterminer si des procédures précises ont trait à une affaire criminelle ou pénale de manière à relever de l'article. La note marginale «affaires criminelles et pénales» semblerait laisser entendre qu'une affaire pourrait relever de l'art. 11 soit parce que, de par sa nature même, il s'agit d'une procédure criminelle, soit parce qu'une déclaration de culpabilité relativement à l'infraction est susceptible d'entraîner une véritable conséquence pénale. Je crois qu'une affaire pourrait relever de l'art. 11 dans les deux cas.

Il y a de nombreux exemples d'infractions qui sont de nature criminelle mais qui entraînent des conséquences relativement mineures par suite d'une déclaration de culpabilité. Les procédures relatives à ces infractions seraient néanmoins assujetties à la protection de l'art. 11 de la *Charte*. On ne peut sérieusement soutenir que du seul fait qu'une infraction mineure en matière de circulation entraîne une conséquence très négligeable, voire une légère amende seulement, cette infraction ne relève pas de l'art. 11. Il s'agit d'une procédure criminelle ou quasi criminelle. C'est le genre d'infraction qui, de par sa nature même, doit relever de l'art. 11. Par conséquent, je suis d'accord avec les observations du juge Linden dans *Re McCutcheon and City of Toronto* (1983), 147 D.L.R. (3d) 193 (H.C.) Dans cette affaire, l'accusée a réclamé l'application de l'art. 11 par suite d'une prétendue infraction en matière de stationnement. À la page 205, le juge Linden a dit:

[TRADUCTION] Seuls les inculpés peuvent invoquer cette disposition de la Charte. Selon mon interprétation du règlement et de la loi en question, la requérante est une telle personne, ayant été accusée d'avoir commis des infractions lorsque les sommations ont été délivrées contre elle.

Il est incontestable que les infractions de stationnement sont des «infractions» au sens de l'art. 11 de la Charte. Les intimés soutiennent que l'art. 11 de la Charte ne vise pas ce genre de fautes contre la société puisqu'un billet de stationnement ne laisse pratiquement

a parking ticket. In my view, however, the degree of stigma is of no significance.

In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity: see, for example, *Re Law Society of Manitoba and Savino*, *supra*, at p. 292, *Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission* (1986), 54 O.R. (2d) 544 (H.C.), at p. 549, and *Re Barry and Alberta Securities Commission*, *supra*, at p. 736, *per* Stevenson J.A. There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.

This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the

aucun stigmatisme. Toutefois, j'estime que la gravité des conséquences n'est pas importante.

À mon avis, si une affaire en particulier est de nature publique et vise à promouvoir l'ordre et le bien-être publics dans une sphère d'activité publique, alors cette affaire est du genre de celles qui relèvent de l'art. 11. Elle relève de cet article de par sa nature même. Il faut distinguer cela d'avec les affaires privées, internes ou disciplinaires qui sont de nature réglementaire, protectrice ou corrective et qui sont principalement destinées à maintenir la discipline, l'intégrité professionnelle ainsi que certaines normes professionnelles, ou à réglementer la conduite dans une sphère d'activité privée et limitée: voir, par exemple, *Re Law Society of Manitoba and Savino*, précité, à la p. 292, *Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission* (1986), 54 O.R. (2d) 544 (H.C.), à la p. 549, et *Re Barry and Alberta Securities Commission*, précité, à la p. 736, le juge Stevenson. Il existe également une distinction fondamentale entre les procédures engagées pour promouvoir l'ordre et le bien-être public dans une sphère d'activité publique et les procédures engagées pour déterminer l'aptitude à obtenir ou à conserver un permis. Lorsque les disqualifications sont imposées dans le cadre d'un régime de réglementation d'une activité visant à protéger le public, les procédures de disqualification ne sont pas le genre de procédures relative à une «infraction» auxquelles s'applique l'art. 11. Les procédures de nature administrative engagées pour protéger le public conformément à la politique générale d'une loi ne sont pas non plus le genre de procédures relatives à une «infraction», auxquelles s'applique l'art. 11. Toutefois, toutes les poursuites relatives à des infractions criminelles aux termes du *Code criminel* et à des infractions quasi criminelles que prévoient les lois provinciales sont automatiquement assujetties à l'art. 11. C'est le genre même d'infractions auxquelles l'art. 11 était destiné à s'appliquer.

Cela ne veut pas dire que la personne accusée d'une affaire privée, domestique ou disciplinaire qui est principalement destinée à maintenir la discipline, l'intégrité ou à réglementer une conduite dans une sphère d'activité privée et limitée,

rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity. In "Annotation to *R. v. Wigglesworth*" (1984), 38 C.R. (3d) 388, at p. 389, Professor Stuart states:

... other *punitive* forms of disciplinary measures, such as fines or imprisonment, are indistinguishable from criminal punishment and should surely fall within the protection of s. 11(h).

I would agree with this comment but with two caveats. First, the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. One *indiciu*m of the purpose of a particular fine is how the body is to dispose of the fines that it collects. If, as in the case of proceedings under the *Royal Canadian Mounted Police Act*, the fines are not to form part of the Consolidated Revenue Fund but are to be used for the benefit of the Force, it is more likely that the fines are purely an internal or private matter of discipline: *Royal Canadian Mounted Police Act*, s. 45. The second caveat I would raise is that it is difficult to conceive of the possibility of a particular proceeding failing what I have called the "by nature" test but passing what I have called the "true penal consequence" test. I have grave doubts whether any body or official which exists in order to achieve some administrative or private disciplinary purpose can ever imprison an individu-

ne peut jamais posséder les droits que garantit l'art. 11. Certaines de ces affaires peuvent très bien relever de l'art. 11, non pas parce qu'il s'agit du genre d'affaires classiques destinées à relever de l'article, mais parce qu'elles comportent l'imposition de véritables conséquences pénales. À mon avis, une véritable conséquence pénale qui entraînerait l'application de l'art. 11 est l'emprisonnement ou une amende qui par son importance semblerait imposée dans le but de réparer le tort causé à la société en général plutôt que pour maintenir la discipline à l'intérieur d'une sphère d'activité limitée. Dans «Annotation to *R. v. Wigglesworth*» (1984), 38 C.R. (3d) 388, le professeur Stuart dit à la p. 389:

[TRADUCTION] ... d'autres formes de mesures disciplinaires *punitives*, comme les amendes ou l'emprisonnement, ne peuvent être distinguées des peines en matière criminelle et devraient certainement être assujetties à la protection de l'al. 11h).

Je fais mienne cette observation, mais avec deux mises en garde. D'abord, la possibilité d'imposer une amende peut être tout à fait conforme au maintien de la discipline et de l'ordre dans une sphère d'activité privée et limitée et ainsi ne pas entraîner l'application de l'art. 11. Je suis d'avis que si un organisme ou une personne responsable détient un pouvoir illimité d'imposer des amendes et s'il n'accorde pas les droits énumérés à l'art. 11, il ne peut imposer des amendes destinées à réparer le tort causé à la société en général. Il est plutôt limité au pouvoir d'imposer des amendes pour atteindre un objectif privé en particulier. La manière dont l'organisme doit employer les amendes qu'il perçoit constitue un indice de l'objet d'une amende en particulier. Si, comme dans le cas des procédures prévues dans la *Loi sur la Gendarmerie royale du Canada*, les amendes doivent être non pas versées dans le Fonds du revenu consolidé, mais plutôt être utilisées dans l'intérêt de la Gendarmerie, il y a plus de chances que les amendes constituent purement une affaire de discipline interne ou privée: art. 45 de la *Loi sur la Gendarmerie royale du Canada*. Ma seconde mise en garde porte qu'il est difficile de concevoir qu'une procédure en particulier ne satisfasse pas au critère dit de la «nature même», mais satisfasse à celui que j'appelle le critère de la «véritable consé-

TAB 9

Federal Court		Cour fédérale
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Date: 20100614**Docket: T-1162-09****Citation: 2010 FC 642****Ottawa, Ontario, June 14, 2010****PRESENT: The Honourable Madam Justice Hansen****BETWEEN:****THE ATTORNEY GENERAL OF CANADA****Respondent (Applicant)****and****UNITED STATES STEEL CORPORATION AND
U.S. STEEL CANADA INC.****Applicants (Respondents)****REASONS FOR ORDER AND ORDER****Introduction**

[1] The United States Steel Corporation and U.S. Steel Canada Inc. (U.S. Steel) challenge the validity of section 40 of the *Investment Canada Act*, R.S. 1985, c.28 (1st Supp.) (ICA or Act) as

being in violation of section 11(d) of the *Canadian Charter of Rights and Freedoms* and section 2(e) of the *Canadian Bill of Rights*, R.S.C. 1985.

Facts

[2] For the purpose of this motion, only a brief review of the facts is necessary. In September 2007, U.S. Steel submitted an application for review under the Act to obtain ministerial approval of its proposed investment in and acquisition of control of Stelco Inc.'s Hamilton-based Canadian business. In support of the application, U.S. Steel provided 31 undertakings including two in relation to employment and production levels. On October 29, 2007, the Minister approved the acquisition.

[3] On May 5, 2009, the Minister sent a demand to U.S. Steel pursuant to section 39 of the Act advising U.S. Steel that it was in contravention of the employment and production undertakings and requested that U.S. Steel cease the contraventions, remedy the default, show cause why there were no contraventions or justify any non-compliance. Subsequent to U.S. Steel's response to the demand, the Minister informed U.S. Steel that he was not satisfied with the response. On July 17, 2009, the Attorney General of Canada filed an application under section 40 of the Act seeking an order directing U.S. Steel to comply with the two undertakings and a penalty of \$10,000 per day, per breach of the undertakings calculated from November 1, 2008 until compliance with the undertakings. U.S. Steel then filed the within motion.

Overview of the legislation, transactions subject to review and the relationship between the parties

[4] Before turning to a consideration of the issues raised in this motion, an overview of the legislation together with some observations regarding the types of transactions that are subject to review under the Act and the relationship between the government and the non-Canadian investor are useful.

[5] The ICA came into force in 1985. It repealed and replaced the *Foreign Investment Review Act*, S.C. 1973 -1974, c. 46 (FIRA). The ICA provides that certain investments in Canada by non-Canadian investors may not be implemented unless the investment has been reviewed and approved by the Minister. To initiate the review process, the non-Canadian investor is required to submit an application containing the requisite information. In addition, the non-Canadian investor may give written undertakings in support of the application. Section 21 of the Act provides that if after taking into account the information, undertakings and representations received under section 19 and the factors set out in section 20 the Minister is satisfied that the proposed investment “is likely to be of net benefit to Canada”, the proposed investment will be given ministerial approval. Subsequent to the implementation of the investment, the Minister has the authority to monitor the investment to determine whether the investment is being carried out in accordance with the application and any representations and undertakings given by the non-Canadian investor in relation to the investment.

[6] Section 38 authorizes the Minister to issue guidelines and interpretation notes with respect to the application and administration of the Act. The current Guidelines issued by the Minister outline

the procedural aspects of the proposal and monitoring stages. The Guidelines contain information regarding the pre-filing meetings, undertakings, third party representations, feedback during the review process, the determination “is likely to be of net benefit to Canada”, and post-approval monitoring.

[7] With respect to undertakings, the Guidelines encourage investors to incorporate in their plans as much detail and precision as possible to reduce the likelihood that undertakings will be needed to supplement the plans. The Guidelines also note that undertakings may still be “helpful to provide greater assurances when issues, critical to the determination of net benefit, arise.” As to monitoring, the Guidelines state that an evaluation will usually be made 18 months after the implementation of the investments.

[8] Section 39 provides that where the Minister believes that the non-Canadian investor has failed, among other things, to comply with an undertaking given at the time of the approval, the Minister may send a demand to the non-Canadian investor requiring the investor within a specified period “to cease the contravention, to remedy the default, to show cause why there is no contravention of the Act or Regulations or, in the case of undertakings, to justify any non-compliance.”

[9] A section 40 proceeding arises from the ministerial demand made pursuant to section 39. It is initiated by an application in a superior court. If at the conclusion of the hearing, the court is satisfied that the Minister was justified in sending the demand and the non-Canadian investor has

failed to comply with the demand, the court may make any order or orders the court considers the circumstances require including any of the orders provided in subsection 40(2). In particular, for the purpose of this motion, the court may impose a monetary penalty not exceeding \$10,000 per breach for each day the non-Canadian investor is in contravention and may direct the disposition by the non-Canadian investor of any voting interests or assets acquired that are or were used in carrying on a Canadian business.

[10] Section 40(3) provides that a monetary penalty is a debt due to Her Majesty the Queen in right of Canada and is recoverable as such in a superior court. Under section 40(4), a person or entity that fails or refuses to comply with an order made under subsection (2), may be cited and punished by the court that made the order “as for other contempts of that court”.

[11] Lastly, under section 42, everyone who knowingly provides false or misleading information under the Act or the Regulations or contravenes section 36 of the Act is guilty of an offence punishable on summary conviction.

[12] For ease of reference, the relevant statutory provisions are included with these reasons in Annex “A”.

[13] Leaving aside for the moment reviews undertaken in relation to investments that could be injurious to national security, the Act applies to significant investments by non-Canadian investors. In 2007, at the time of the approval of the investment at issue in this proceeding, the financial

threshold for investments by non-Canadian investors from World Trade Organization countries was 281 million dollars. For non-World Trade Organization countries, the threshold was 5 million dollars. It is also important to note that the transactions that are subject to review are private transactions involving the acquisition of interests in Canadian businesses by non-Canadian investors.

[14] Undertakings play an important role within the legislative scheme. As Richard Lajeunesse, Investment Review Manager with Industry Canada explains in his affidavit, an application for approval under the Act must include a detailed description of the non-Canadian investor's plans for the business being acquired with specific reference to the section 20 factors that the Minister is required to take into account in reaching a decision. In the case of significant investments, non-Canadian investors will also often submit undertakings in relation to the investor's plans for the Canadian business directed at the section 20 factors that include maintaining the business operations in Canada, Canadian participation in the business and employment for Canadians. These undertakings are intended to demonstrate that the investment will be carried out in a manner that "is likely to be of net benefit to Canada".

[15] During the hearing, both parties characterized the relationship under the legislation between the non-Canadian investor and the government, particularly in relation to the undertakings, as being akin to a contractual relationship. It is not necessary for the purpose of this motion to make a determination regarding the legal nature of the relationship between the government and the non-Canadian investor. It is sufficient to note that there is no dispute between the parties that the

undertakings drafted by the non-Canadian investor and submitted to the government in support of the application for approval are binding commitments.

The Charter

[16] The first issue is whether section 11(d) of the *Charter* applies to a proceeding under section 40 of the Act. Section 11(d) reads:

11. Any person charged with an offence has the right

d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

11. Tout inculpé a le droit :

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

[17] As section 11(d) is limited in its application to “a person charged with an offence”, U.S.

Steel must establish that a person or corporation against whom a section 40 proceeding is initiated “is a person charged with an offence”. To do so, the parties agree that U.S. Steel must demonstrate that it meets either of the two branches of the test articulated in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541. In *Wigglesworth*, Justice Wilson stated that section 11(d) will apply if a matter by its very nature is a criminal proceeding or if it involves the imposition of true penal consequences.

[18] The first question to resolve is whether a section 40 proceeding is by its very nature a penal proceeding. In *Wigglesworth* at paragraph 23, Justice Wilson explained:

[51] Even though, in my opinion, this is not the type of matter that was intended to come within section 11 of the *Charter*, section 11 may still be engaged if it involves the imposition of a true penal consequence. In *Wigglesworth*, at paragraph 24, Justice Wilson described a true penal consequence in the following terms:

This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

[52] As stated above, U.S. Steel contends that the magnitude of the monetary penalty alone is sufficient to engage section 11(d) of the *Charter*. U.S. Steel characterizes the potential monetary penalty under section 40 as being a “King Kong fine” and submits that the magnitude is of such significance that it can only be regarded as a true penal consequence. This assertion raises a number of questions. The first is whether U.S. Steel’s interpretation of the second branch of the test is correct. As set out earlier, U.S. Steel’s interpretation is that it is the fine by its magnitude that leads to the conclusion it is being imposed for the purpose of redressing the harm done to society.

[53] U.S. Steel claims that its interpretation is supported by Justice Wilson’s observation “... that if a body or an official has an unlimited power to fine, and if it does not afford the rights

enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large”. I note, however, that Justice Wilson added “[i]nstead, it is restricted to the power to impose fines in order to achieve the particular private purpose.” I interpret Justice Wilson’s observation to mean that a body can have an unlimited power to fine, however, to determine whether the penalty is a true penal consequence the analysis has to proceed beyond the magnitude of the fine to determine whether it is being imposed for the purpose of redressing the harm done to society or for a particular private purpose.

[54] I note, as well, that U. S. Steel’s interpretation of the test does not find support in the jurisprudence. In *Martineau*, the appellant argued that the magnitude of the amount claimed under the *Customs Act*, R.S.C. 1985 c.1 (2nd Supp.) made it a true penal consequence. In rejecting the argument, Justice Fish observed that the argument was falsely premised on magnitude alone and continued his analysis to determine whether the payment claimed under the *Customs Act* constituted a fine that by its magnitude was being imposed for the purpose of redressing a wrong done to society.

[55] More recently, in *Lavallee*, a case concerning the Alberta securities legislation, Chief Justice Wittmann, at paragraph 142, stated:

My reading of *Wigglesworth* is that, on one hand, the fact that the *Securities Act* is regulatory legislation is obviously not sufficient to determine whether the consequences of the application of s. 29 leads to true penal consequences. **On the other hand, the dollar amount of the administrative penalty or its magnitude is not determinative, in itself, to qualify as a true penal consequence.** In fact, it is the magnitude of the administrative penalty combined with the purpose for which it can be imposed that will determine whether it entails true penal consequences. **[Emphasis added]**

[56] Subsequent to the hearing of this motion, the Alberta Court of Appeal dismissed the appeal from this decision: *Lavallee v. Alberta (Securities Commission)*, [2010] A.J. No. 144. On the question as to whether the magnitude of a penalty alone was sufficient to engage the protections of section 11, of the *Charter*, the Court observed at paragraph 23:

... The chambers judge rejected that argument, emphasizing the need to consider the purpose of the sanction, and not just its magnitude, in assessing whether it amounts to a true penal consequence. Moreover, when considering the purpose of the sanction it is necessary to consider the overarching purposes of the **Securities Act**, which include the protection of investors and the public, the efficiency of the capital markets, and ensuring public confidence in the system. In the end, the chambers judge agreed with this Court's conclusion, at para. 54 of **Brost**, that the increase in the magnitude of administrative penalties reflects a legislative intent to ensure that the penalties are not simply considered another cost of doing business. He therefore concluded that no true penal consequences arise under ss. 198 and 199 of the **Securities Act** and that s. 11 of the **Charter** is, accordingly, not engaged here. I agree.

[57] Having regard to Justice Wilson's observation and the jurisprudence it is clear that the magnitude of a monetary penalty alone is not a sufficient basis upon which to conclude that the penalty is a true penal consequence. However, this does not fully respond to U.S. Steel's argument. U.S. Steel contends that there is a point at which the penalty is so large that the only conclusion that can be drawn is that it is a true penal consequence. U. S. Steel submits that the characterization of a penalty as an administrative monetary penalty cannot immunize it from *Charter* scrutiny and notes the following recent statement of the Federal Court of Appeal in *Doyon v. Canada (Attorney General)*, 2009 FCA 152, at paragraph 27:

In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor's burden of proof. Absolute liability, arising from an *actus reus* which the

prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him- or herself.

[58] The difficulty with this argument is that the enormity of a monetary penalty cannot be assessed in isolation. On the one hand, in the context of the financial threshold of the investments subject to review under the ICA, 281 million dollars at the time of the approval in this case, a monetary penalty of \$10,000 per breach for each day the investor is in contravention may be less significant. On the other hand, in the context of the five million dollar financial threshold for investors from non-World Trade Organization countries the potential penalty is enormous. Without context, it cannot be said that a dollar value alone, can lead to no other inference but that the penalty is being imposed to punish. To be effective, the legislated monetary penalty has to be of a sufficient scope to address the financial range of the reviewable investments. It also has to be of a sufficient magnitude to deter non-compliance and to not be seen as simply a cost of doing business.

[59] As part of the response to U.S. Steel's assertion that the magnitude of the monetary penalty alone is sufficient to make it a true penal consequence, the Attorney General notes that the determination of the amount of the penalty is a matter of judicial discretion to which U.S. Steel counters that the exercise of judicial discretion cannot save an otherwise unconstitutional provision. This argument is rejected for two reasons. First, the argument is premised on the assertion that the magnitude of the maximum monetary penalty available under the legislation alone is sufficient to render the provision unconstitutional. Section 40 does not require the imposition of the maximum monetary penalty or any monetary penalty. The court may make

any order or orders the court considers the circumstances require. Second, as the Attorney General submits, this argument assumes a prospective breach of the *Charter* in the exercise of the discretion under the monetary penalty provision of the Act. As Justice Lebel reaffirmed in *R. v. Shoker*, [2006] 2 S.C.R. 399, at para. 39, Parliament is entitled to assume that its legislation will be applied in a manner consistent with the constitution.

[60] As to U.S. Steel's reference to the *Doyon* decision, on my reading of the decision the reference to the "Administrative Monetary Penalty System" is not to the use of administrative monetary penalties generally but to the particular system established by the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, S.C. 1995, c. 40 and *Regulations*. Further, the decision does not deal with the question as to what constitutes a true penal consequence.

[61] The fact that the upper limit of the monetary penalty is \$10,000 per breach for each day the non-Canadian investor is in contravention alone does not render the provision unconstitutional.

[62] The next question is whether the imposition of the monetary penalty under the Act is to redress the harm done to society. U.S. steel argues that a number of indicators show that it is. As Justice Wilson stated in *Wigglesworth*, one indicator of the purpose of a fine is the manner in which the recipient entity disposes of the fine. In particular, "if the fines are not to form part of the Consolidated Revenue Fund but are to be used for the benefit of the [body], it is more likely that the fines are purely an internal or private matter of discipline". Under the IAC, the monetary

penalty is a debt to her Majesty the Queen in right of Canada that ultimately forms part of the Consolidated Revenue Fund. Although in the context of legislation concerning professional disciplinary matters the fact that the monetary penalty is used for some internal benefit is a useful indicator of the purpose of the sanction, it is not a useful or relevant indicator given that the legislation at issue does not concern these internal types of matters. As well, the fact that the monetary penalty ultimately forms part of the Consolidated Revenue Fund is at best neutral in light of the fact that there is no internal body to which the penalty could be paid and there is no other fund to which the penalty could be paid. I note, as well, that administrative monetary penalties under other legislation, such as, income tax, competition, and customs legislation all become part of the Consolidated Revenue Fund.

[63] U.S. Steel also points out that unlike other administrative penalties the monetary penalty under the ICA is unconnected to the extent of the breach and it has no mathematical connection with the regulated activity or the loss. In the same vein, U.S. Steel notes that the monetary penalty is unlimited, it does not serve some compensatory purpose, it is unrelated to the monetary implications flowing from non-compliance and the Act does not provide any criteria for the determination of the amount of the monetary penalty. U.S. Steel takes the position that in these circumstances the only reasonable inference that can be drawn is that the amount of the penalty is being determined on some other basis, namely, to redress the harm done to society at large.

[64] As to the monetary penalty being limitless, although, in my view, this characterization is inaccurate in that there are both temporal and monetary limits, even if it is correct, as Justice Wilson stated an unlimited power to fine is permissible provided that it is being imposed to achieve a particular private purpose. While it may be true that the existence of some connection between the penalty and the conduct at issue is a useful indicator, it does not necessarily follow that redressing the harm done to society is the only possible purpose of the penalty.

[65] Additionally, the absence of any criteria in the Act on which to determine the amount of the monetary penalty is of no consequence. Should the circumstance arise, part of the court's task will be to identify those factors that are relevant to the determination of the amount of the monetary penalty.

[66] U.S. Steel also argues that the potential exposure to a term of imprisonment as a result of a contempt proceeding makes the penalty a true penal consequence. I reject this argument. The contempt proceeding is not brought under the ICA. Rather, it is a separate proceeding brought pursuant to the *Federal Courts Rules*, SOR/98-106 where the alleged contemnor will be accorded all of the section 11(d) *Charter* protections and, if found guilty, will be subject to the penalties provided in the *Rules*.

[67] In the absence of any of the usual indicia, on what basis can it be determined whether the monetary penalty by its magnitude is being imposed for the purpose of redressing the harm done to society. In the context of ICA, the court should have regard to the objectives of the

determination of his rights and obligations;

définition de ses droits et obligations;

[69] It is not disputed that the *Bill of Rights* applies to the ICA. As well, it is not disputed that the *Bill of Rights* section 2(e) protections extend to corporations. The question is whether section 40 violates the right to a fair hearing in accordance with the principles of fundamental justice. U.S. Steel takes the position that it does.

[70] U.S. Steel submits that the meaning of the phrase “the principles of fundamental justice” is context-specific having regard to the nature of the rights and the extent of the jeopardy at issue. In summary, U.S. Steel asserts that the factual and legal context in the present case is one in which it is exposed to extreme sanctions, including a multimillion dollar penalty, and the most serious interference with the enjoyment of property, forced divestiture, through a summary civil application process without the most basic procedural protections of fundamental justice. In particular, it does not give the non-Canadian investor a right of full disclosure, a right to know the case to meet, or a right to hear the applicant’s case before being called upon to answer. Additionally, the Act does not state the applicable burden of proof, the requisite elements of a failure to comply and justification are not defined, and the available defenses are not delineated. This results in vagueness and leaves the judiciary to decide the matter in a vacuum.

[71] U.S. Steel maintains that “given the severity of the consequences in the adjudication of the rights at issue in the instant legislation,... the principles of fundamental justice must provide the investor with the full range of procedural and substantive protections available pursuant to the *Bill*

of Rights, including the right to know the case to meet, the right to full disclosure and the right to fair notice of the proscribed conduct and the available defences.” At this point, it should be noted that U.S. Steel initially argued that the *Bill of Rights* guarantees both substantive and procedural rights, however, U.S. Steel abandoned its position in relation to substantive rights.

[72] U.S. Steel acknowledges that the term “the principles of fundamental justice” in section 7 of the *Charter* does not have the same meaning as it does in section 2(e) of the *Bill of Rights*.

However, relying on the Supreme Court of Canada decision in *Reference re Motor Vehicles Act (British Columbia) section 94(2)*, [1985] 2 S.C.R. 486, paras. 31-33, U.S. Steel argues that the procedural protections provided by section 2(e) are much broader than those provided under the common law principles of natural justice and that the term “the principles of fundamental justice” under section 2(e) is not synonymous with the term “the principles of natural justice”. Therefore, *Charter* jurisprudence is relevant and informs the meaning of “the principles of fundamental justice” in the *Bill of Rights*.

[73] U.S. Steel submits that the right to make full answer and defence is the bedrock of the principles of fundamental justice. In *R. v. Rose*, [1998] 3 S.C.R. 262, at paras. 98 and 103, the Supreme Court of Canada stressed the importance of this right and explained the breadth of the right and the manner in which this right is implicated in other rights and principles. The Court stated:

98 The right to make full answer and defence is protected under s. 7 of the Charter. It is one of the principles of fundamental justice. In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at p. 336, Sopinka J., writing for the Court, described this right as “one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted”. The right to make full answer and defence manifests itself in several more specific rights and principles, such as the right to full and timely disclosure, the right to know the case to be

[78] As to U.S. Steel's reliance on the *B.C. Motor Vehicles* case, on my reading of the passage referenced, when Chief Justice Lamer stated that "to replace "fundamental justice" with the term "natural justice" misses the mark entirely" he was referring to the meaning of "fundamental justice" as it is used in the *Charter* and not the *Bill of Rights*. Similarly, in the reference to "the degree of synonymy between the two expressions in the past", the Chief Justice was referring to the synonymy of the term "fundamental justice" and the term "natural justice"

[79] Accordingly, it can be seen that a fair hearing in accordance with the principles of fundamental justice in the context of section 2(e) of the *Bill of Rights* is synonymous with the concept of natural justice and procedural fairness. It remains to be determined what the requirements of natural justice are in these circumstances.

[80] As Justice L'Heureux-Dubé stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 22, "the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, ...". Justice L'Heureux-Dubé explained that a number of factors are relevant to the determination of the requirements of the duty of fairness are in a particular context.

[81] However, as the Attorney General points out, the *Baker* analysis is somewhat anomalous in the present case as it is directed at the requirements of fairness in the context of administrative hearings and not judicial hearings. I agree with this observation. The *Baker* analysis is generally retrospective in application and aimed at helping a court "determine whether the procedures that

were followed respected the duty of fairness.” While the structure of the analysis may not be helpful, this does not undermine the importance and the relevance of the principles that may be drawn from *Baker*.

[82] As Justice L’Heureux-Dubé stated at paragraph 28, “[t]he values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.” That is, the underlying values and all of the circumstances must be considered to determine the content of the duty of fairness in a given situation.

[83] It is evident from U.S. Steel’s oral and written submissions that while it recognizes the context-specific nature of the analysis in principle, their assertion as to the requirements of the duty of fairness is grounded on the magnitude of the monetary penalty and the possibility of forced divestiture. It is from this premise that U.S. Steel maintains that an investor facing a section 40 proceeding should, in effect, be accorded the same right to make full answer and defence together with the related rights including *Stinchcombe* disclosure that would be accorded to a defendant in a criminal proceeding. In my opinion, this position stems from a narrow focus on the penalties at issue and fails to take into account the broader context and circumstances within which a section 40 proceeding arises. Even if the focus of the inquiry was limited to the nature of the penalties, it would not give rise to the expansive rights U.S. Steel submits section 2(e) requires.

[84] There is no doubt that the importance of the decision to the affected party is a significant factor. However, a distinction must be drawn between those decisions that implicate the life, liberty, and security of the person involved and those, as in the present case, having only an economic impact. As well, the magnitude of the penalty and the forced divestiture have to be viewed in the context of the legislative scheme. Although when viewed in isolation the monetary penalty may appear to be very large, as stated earlier, having regard to the financial thresholds that trigger ministerial review and approval, the penalties under the ICA have to be sufficiently significant to be effective given the size of the investments under the Act. Further, although the possibility of forced divestiture appears to be ominous and a serious intrusion on the right to the enjoyment of property, having regard to the objectives of the legislation and the broad discretion a court has in structuring a divestiture, it does not rise to the level of those decisions in which the life, liberty and security of the person are at stake. It is purely an economic outcome. It is also important to note that a section 40 proceeding arises in a regulatory context. As well, the parties seeking ministerial approval are sophisticated, well represented, economic actors who are given an opportunity of voluntary compliance before the application at issue is undertaken.

[85] For this reason, U.S. Steel's reliance on *R v. Rose*, above, is misplaced. That decision established a broad right to "make full answer and defence" in a criminal context. For example, the Supreme Court of Canada noted, at paragraphs 98 to 100, that this right was "one of the pillars of criminal justice," was linked to the presumption of innocence and the principle against self-incrimination, and included "the right of an accused person to defend himself or herself against all

of the state's efforts to achieve a conviction." Similarly, most of the cases upon which U.S. Steel relies in support of its assertion of the procedural rights are from the criminal and are not helpful in the context of the legislation at issue.

[86] Turning to the application process contemplated in section 40 of the Act, U.S. Steel does not seriously contend that it will be denied the opportunity to be heard through both written and oral submissions or, as stated earlier, to have its case decided by an independent and impartial decision-maker. Rather, U.S. Steel argues that it will not be given an adequate opportunity to know the case it has to meet. In summary, U.S. Steel says that it does not know why the Minister thinks its undertakings were breached since the undertakings were subject to the Guidelines with which U.S. Steel maintains it complied. Furthermore, U.S. Steel also says it does not know the reason for the Minister's assertion that it failed to comply with the demand to justify its breach of the undertakings and believes it has provided adequate justification.

[87] In my view, there are adequate procedural protections in the *Federal Courts Rules*, SOR/98-106 relating to the conduct of applications to permit U.S. Steel to know the case it has to meet. First, a notice of application must, among other things, state the grounds intended to be argued, including any reliance on statutory or regulatory provisions and must include a list of the documentary evidence to be used at the hearing.

[88] Second, the Attorney General must file his affidavits and documentary exhibits well in advance of the hearing. Prior to submitting any legal argument, U.S. Steel will have an opportunity

to conduct cross-examinations on the Attorney General's affidavits. Thus, U.S. Steel will have all of the evidence upon which the Attorney General intends to rely.

[89] Third, before the matter comes on for hearing, the Attorney General, as the applicant, will have had to serve and file the applicant's record containing all affidavit and documentary evidence, descriptions of any physical evidence together with its memorandum of fact and law. Thus, U.S. Steel will know the basis for the Minister's belief that there has been a breach of an undertaking and the Minister's reason for rejecting its justification. Further, the Attorney General is, without leave of the court, precluded from raising any new allegations or arguments.

[90] Fourth, U.S. Steel points out that it must serve and file its affidavit and documentary evidence before fully knowing the Attorney General's case, that is, before cross-examining the Attorney General's affiants and before receiving the Attorney General's memorandum of fact and law. However, U.S. Steel may apply for leave to file additional affidavits, conduct additional cross-examinations or file a supplementary record after the parties have exchanged records.

[91] Based on the above review of the applications procedure, I am satisfied that having regard to the context and the potential consequences to U.S. Steel, it satisfies the right to a fair hearing in accordance with the principles of fundamental justice, in particular, its right to know the case to meet.

TAB 10

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110525

Docket: A-242-10

Citation: 2011 FCA 176

CORAM: NADON J.A.
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

**UNITED STATES STEEL CORPORATION
and U.S. STEEL CANADA INC.**

Appellants

and

THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Ottawa, Ontario, on December 7, 2010.

Judgment delivered at Ottawa, Ontario, on May 25, 2011.

REASONS FOR JUDGMENT BY:

NADON J.A.

CONCURRED IN BY:

DAWSON J.A.
TRUDEL J.A.

Federal Court
of Appeal



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REASONS FOR JUDGMENT

NADON J.A.

[1] The *Investment Canada Act*, R.S. 1985, c. 28 (1st Suppl.) (the “Act”) allows the Minister of Industry (the “Minister”) to review and approve applications from foreign investors who wish to obtain control of major Canadian corporations. Section 39 of the Act allows the Minister to demand that a foreign investor in control of a Canadian corporation comply with the Act and with any undertaking made during the application stage. If the Minister is not satisfied with the investor’s actions or response, he can apply under section 40 to a superior court which can grant several forms of relief.

[2] On July 17, 2009, the Minister commenced an application in the Federal Court pursuant to section 40 of the *Act* with respect to two written undertakings, namely, the production and employment undertakings given by the respondents United States Steel Corporation and U.S. Steel Canada Inc. (collectively “U.S. Steel”) in connection with the acquisition of Stelco Inc. (“Stelco”).

[3] On October 8, 2009, U.S. Steel filed a Notice of Motion challenging the constitutional validity of sections 39 and 40 of the *Act*. More particularly, U.S. Steel says that the impugned provisions violate their right to a fair hearing in accordance with principles of fundamental justice, contrary to subsection 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c.44 (the “*Bill of Rights*”) and that they violate the principle of presumption of innocence and the right to a fair hearing, contrary to subsection 11(d) of the *Canadian Charter of Rights and Freedoms*, the *Constitution Act* being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 (the “*Charter*”).

[4] In a judgment dated June 14, 2010, 2010 FC 642, Hansen J. (the “Judge”) of the Federal Court dismissed U.S. Steel’s challenge in its entirety. This is an appeal from that decision.

Facts and Procedural History

[5] In September 2007, U.S. Steel intended to invest in and acquire control of Stelco’s Hamilton-based business. To this end, it submitted an application for ministerial approval and provided 31 undertakings to the Minister, two of which related to employment and production levels. On October 29, 2007, the Minister approved the acquisition.

[6] On May 5, 2009, the Minister advised U.S. Steel that it was in contravention of the employment and production undertakings. As a result, the Minister demanded, under section 39 of the Act, that U.S. Steel cease the contraventions, remedy the default and either demonstrate there were no contraventions or justify the contraventions.

[7] U.S. Steel responded by sending a lengthy letter to the Minister which explained the difficulties it was facing due to the unexpected economic downturn.

[8] The Minister, being dissatisfied with U.S. Steel's response, informed it on July 15, 2009, that he would be bringing proceedings under section 40 of the Act, seeking an order directing compliance with the undertakings and imposing a penalty of \$10,000 per day per breach, running from November 1, 2008, until such time as U.S. Steel had complied with the undertakings.

[9] As I indicated earlier, the Minister filed his Notice of Application on July 17, 2009.

Paragraphs 3 and 4 of the application read as follows:

3. Directing the Respondents to forthwith comply with the relevant undertakings:
 - a. by increasing steel production at the Canadian Business, as defined in this Application, such that:
 - i. in the period from November 1, 2007 to October 31, 2009, steel production at the Canadian Business is greater than or equal to a total of 8,690,000 tons (2 x 4,345,000); and
 - ii. in the period from November 1, 2009 to October 31, 2010, steel production at the Canadian Business is greater than or equal to 4,345,000 net tons; and
 - b. by taking all such steps as are necessary to ensure that over the Term of the undertakings, as defined in this Application, the Respondents

maintain an average level of employment at the Canadian Business of 3,105 employees on a full time equivalent.

4. Imposing on US Steel and US Steel Canada, jointly and severally, a penalty of \$10,000 per day, per breach of the relevant undertakings, calculated from November 1, 2008 or from such other dates as this Court may determine, until the Respondents have complied with the relevant undertakings and such order as this Court may issue;

[10] In response to the Minister's Notice of Application, U.S. Steel filed an application with the Federal Court seeking to have sections 39 and 40 of the Act declared of no force or effect.

Legislation

[11] Before turning to the Judge's decision, I will set out the relevant legislation. Section 39 of the Act allows the Minister to send a demand to a non-Canadian investor requiring compliance with the Act or the investor's undertakings, or else a justification for non-compliance:

39. (1) Where the Minister believes that a non-Canadian, contrary to this Act,

(a) has failed to give a notice under section 12 or file an application under section 17,

(a.1) has failed to provide any prescribed information or any information that has been requested by the Minister or Director,

(b) has implemented an investment the implementation of which is prohibited by section 16, 24, 25.2 or 25.3,

(c) has implemented an investment on terms and conditions that vary materially from those contained in an application filed under section 17 or

39. (1) Le ministre peut faire émettre une mise en demeure à l'intention d'un non Canadien qui, selon lui, a, contrairement à la présente loi, selon le cas :

a) fait défaut de déposer l'avis mentionné à l'article 12 ou la demande d'examen mentionnée à l'article 17;

a.1) omis de fournir les renseignements prévus par règlement ou ceux exigés par le ministre ou le directeur;

b) effectué un investissement en contravention avec les articles 16, 24, 25.2 ou 25.3;

c) effectué un investissement selon des modalités qui sont substantiellement différentes de celles que contenait la demande d'examen déposée en

from any information or evidence provided under this Act in relation to the investment,

(d) has failed to divest himself of control of a Canadian business as required by section 24,

(d.1) has failed to comply with an undertaking given to Her Majesty in right of Canada

in accordance with an order made under section 25.4,

(d.2) has failed to comply with an order made under section 25.4,

(e) has failed to comply with a written undertaking given to Her Majesty in right of Canada relating to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada,

(f) has failed to comply with any other provision of this Act or with the regulations, or

(g) has entered into any transaction or arrangement primarily for a purpose related to this Act, the Minister may send a demand to the non- Canadian, requiring the non-Canadian, forthwith or within such period as is specified in the demand, to cease the contravention, to remedy the default, to show cause why there is no contravention of the Act or regulations or, in the case of undertakings, to justify any non-compliance therewith.

(2) If the Minister believes that a person or an entity has, contrary to this Act, failed to comply with a requirement to provide information

conformité avec l'article 17 ou des autres renseignements ou éléments de preuve fournis en conformité avec la présente loi à l'égard de l'investissement;

d) fait défaut de se départir du contrôle d'une entreprise canadienne comme l'exige l'article 24;

d.1) omis de se conformer à tout engagement pris envers Sa Majesté du chef du Canada conformément au décret pris en vertu de l'article 25.4;

d.2) omis de se conformer au décret pris en vertu de l'article 25.4;

e) fait défaut de se conformer à l'engagement écrit envers Sa Majesté du chef du Canada qu'il a pris à l'égard de l'investissement au sujet duquel le ministre est d'avis ou est réputé être d'avis qu'il sera vraisemblablement à l'avantage net du Canada;

f) fait défaut de se conformer à une autre disposition de la présente loi ou des règlements;

g) procédé à une opération ou à un arrangement dans un but lié à la présente loi. La mise en demeure exige du non-Canadien, de mettre fin, immédiatement ou à l'intérieur du délai qu'elle précise, à la contravention, de se conformer à la loi ou aux règlements, ou de démontrer qu'ils n'ont pas été violés ou, dans le cas d'un engagement, de justifier le défaut.

(2) S'il estime qu'une personne ou une unité a, contrairement à la présente loi, omis de se conformer soit à une demande de renseignements faite en

under subsection 25.2(3) or 25.3(5) or failed to comply with subsection 25.4(3), the Minister may send a demand to the person or entity requiring that they immediately, or within any period that may be specified in the demand, cease the contravention, remedy the default or show cause why there is no contravention of the Act.

vertu des paragraphes 25.2(3) ou 25.3(5), soit au paragraphe 25.4(3), le ministre peut envoyer une mise en demeure exigeant de la personne ou de l'unité que, sans délai ou dans le délai imparti, elle mette fin à la contravention, elle se conforme à la présente loi ou elle démontre que celle-ci n'a pas été violée.

(3) A demand under subsection (1) or (2) shall indicate the nature of the proceedings that may be taken under this Act against the non-Canadian or other person or entity to which it is sent in the event that the non-Canadian, person or entity fails to comply with the demand.

(3) La mise en demeure fait état de la nature des poursuites judiciaires qui peuvent être instituées en vertu de la présente loi contre le non-Canadien, la personne ou l'unité à qui elle est adressée s'il omet de s'y conformer.

[Emphasis added]

[Non souligné dans l'original]

[12] Section 40 of the Act allows the Minister to bring an application to a superior court if a section 39 demand is not complied with:

40. (1) If a non-Canadian or any other person or entity fails to comply with a demand under section 39, an application on behalf of the Minister may be made to a superior court for an order under subsection (2) or (2.1).

40. (1) Une demande d'ordonnance judiciaire peut être présentée au nom du ministre à une cour supérieure si le non-Canadien, la personne ou l'unité ne se conforme pas à la mise en demeure reçue en application de l'article 39.

(2) If, at the conclusion of the hearing on an application referred to in subsection (1), the superior court decides that the Minister was justified in sending a demand to the non-Canadian or other person or entity under section 39 and that the non-Canadian or other person or entity has failed to comply with the demand, the court may make any order or orders as, in its opinion, the circumstances

(2) Après audition de la demande visée au paragraphe (1), la cour supérieure qui décide que le ministre a agi à bon droit et constate le défaut du non-Canadien, de la personne ou de l'unité peut rendre l'ordonnance que justifient les circonstances; elle peut notamment rendre une ou plusieurs des ordonnances suivantes :

require, including, without limiting the generality of the foregoing, an order

(a) directing the non-Canadian to divest themselves of control of the Canadian business, or to divest themselves of their investment in the entity, on any terms and conditions that the court considers just and reasonable;

(b) enjoining the non-Canadian from taking any action specified in the order in relation to the investment that might prejudice the ability of a superior court, on a subsequent application for an order under paragraph (a), to effectively accomplish the end of such an order;

(c) directing the non-Canadian to comply with a written undertaking given to Her Majesty in right of Canada in relation to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada;

(c.1) directing the non-Canadian to comply with a written undertaking given to Her Majesty in right of Canada in accordance with an order made under section 25.4;

(d) against the non-Canadian imposing a penalty not exceeding ten thousand dollars for each day the non-Canadian is in contravention of this Act or any provision thereof;

(e) directing the revocation, or suspension for any period specified in the order, of any rights attached to any voting interests acquired by the non-Canadian or of any right to control any such rights;

a) ordonnance enjoignant au non-Canadien de se départir soit du contrôle de l'entreprise canadienne, soit de son investissement dans l'unité, selon les modalités que la cour estime justes et raisonnables;

b) ordonnance enjoignant au non-Canadien de ne pas prendre les mesures mentionnées dans l'ordonnance à l'égard de l'investissement qui pourraient empêcher une cour supérieure, dans le cadre d'une autre demande pour une ordonnance visée à l'alinéa a), de rendre une ordonnance efficace;

c) ordonnance enjoignant au non-Canadien de se conformer à l'engagement écrit envers Sa Majesté du chef du Canada pris à l'égard d'un investissement au sujet duquel le ministre est d'avis ou est réputé être d'avis qu'il sera vraisemblablement à l'avantage net du Canada;

c.1) ordonnance enjoignant au non-Canadien de se conformer à l'engagement écrit pris envers Sa Majesté du chef du Canada conformément au décret pris en vertu de l'article 25.4;

d) ordonnance infligeant au non-Canadien une pénalité maximale de dix mille dollars pour chacun des jours au cours desquels se commet ou se continue la contravention;

e) ordonnance de révocation ou de suspension, pour une période qu'elle précise, des droits afférents aux intérêts avec droit de vote qu'a acquis le non-Canadien ou du droit de contrôle de ces droits;

(f) directing the disposition by any non-Canadian of any voting interests acquired by the non-Canadian or of any assets acquired by the non-Canadian that are or were used in carrying on a Canadian business; or

(g) directing the non-Canadian or other person or entity to provide information requested by the Minister or Director.

(2.1) If, at the conclusion of the hearing on an application referred to in subsection (1), the superior court decides that the Minister was justified in sending a demand to a person or an entity under section 39 and that the person or entity has failed to comply with it, the court may make any order or orders that, in its opinion, the circumstances require, including, without limiting the generality of the foregoing, an order against the person or entity imposing a penalty not exceeding \$10,000 for each day on which the person or entity is in contravention of this Act or any of its provisions.

(3) A penalty imposed by an order made under paragraph (2)(d) or subsection (2.1) is a debt due to Her Majesty in right of Canada and is recoverable as such in a superior court.

(4) Everyone who fails or refuses to comply with an order made by a superior court under subsection (2) or (2.1) that is directed to them may be cited and punished by the court that made the order, as for other contempts of that court.

f) ordonnance enjoignant au non-Canadien de se départir des intérêts avec droit de vote qu'il a acquis ou des actifs qu'il a acquis et qui sont ou ont été utilisés dans l'exploitation de l'entreprise canadienne;

g) ordonnance enjoignant au non-Canadien, à la personne ou à l'unité de fournir les renseignements exigés par le ministre ou le directeur.

(2.1) Après audition de la demande visée au paragraphe (1), la cour supérieure qui décide que le ministre a agi à bon droit et constate le défaut de conformité peut rendre l'ordonnance que justifie, à son avis, les circonstances, et notamment infliger à la personne ou à l'unité en défaut une pénalité maximale de 10 000 \$ pour chacun des jours au cours desquels se commet ou se continue la contravention.

(3) Les pénalités infligées en vertu de l'alinéa (2)d) ou du paragraphe (2.1) sont des créances de Sa Majesté du chef du Canada dont le recouvrement peut être poursuivi à ce titre devant une cour supérieure.

(4) Quiconque refuse ou omet de se conformer aux ordonnances visées aux paragraphes (2) ou (2.1) peut être puni pour outrage au tribunal par la cour qui a rendu l'ordonnance.

(5) For greater certainty, all rights of appeal provided by law apply in the case of any decision or order made by a superior court under this section, as in the case of other decisions or orders made by that court.

(5) Il demeure entendu que tous les droits d'appel que prévoit la loi s'appliquent aux ordonnances visées au présent article comme s'il s'agissait d'une ordonnance ordinaire rendue par la cour.

(6) In this section, "superior court" has the same meaning as in subsection 35(1) of the *Interpretation Act* but does not include the Supreme Court of Canada, the Federal Court of Appeal or the Tax Court of Canada.

(6) Au présent article, « cour supérieure » a le sens que lui donne le paragraphe 35(1) de la *Loi d'interprétation* mais ne vise pas la Cour suprême du Canada, la Cour d'appel fédérale et la Cour canadienne de l'impôt.

[Emphasis added]

[Non souligné dans l'original]

[13] Subsection 11(d) of the Charter reads as follows:

11. Any person charged with an offence has the right:

11. Tout inculpé a le droit:

...

(e) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

...

e) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un

[14] Subsection 2(e) of the Bill of Rights reads as follows:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

...

[73] I must therefore conclude that the third *Martineau* factor also points away from section 40 proceedings being penal and away from subsection 11(d) applicability. Consequently, section 40 proceedings are not criminal by their very nature and as a result, do not fit within the first *Wigglesworth* category.

b. Do proceedings brought under section 40 lead to true penal consequences?

[74] As I have already made clear, even if section 40 proceedings are not criminal by their very nature, section 11 of the *Charter* will still apply to them if they lead to “true penal consequences” (*Wigglesworth* at p. 559). With respect to monetary penalties, sheer magnitude is not determinative. The case law has consistently drawn a distinction between penalties that aim to punish or denounce (penal) and penalties that aim to deter (non-penal). *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 [*Asbestos Minority Shareholders*] and *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672 [*Cartaway*], establish that, in general, administrative penalties do not aim to punish. Rather, they aim to deter. Summarizing these authorities, Groberman J.A. of the British Columbia Court of Appeal wrote in *Thow v. B.C. (Securities Commission)*, [2009] B.C.J. No. 211 (Q.L.) at paragraph 30, that these cases establish that “[a]dministrative sanctions and penalties, in contradiction to criminal ones, are, as Iacobucci J. went on to observe at paragraph 45 of [*Asbestos Minority Shareholders*], ‘preventive in nature and prospective in orientation’”.

[75] On the relationship between magnitude and purpose, Fish J. wrote in *Martineau* at paragraph 60:

60. It remains to be determined whether the payment of \$315,458 demanded pursuant to s. 124 of the *CA* [*Customs Act*] constitutes a fine that, by its magnitude, is imposed for the purpose of redressing a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness of customs requirements.

[Emphasis in original]

[76] The important thing is purpose. Magnitude might be an indicator of purpose, but there are other indicators as well. One of these is the final destination of the fine. The fact that a fine is being paid into the Consolidated Revenue Fund points towards a penal sanction (*Wigglesworth*, p. 561). This is the case with a paragraph 42(2)(d) fine.

[77] However, other indicators point in the opposite direction. First, no stigma attaches to a regulatory penalty such as is provided for in the *Act* (*Martineau*, para. 64). Second, the large potential size of the fine does not necessarily point to a punitive character. As the Judge pointed out in her Reasons at paragraph 58, large penalties are required to deter major corporations. Recently, in *Lavallée*, the Alberta Court of Appeal remarked at paragraph 23 that a large pecuniary penalty “reflects a legislative intent to ensure that the penalties are not simply considered another cost of doing business”. That the financial penalty is intended to deter is demonstrated by the fact that it rises with each passing day of non-compliance. When the contravention stops, the fine stops accumulating, so foreign investors have every incentive to comply with the *Act* and their undertakings.

[78] Moreover, that the fine can be imposed retrospectively to account for past contraventions is not necessarily an indicator of penal purpose (*Lavallée*, para. 25). *Cartaway* was not a case about section 11, but it did clarify that “it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders on a both protective and preventative basis (para. 61). Imposing fines retrospectively is an attempt to meet the goal of general deterrence. If foreign investors know that they will face penalties for contraventions after those contraventions have taken place, they will think twice about not complying. If retrospective fines were not available, investors could act however they pleased until faced with a court-ordered prospective penalty. The *Act* would have no “teeth” and the administrative scheme would be weak. The penalty’s potential size is therefore not indicative of penal purpose.

[79] U.S. Steel’s principal submission with regard to the second *Wigglesworth* category is that the *Act* provides no criteria by which to assess monetary penalties. These penalties will not be directly related to the consequences of breach, unlike the penalties discussed for example in *Martineau*. Essentially, U.S. Steel assumes that the lack of criteria for setting fines means that “a monetary penalty assessed under the *Act* will inevitably be punitive” (U.S. Steel Memorandum of Fact and Law, paras. 55-60 / Emphasis added). With respect, I fail to see why this should be the case. Indeed, *Wigglesworth* implies that it should be the opposite. At page 561 of her Reasons in *Wigglesworth*, Wilson wrote as follows:

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

[80] A statutory power to impose fines that comes along with little statutory guidance will not be subject to section 11 as long as it is exercised in a way so as to achieve proper administrative aims. If, as U.S. Steel contends, the procedure provided for in section 40 does not meet the standard of subsection 11(d) of the *Charter*, this simply means that the Court is limited in the goals it can consider in imposing monetary fines. It can only consider goals that are constitutionally appropriate for the sanctioning regime. This, in my view, accords with the principle that we should not assume before the fact that judges will exercise their discretion in an unconstitutional way (see: *R. v. Shoker*, [2006] 3 S.C.R. 399, para. 39). The deterrence goals of the *Act* will necessarily be front and centre. The fact that such an approach to setting penalties accords well with the goals of the *Act* and of the sanction further suggests that an approach to setting penalties that is focused on deterrence is appropriate.

[81] I therefore conclude that the penalties provided for under paragraph 20(2)(d) of the *Act* are best understood, and will necessarily be exercised, as being part of "... proceedings of an administrative – private, internal or disciplinary – nature instituted for the protection of the public in accordance with the policy of a statute..." (*Martineau*, para. 22). These penalties do not lead to true penal consequences and, thus, subsection 11(d) of the *Charter* is not engaged.

3. **Do sections 39 and 40 violate subsection 2(e) of the Bill of Rights?**

[82] The subject of the subsection 2(e) analysis is the hearing under section 40 and not the Minister's actions under section 39. The latter do not constitute a hearing under subsection 2(e) and

they do not make any determination of rights or obligations as that section requires. The parties are agreed on that, but there the agreement ends.

[83] U.S. Steel submits that the principles of fundamental justice differ from the rules of natural justice or procedural fairness, pointing out that unlike the rules of natural justice, subsection 2(e) works *ex ante* to determine whether federal laws set out adequate procedures. Moreover, subsection 2(e) allows a court to override or not apply such laws. This assertion is, of course, correct, but the argument says nothing about content. U.S. Steel is vague about what subsection 2(e) adds to the general common law principle that a party should know the case he or she has to meet. I have considered *R. v. Duke*, [1972] S.C.R. 917 [*Duke*], and *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, and agree entirely with the Judge's view that these cases suggest "or at least assume without deciding" that subsection 2(e)'s principles of fundamental justice do not go any further than demanding that "the tribunal which adjudicates upon a party's rights just act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case" (*Duke*, p. 923).

[84] Nor does U.S. Steel present any argument that would suggest that the *Federal Court Rules*, which deal with the conduct of applications, would be inadequate to satisfy the requirements of subsection 2(e). In its arguments on right to disclosure, U.S. Steel focuses on the fact that section 40 does not provide for any – or for any procedural protections for that matter. But this ignores the fact that providing procedural protections is not the purpose of the *Act*. It is, instead, the purpose of the *Federal Courts Rules* which the Judge correctly points out provide for a notice of application, list of

documentary evidence to be used at a hearing, the filing of affidavits and documentary exhibits, pre-hearing cross-examinations and the disclosure of evidence (Judge's Reasons, paras. 87 to 89).

[85] With respect for the contrary view, I cannot see how these *Rules* can be found to be inadequate to satisfy an investor's right to understand the Minister's case. I would add that, in any event, the record provides little assistance to U.S. Steel's argument that it will be unable to understand the Minister's case.

[86] U.S. Steel also asserts that sections 39 and 40 are so vague that they do not allow an investor to know what constitutes complying with any demands or justifying non-compliance. The Judge dismissed this "void for vagueness" argument as going not to procedural due process, but to substantive due process. The argument, therefore, fell outside the ambit of subsection 2(e).

[87] It seems to me that the notion of vagueness cannot be totally dissociated from procedural rights, since knowing the case one has to meet must entail understanding what one has to prove to win. However, the Judge was correct to cite in support of her view *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, as considering vagueness to be a substantive doctrine. In that case, Gonthier J. called the right to know the scope of the law "a substantive aspect to fair notice" (para. 46). In my view, this is sufficient to dispose of this aspect of U.S. Steel's subsection 2(e) arguments.

TAB 11

Her Majesty The Queen *Appellant*

v.

Harjit Singh Shoker *Respondent*

and

**Attorney General of Canada and Criminal
Lawyers' Association (Ontario)** *Interveners***INDEXED AS: R. v. SHOKER****Neutral citation: 2006 SCC 44.**

File No.: 30779.

2006: February 14; 2006: October 13.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel,
Fish, Abella and Charron JJ.**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Criminal law — Sentencing — Probation — Accused convicted of entering a dwelling house with intent to commit sexual assault and sentenced to incarceration followed by two years of probation subject to conditions — Probation order requires accused to abstain from consumption and possession of alcohol and non-prescription narcotics and to provide bodily substances on demand by probation officer or peace officer to monitor compliance with abstention condition — Whether sentencing judge had jurisdiction under Criminal Code to authorize search and seizure of bodily substances as part of probation order — Criminal Code, R.S.C. 1985, c. C-46, ss. 732.1(3)(c), 732.1(3)(h).

The accused was convicted of breaking and entering a dwelling house with intent to commit sexual assault. A psychological pre-sentencing report revealed that accused blamed his drug use for his behaviour and recommended requiring the accused to submit to random urinalysis to manage his risk in the community. The accused was sentenced to imprisonment followed by probation. The probation order required that he abstain

Sa Majesté la Reine *Appelante*

c.

Harjit Singh Shoker *Intimé*

et

**Procureur général du Canada et Criminal
Lawyers' Association (Ontario)** *Intervenants***RÉPERTORIÉ : R. c. SHOKER****Référence neutre : 2006 CSC 44.**

N° du greffe : 30779.

2006 : 14 février; 2006 : 13 octobre.

Présents : La juge en chef McLachlin et les juges
Bastarache, Binnie, LeBel, Fish, Abella et Charron.**EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE**

Droit criminel — Détermination de la peine — Probation — Accusé déclaré coupable d'introduction dans une maison d'habitation avec l'intention d'y commettre une agression sexuelle et condamné à une peine d'emprisonnement suivie d'une période de probation de deux ans assortie de certaines conditions — Ordonnance de probation intimant à l'accusé de s'abstenir de consommer et de posséder de l'alcool et des narcotiques non vendus sur ordonnance et de fournir, à la demande d'un agent de probation ou d'un agent de la paix, des échantillons de substances corporelles permettant de vérifier si la condition interdisant la consommation et la possession de ces substances est respectée — Le Code criminel habilite-t-il un juge chargé de la détermination de la peine à autoriser le prélèvement de substances corporelles dans le cadre d'une ordonnance de probation? — Code criminel, L.R.C. 1985, ch. C-46, art. 732.1(3)(c), 732.1(3)(h).

L'accusé est déclaré coupable d'introduction par effraction dans une maison d'habitation avec l'intention d'y commettre une agression sexuelle. Un rapport psychologique prédécisionnel révèle que l'accusé attribue son comportement à sa consommation de drogue, et recommande de l'obliger à se soumettre à des analyses d'urine au hasard afin de gérer le risque qu'il présente pour la société. L'accusé est condamné à une

judge the authority to include monitoring procedures in probation orders. To hold otherwise might well cause unforeseen and undesirable effects, as the inflexibility of such an interpretative approach would likely require Parliament to attempt to foresee a wide range of individual situations and to address them in minute detail. A drafting technique such as this would hardly be consistent with the canons of sound legal drafting, even if it were feasible.

habilite le juge chargé de la détermination de la peine à inclure des modes de surveillance dans une ordonnance de probation. Conclure différemment pourrait bien entraîner des effets inattendus et peu souhaitables, parce que la rigidité d'une telle méthode d'interprétation forcerait vraisemblablement le législateur à tenter de prévoir une vaste gamme de situations particulières et à en traiter de manière très détaillée. Même s'il était possible de l'utiliser, cette technique de rédaction ne serait guère compatible avec les règles fondamentales d'une bonne rédaction législative.

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Moreover, a narrow interpretation of the residual clause would cast doubt on a number of useful monitoring methods, which sentencing judges appear to be resorting to with increasing frequency. For example, it might prevent the use of electronic monitoring, which allows probation officers or public authorities to make sure that conditions relating to house arrest or curfews are complied with. I note that a number of judges have found such conditions to be valid:

De plus, une interprétation restrictive de la clause résiduelle jetterait le doute sur un certain nombre de modes de surveillance utiles auxquels semblent recourir de plus en plus les juges chargés de la détermination de la peine. Elle pourrait notamment empêcher le recours à la surveillance électronique qui permet aux agents de probation ou aux autorités publiques de s'assurer que les conditions prescrivant la détention à domicile ou un couvre-feu sont respectées. D'ailleurs, je constate qu'un certain nombre de juges ont conclu à la validité de ces conditions :

The conclusion is that section 732.1(3)(h) allows orders which restrict a defendant's lifestyle, such as curfews, orders that he or she not frequent specified places, or associate with specified persons, or orders that a defendant be confined on electronic monitoring.

[TRADUCTION] Il faut conclure que l'al. 732.1(3)h) permet de rendre des ordonnances qui restreignent le mode de vie d'un défendeur par l'imposition d'un couvre-feu notamment, qui lui intiment de ne pas fréquenter certains endroits ou certaines personnes ou qui le placent sous surveillance électronique.

. . .

. . .

The terms of probation can control the defendant's lifestyle. For example, a defendant might be . . . ordered to wear an electronic monitoring device . . .

Les conditions de probation peuvent régir le mode de vie du défendeur. Par exemple, un défendeur pourrait se voir [. . .] ordonner de porter un dispositif de surveillance électronique . . .

. . .

. . .

Thus, curfews, house arrest (with or without electronic monitoring), bed checks . . . etc., can all be appropriate "other conditions". It does not matter whether one sees them as rehabilitative measures, control measures, or punishment. What counts is not the label but an intent that the condition should further public protection or the acceptance of the defendant in the community, and some reasonable grounds for belief that it will

Ainsi, les couvre-feux, les détentions à domicile (avec ou sans surveillance électronique), les contrôles de présence à domicile [. . .] etc., peuvent tous constituer « d'autres conditions » appropriées. Il importe peu que ces conditions soient perçues comme des mesures de réadaptation, des modes de contrôle ou des sanctions. Ce qui compte est non pas la façon de désigner une condition mais plutôt l'intention que cette condition

have a tendency to effect those purposes. [Emphasis added.]

(T. W. Ferris, *Sentencing: Practical Approaches* (2005), at pp. 79, 116 and 216-17)

Ferris reports that the courts in the following cases held that electronic monitoring is lawful under s. 732.1(3)(h) : *R. v. Carlson* (1996), 141 Sask. R. 168 (C.A.); *R. v. Curtis* (1996), 144 Sask. R. 156 (C.A.); *R. v. McLeod* (1992), 109 Sask. R. 8 (C.A.).

The range of possible conditions is broad. The purpose of such conditions is often to control aspects of the lifestyle of an accused to ensure that the goals of probation — protection of society and reintegration into the community — are achieved.

We should not assume that such a discretion would be abused by sentencing judges or exercised in an unconstitutional manner in the absence of a detailed statutory framework. In another context — a case concerning an exercise of discretion by an administrative authority — this Court asserted that it should not rely on assumptions of prospective breaches of the *Charter*:

I do not think there is any constitutional rule that requires Parliament to deal with Customs' treatment of constitutionally protected expressive material by legislation (as the appellants contend) rather than by way of regulation (as Parliament contemplated in s. 164(1)(j)) or even by ministerial directive or departmental practice. Parliament is entitled to proceed on the basis that its enactments "will be applied constitutionally" by the public service.

. . .

[I]t is in the nature of government work that the power of the state is exercised and the *Charter* rights of the citizen may therefore be engaged. While there is evidence of actual abuse here, there is the *potential* for

contribue à protéger le public ou à faciliter la réinsertion sociale du défendeur, ainsi que l'existence de motifs raisonnables de croire qu'elle contribuera à l'atteinte de ces objectifs. [Je souligne.]

(T. W. Ferris, *Sentencing : Practical Approaches* (2005), p. 79, 116 et 216-217)

Ferris indique que, dans les affaires suivantes, les tribunaux ont statué que l'al. 732.1(3)(h) autorise la surveillance électronique : *R. c. Carlson* (1996), 141 Sask. R. 168 (C.A.); *R. c. Curtis* (1996), 144 Sask. R. 156 (C.A.); *R. c. McLeod* (1992), 109 Sask. R. 8 (C.A.).

Il existe un large éventail de conditions possibles. Ces conditions visent souvent à régir certains aspects du mode de vie d'un accusé de manière à assurer la réalisation des objectifs de la probation, à savoir la protection de la société et la réinsertion sociale de l'accusé.

Nous ne devrions pas supposer qu'en l'absence d'un cadre législatif détaillé les juges chargés de la détermination de la peine abuseraient d'un tel pouvoir discrétionnaire ou qu'ils l'exerceraient d'une manière non conforme à la Constitution. Dans un autre contexte où il était question de l'exercice d'un pouvoir discrétionnaire par une autorité administrative, notre Cour a souligné qu'elle ne devrait pas s'appuyer sur des présomptions de violation éventuelle de la *Charte* :

Je ne crois pas qu'il y ait quelque règle constitutionnelle obligeant le Parlement à prescrire au moyen d'une loi (comme le prétendent les appelants) plutôt que d'un règlement (comme l'a prévu le Parlement à l'al. 164(1)(j)) ou même d'une directive ministérielle ou d'une pratique institutionnelle, la façon dont les Douanes doivent traiter le matériel expressif protégé par la Constitution. Le Parlement a le droit d'agir en tenant pour acquis que les textes de loi qu'il adopte « s[eront] appliqué[s] [...] d'une manière conforme à la Constitution » par les fonctionnaires.

. . .

[I]l est normal, de par la nature des activités de l'État, que celui-ci soit appelé à exercer son pouvoir et que les droits garantis au citoyen par la *Charte* puissent en conséquence être touchés. Quoiqu'il y ait preuve d'abus

38

39

abuse in many areas, and a rule requiring Parliament to enact in each case special procedures for the protection of *Charter* rights would be unnecessarily rigid. [Underlining added.]

(*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at paras. 71 and 137)

40 Any challenge in the instant case should have related to the reasonableness of the order under s. 8 of the *Charter*. The authority to impose the monitoring conditions exists. It remains to be seen whether the conditions meet the standards of the *Charter* (see Ruby, at para. 10.63).

41 Before I move on to some brief comments on the application of s. 8 in the context of the case at bar, I must add that I agree with Charron J. that the part of the order that would, in essence, turn a positive test into a breach of the conditions set out in the order is contrary to the principles of criminal law. Guilt must be proved in the usual manner, that is, beyond a reasonable doubt, and the accused is entitled to the protection of the law of criminal evidence and criminal procedure.

III. Application of Section 8

42 Section 8 raises difficulties in respect of parts of the order. I agree that the part compelling the accused to undergo blood tests would be far too intrusive and would breach s. 8 absent a statutory framework consistent with the standards of the *Charter*.

43 Although it may very well be a more efficient way to monitor compliance, random drug testing at the probation officer's discretion could become highly arbitrary. Courts would have difficulty defining a proper framework to supplement the silence of the *Code*. This is a situation where Parliament would be in a better position to address the issue. Its solution would then be open to review by the courts under s. 8 and s. 1 of the *Charter*.

r  el en l'esp  ce, il y a *risque* d'abus dans de nombreux domaines, et une r  gle qui obligerait le Parlement   dicter dans chaque cas des proc  dures sp  ciales pour prot  ger les droits garantis par la *Charte* serait inutilement rigide. [Je souligne.]

(*Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120, 2000 CSC 69, par. 71 et 137)

En l'esp  ce, toute contestation aurait d   porter sur le caract  re raisonnable de l'ordonnance au regard de l'art. 8 de la *Charte*. L'imposition des conditions en mati  re de surveillance est permise. Il reste    voir si ces conditions respectent les normes de la *Charte* (voir Ruby, par. 10.63).

Avant de commenter bri  vement l'application de l'art. 8 dans le cadre du pr  sent pourvoi, je dois ajouter que je conviens avec la juge Charron que la partie de l'ordonnance qui, pour l'essentiel, ferait d'un test positif une violation des conditions   nonc  es dans cette ordonnance, contrevient aux principes du droit criminel. La culpabilit   doit   tre   tablie de la mani  re habituelle, c'est-  -dire hors de tout doute raisonnable, et l'accus   a droit    la protection des r  gles de preuve et de proc  dure en mati  re criminelle.

III. Application de l'art. 8

Certaines parties de l'ordonnance pr  sentent des difficult  s au regard de l'art. 8. Je suis d'accord pour dire que, en l'absence d'un cadre l  gislatif conforme aux normes de la *Charte*, la partie qui oblige l'accus      se soumettre    des analyses sanguines serait beaucoup trop envahissante et contreviendrait    l'art. 8.

Bien qu'ils puissent tr  s bien repr  senter un moyen plus efficace de veiller au respect des conditions impos  es, les tests de d  pistage de drogue faits au hasard,    la discr  tion de l'agent de probation, risqueraient de devenir tr  s arbitraires. Les tribunaux auraient de la difficult      d  finir un cadre appropri   pour suppl  er au silence du *Code*. Il s'agit d'un cas o   le l  gislateur serait mieux plac   pour r  gler la question. La solution qu'il retiendrait pourrait ensuite faire l'objet d'un examen judiciaire fond   sur l'art. 8 et l'article premier de la *Charte*.

TAB 12

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Direct Energy Marketing Limited*, 2015 Comp. Trib. 2
File No.: CT-2012-003
Registry Document No.: 122

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

AND IN THE MATTER of an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER of certain policies and procedures of Direct Energy Marketing Limited.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Direct Energy Marketing Limited
(respondent)

and

National Energy Corporation
(intervener)



Date of Hearing: December 18, 2014
Before Judicial Member: Rennie J. (Chairperson)
Date of Reasons and Order: March 26, 2015

**REASONS FOR ORDER AND ORDER REGARDING THE COMMISSIONER'S
MOTION FOR THE DETERMINATION OF QUESTIONS OF LAW AND THE
RESPONDENT'S MOTION FOR SUMMARY DISPOSITION**

[42] Further, section 79 is one of those rare provisions in Part VIII of the *Competition Act* which provides a limitation period. Subsection 79(6) provides that no application may be brought more than three years after the practice of anti-competitive acts has ceased. A comparison can be made between the situation in which a dominant firm has exited the market and one where it has ceased its practice of anti-competitive acts. In both instances, Parliament has given the Commissioner three years to bring an application to address any consequences of the anti-competitive behaviour and to seek orders such as the administration of an administrative monetary penalty to ensure compliance.

[43] This does not mean that in all instances, an order will issue – evidentiary considerations may point to a different outcome or order on the merits. Nonetheless, the Commissioner of Competition, who is responsible for the enforcement of the *Competition Act* and who benefits from a presumption that actions taken pursuant to the Act are *bona fide* and in the public interest (*Commissioner of Competition v. Pearson Canada Inc.*, 2014 FC 376, at para. 43), may bring an application.

[44] With respect to the reliance by Direct Energy on the maxim *expressio unius est exclusio alterius*, also known as the *a contrario* reasoning, Professor Sullivan notes that the weight of this maxim depends on a range of contextual factors and competing considerations (Sullivan, at p. 257). Professor Côté finds that it is “among the interpretative arguments that must be used with the utmost caution” and that it has been declared often as “an unreliable tool” (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2011) at p. 359).

[45] In this case, I accord very little weight to the Latin maxim.

[46] Direct Energy also asserts that in past Tribunal cases involving allegations of abuse of dominance, the Tribunal considered the evidence regarding the abuse of dominance analysis at the time of the hearing. I agree with the Commissioner that no conclusion or useful inference can be drawn from these decisions. The respondents in those cases had not exited the market.

[47] I now turn to the questions of whether the Tribunal can make an order against Direct Energy under paragraph 79(1)(a) and subsection 79(3.3) of the *Competition Act* and whether the application should be summarily dismissed.

TAB 13

T-411-14
2014 FC 376

T-411-14
2014 CF 376

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

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

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;

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;

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*.

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*.

BETWEEN:

ENTRE :

The Commissioner of Competition (*Applicant*)

Le commissaire de la concurrence (*demandeur*)

v.

c.

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

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

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

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

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

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

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

[41] However, I do not share Justice Reed's view that the Commissioner is required to provide sufficient evidence that a *bona fide* inquiry has been commenced. Stated alternatively, I do not accept the respondents' position that the Commissioner is required to provide some evidence to explain why there is reason to believe that the grounds set forth in subparagraph 10(1)(b)(ii) exist. I am not aware of any other authority that would support this view. That being said, as a practical matter, it may be difficult for the Court to satisfy itself that a respondent has or is likely to have information that is relevant to the Commissioner's inquiry, as required by subsection 11(1), without some contextual evidence of this nature. In the present application, the Commissioner amply satisfied the Court in this regard.

[42] In my view, the Commissioner's evidentiary obligations on an application under section 11 are not rooted in his reasons to believe that those grounds exist, but rather in (i) the duty of full and frank disclosure that exists on an *ex parte* application; and (ii) the Court's duty to satisfy itself that the information being sought by the Commissioner is relevant to the inquiry in question, and is not excessive, disproportionate or unnecessarily burdensome (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paragraph 32; *RBC*, above, at paragraphs 21–23).

[43] It is now well established that, as a statutory authority responsible for the administration and enforcement of the Act, the Commissioner benefits from a presumption that actions taken pursuant to the Act are *bona fide* and in the public interest (*Canada (Competition Act, Director of Investigation and Research) v. Bank of Montreal* (1996), 68 C.P.R. (3d) 527 (Comp. Trib.), at paragraph 32; *Canada (Competition Act, Director of Investigation and Research) v. Superior Propane Inc.* (1998), 85 C.P.R. (3d) 194 (Comp. Trib.), at paragraph 19; *Rona Inc. v. Commissioner of Competition*, 2005 Comp. Trib. 26, at paragraph 17; see

commissaire (décision *Labatt*, précitée, aux paragraphes 50 et 51).

[41] Cependant, je ne partage pas l'avis de la juge Reed lorsqu'elle estime que le commissaire doit fournir suffisamment d'éléments de preuve pour démontrer qu'une véritable enquête est entreprise. Autrement dit, je ne souscris pas à la prétention des défenderesses selon laquelle le commissaire est tenu de présenter certains éléments de preuve pour expliquer pourquoi il a des raisons de croire qu'il existe des motifs visés au sous-alinéa 10(1)b)(ii). Je ne connais aucun précédent judiciaire à l'appui de cette prétention. Cela dit, il peut s'avérer difficile en pratique pour la Cour de se convaincre qu'un défendeur détient ou détient vraisemblablement des renseignements qui sont pertinents quant à l'enquête du commissaire, comme l'exige le paragraphe 11(1), sans disposer de certains éléments de preuve contextuelle de cette nature. Dans la présente demande, le commissaire a amplement convaincu la Cour à cet égard.

[42] À mon avis, les obligations du commissaire en matière de preuve aux termes de l'article 11 ne trouvent pas leur source dans ses raisons de croire que ces motifs existent, mais plutôt dans i) l'obligation de divulgation entière et franche qui existe dans le contexte d'une demande *ex parte* et ii) l'obligation de la Cour d'être convaincue que les renseignements que le commissaire cherche à obtenir sont pertinents pour l'enquête en question, et ne sont pas excessifs, disproportionnés ou inutilement onéreux (*Hryniak c. Mauldin*, 2014 CSC 7, [2014] 1 R.C.S. 87, au paragraphe 32; arrêt *RBC*, précité, aux paragraphes 21 à 23).

[43] Il est maintenant bien établi qu'en tant qu'autorité désignée par la loi pour appliquer et exécuter la *Loi sur la concurrence*, le commissaire jouit d'une présomption selon laquelle il agit de bonne foi et dans l'intérêt public lorsqu'il prend des mesures en vertu de la Loi (*Canada (Loi sur la concurrence, Directeur des enquêtes et recherches) c. Banque de Montréal* (1996), 68 C.P.R. (3d) 527 (Trib. conc.), au paragraphe 32; *Canada (Directeur des enquêtes et recherches) c. Superior Propane Inc.* (1998), 85 C.P.R. (3d) 194 (Trib. conc.), au paragraphe 19; *Rona Inc. c. Commissaire de la concurrence*, 2005 Trib. concurr. 26, au paragraphe 17; voir aussi

also *Industrial Milk Producers Assn. v. British Columbia (Milk Board)*, [1989] 1 F.C. 463 (T.D.), at page 476; *North of Smokey Fishermen's Assn. v. Canada (Attorney General)*, 2003 FCT 33, 229 F.T.R. 1, at paragraph 24; *Frelighsburg (Municipalité) c. Entreprises Sibeca Inc.*, 2002 CanLII 41283, 40 M.P.L.R. (3d) 157 (Que. C.A.), at paragraphs 59–61). Accordingly, in the absence of evidence of bad faith or other evidence that the Commissioner's inquiry is not a *bona fide* inquiry, it will be presumed to be so.

[44] However, given that section 11 applications proceed on an *ex parte* basis, there is a “heavy burden on the Commissioner to make full and frank disclosure” of all of the relevant circumstances surrounding the application (*Labatt*, above, at paragraph 22; *RBC*, above, at paragraphs 26–36). This burden, which can also be expressed as an “utmost duty of good faith”, is not focused on circumstances supporting the Commissioner's application, but rather on two other things. The first is ensuring that the Court is informed of “any points of fact or law known to it which favour the other side” (*United States of America v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.) (QL), at paragraph 27); *Labatt*, above, at paragraphs 25–26; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3, at paragraph 27). The second is ensuring that the Court is able to detect and redress abuses of its own processes (*RBC*, above, at paragraphs 31–36).

[45] For example, the Commissioner cannot, through non-disclosure or misinformation, mislead the Court as to the potential relevance of the information for the inquiry in question. Likewise, the Commissioner is obliged to disclose the general nature and extent of any information already obtained from the respondent in the course of the inquiry and in the investigation leading up to the inquiry. If the respondent has provided significant information to the Commissioner in other contexts, such as a recent merger review, the Commissioner should also provide a general description of that information, together with an explanation of how that

Industrial Milk Producers Assn. c. Colombie-Britannique (Milk Board), [1989] 1 C.F. 463 (1^{re} inst.), à la page 476; *North of Smokey Fishermen's Assn. c. Canada (Procureur général)*, 2003 CFPI 33, au paragraphe 24; *Frelighsburg (Municipalité) c. Entreprises Sibeca Inc.*, 2002 CanLII 41283 (C.A. Qué.), aux paragraphes 59 à 61). Par conséquent, en l'absence de preuve de mauvaise foi ou d'autres preuves que l'enquête du commissaire n'est pas une véritable enquête, la bonne foi du commissaire sera présumée.

[44] Toutefois, étant donné que les demandes en vertu de l'article 11 sont entendues *ex parte*, le commissaire a « l'obligation rigoureuse [...] de faire une divulgation complète et franche » de toutes les circonstances pertinentes entourant la demande (décision *Labatt*, précitée, au paragraphe 22; arrêt *RBC*, précité, aux paragraphes 26 à 36). Ce fardeau, qui peut également être décrit comme une [TRADUCTION] « obligation de faire preuve de la plus haute bonne foi », n'est pas centré sur les faits qui sous-tendent la demande du commissaire, mais plutôt sur deux autres choses. La première est de s'assurer que la Cour est informée de [TRADUCTION] « tout point de fait ou de droit connu qui favorise l'autre partie » (*United States of America v. Friedland*, [1996] O.J. n° 4399 (Div. gén.) (QL), au paragraphe 27; décision *Labatt*, précitée, aux paragraphes 25 et 26; *Ruby c. Canada (Solliciteur général)*, 2002 CSC 75, [2002] 4 R.C.S. 3, au paragraphe 27). La deuxième est de s'assurer que la Cour puisse reconnaître les cas d'abus de sa procédure et puisse y remédier (arrêt *RBC*, précité, aux paragraphes 31 à 36).

[45] Par exemple, le commissaire ne peut pas, par non-divulgation ou la fourniture de renseignements erronés, induire la Cour en erreur quant à la pertinence potentielle des renseignements quant à l'enquête en question. De même, le commissaire est tenu de divulguer la nature et l'étendue générale de tous renseignements déjà obtenus du défendeur au cours de l'enquête et au cours des vérifications ayant mené à l'enquête. Si le défendeur a fourni des renseignements pertinents au commissaire dans d'autres contextes, comme dans le cadre de l'examen récent d'une fusion, le commissaire devrait également fournir une description générale de ces

TAB 14

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

**MOTION RECORD
VOLUME 24 OF 29**

Examining the Canadian *Competition Act* in the Digital Era

Submission by the Competition Bureau

February 8, 2022

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

3.3. Monetary penalties should deter anti-competitive behaviour

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

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

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

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

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

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

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

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

3.4. Private access should be expanded for abuse of dominance

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

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

Additionally, there may be cases where the litigant is better positioned to bring a case than the Commissioner. For example, businesses are typically more familiar with the facts of the industries in which they operate.

Therefore, they can often act more quickly than the Bureau, which would need to conduct a thorough investigation to determine those facts. Another scenario is where conduct harms a particular firm that would therefore obtain a unique benefit from conduct being remedied.

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

TAB 15

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

MEMORANDUM OF FACT AND LAW

(GOOGLE'S CONSTITUTIONAL CHALLENGE)

24. A financial sanction of even a fraction of that amount would be staggering. The financial penalty Google is subject to greatly exceeds the total revenue it generates from its entire display advertising business in Canada and outstrips dramatically the profits (or “benefits”) generated from that business.⁵³ Any sanction of that nature would also be far and away the largest financial penalty in Canadian history. Indeed, the financial penalty Google is subject to exceeds the cumulative total of *all* fines for criminal competition offences imposed in Canada in this country’s history.⁵⁴

25. As the Tribunal is aware, Google raised concerns about the constitutionality of this proceeding in its first appearance in January 2025. Six months later—after Google had delivered its Notice of Constitutional Question on February 14, 2025, filed this motion on May 6, 2025, and the Tribunal had dismissed the Commissioner’s attempt to schedule a motion to strike this Motion on June 11, 2025—the Commissioner amended his Notice of Application. His amendment is purely tactical in nature. Although the Commissioner still claims a significant financial penalty against Google under the Impugned Provision and has not foregone his right to do so, his amendment seeks to sidestep this Motion by framing his request for a penalty in “an amount as the Tribunal decides is appropriate”.⁵⁵ Of course, that amount could still be massive, unprecedented, and equal—under the plain language of the statute—up to 3% of Google’s worldwide gross revenues.

PART III – STATEMENT OF ISSUES

26. The first question presented is whether the remedy provided for in the Impugned Provision and sought by the Commissioner constitutes a “true penal consequence” such that Google must be afforded the constitutional protections guaranteed by the *Charter* and *Bill of Rights*.

the stacking of 3% of Google’s worldwide gross revenue over multiple years. If the Tribunal determines, however, that the Impugned Provision only authorizes a penalty based on Google’s worldwide gross revenue in a single year, Google’s arguments on this Motion remain unchanged. Three percent of Google’s 2024 worldwide gross revenue was US\$10.5 billion (~CDN\$14.4 billion; *see* footnote 2, *supra*). *See* Zember Aff. ¶14, Table 2, pp. 42-43. For the reasons discussed here, that amount readily qualifies as a “true penal consequence”.

⁵³ Google’s revenues associated with “open web display advertising”—the product market allegedly in issue in this case—are a component of the “Google Network” segment. Google Network revenues, which include the revenues Google earns from display advertising, are publicly reported and totaled US\$312.7 billion from 2008 to 2024. Gross revenues attributable to Canada across all products and services are less than 5% to 6% of the company’s worldwide gross revenues. Six percent of US\$312.7 is ~US\$18.8 billion (~CDN\$25.8 billion; *see* footnote 2, *supra*). *See* Zember Aff. ¶5, 16-17, Table 3, pp. 38, 44-46.

⁵⁴ *See* Appendix A: Total Fines Imposed Under the Criminal Provisions of the *Competition Act*.

⁵⁵ [Amended Notice of Application](#) (CT-2024-010) ¶223(a)(iii).

27. If the remedy sought by the Commissioner is a true penal consequence, the next question is whether Google's rights under any of ss. 7, 8, and 11 of the *Charter* have been violated, and whether its rights under s. 2(e) of the *Bill of Rights* have been infringed. If any of Google's *Charter* rights have been violated, the Tribunal must also determine whether any such violation can be saved under s. 1 of the *Charter*.

28. If such violations cannot be saved, or if Google's rights under s. 2(e) of the *Bill of Rights* have been infringed, the final question is which remedy or remedies should be granted by the Tribunal to address the violation of Google's rights.

PART IV – LAW & AUTHORITIES

A. The Impugned Provision Authorizes a “True Penal Consequence”

29. The threshold issue on this Motion is whether the extraordinary penalty provided for in the Impugned Provision constitutes a “true penal consequence”. Under Canadian law, a party targeted by the State in a *penal* proceeding is afforded significantly greater protections than a party who is subject to a more benign *regulatory* process. Of most significance here, such a party enjoys: (i) the right to enhanced protections from unreasonable search and seizure (s. 8); (ii) the right to be found liable only on proof beyond a reasonable doubt (s. 11(d)); (iii) the right not to be prosecuted or punished based on the retroactive application of the law (ss. 11(g) and (i)); and (iv) the right to have its conduct adjudicated in accordance with principles of fundamental justice (s. 7).

30. The Supreme Court's watershed decision in *R. v. Wigglesworth* held that a superficially regulatory proceeding can be characterized as criminal *either* because it is penal “by its very nature” *or* because it “*may lead to a true penal consequence*”.⁵⁶ As the Court has since explained, “[t]he criminal in nature test focuses on the *process* while the [true] penal consequences test focuses on its *potential impact* on the person subject to the proceeding”.⁵⁷ Google's argument is limited to the second branch of *Wigglesworth*—namely that the potential imposition of the draconian sanction authorized by the Impugned Provision is a “true penal consequence”.

⁵⁶ *R. v. Wigglesworth*, 1987 CarswellSask 385 (SCC) ¶30 [“*Wigglesworth*”], GBOA Tab 100 (emphasis added).

⁵⁷ *JHS* ¶28, GBOA Tab 48, quoting *Guindon v. Canada*, 2015 SCC 41 ¶50 [“*Guindon*”], GBOA Tab 46 (emphasis added).

That is the case with the sanctions authorized by the Impugned Provision.

46. “Stigma” has been described as “a label of disgrace”,⁸⁷ “a sign of severe censure or condemnation”,⁸⁸ “[a]n unfavourable reputation”,⁸⁹ and “[a] dishonour or blot on one’s reputation”.⁹⁰ These legal and dictionary definitions may be supplemented through a consideration of the meanings ascribed to “stigma” in the professional literature. A sampling of these further definitions was provided by Rupert Younger—one of the world’s leading experts in the field of reputation management—in his expert report tendered by Google on this Motion: “a label that evokes a collective perception that the organization is deeply flawed and discredited”; “an attribute that is deeply discrediting”; and “a label that evokes a collective stakeholder group-specific perception that an organization possesses a fundamental deep-seated flaw that deindividuates and discredits the organization”.⁹¹ Mr. Younger’s important evidence on this Motion is also largely unchallenged. The Commissioner adduced no evidence from a competing expert in the area of reputational harm and declined to cross-examine Mr. Younger on the substance of his analysis and opinions.

47. There can be little doubt that Google will face significant stigmatization in Canada if a penalty of even a fraction of the maximum fine contemplated by the Impugned Provision is imposed on it after a public finding that it has engaged in “abuse of dominance”. Google will be known as the party that received Canada’s largest-ever fine because of its “abusive” misconduct.

48. As matters now stand, Google is a widely admired and respected company in Canada. Indeed, Ipsos has ranked Google as the most influential brand in Canada for 13 consecutive years, and Leger has named it one of the most admired companies in Canada for 10 consecutive years.⁹² Laura Pearce, the Head of Marketing for Google in Canada, deposed that Google takes very seriously the perception of its brand and reputation among the Canadian public, including existing and

⁸⁷ *Halifax Herald Ltd. v. Nova Scotia*, [2008 NSSC 369 ¶112](#), GBOA Tab 47.

⁸⁸ *The Shorter Oxford English Dictionary*, 3rd ed. (Oxford: Clarendon Press, 1959), Vol. II, pp. 2019-2020 (“Stigma”) [*“Shorter OED”*], GBOA Tab 21.

⁸⁹ *Canadian Oxford Dictionary*, 2nd ed. (Don Mills: Oxford University Press, 2004), p. 1529 (“Stigma”) [*“Canadian OED”*], GBOA Tab 2.

⁹⁰ McGuinness, *The Encyclopedic Dictionary of Canadian Law* (Toronto: Lexis-Nexis, 2021), Vol. 3, p. S-317 (“Stigma”), GBOA Tab 13.

⁹¹ Affidavit of Rupert Younger, sworn May 6, 2025 [*“Younger Aff.”*], Ex. 1 ¶108, pp. 2098-2099.

⁹² Affidavit of Laura Pearce, sworn May 5, 2025 [*“Pearce Aff.”*], Exhibits A and B; Cross-Examination of Laura Pearce taken on August 15, 2025, Ex. 44 and 46, Google Supp. Motion Record, Tabs E44 and E46 at p. 3220 and p. 3239.

allegations of abuse of dominance is also noteworthy. The average Canadian has little if any understanding of what a finding of “abuse of dominance” represents in relation to the nature or seriousness of the adjudicated misconduct. What the average person will recognize, however, is that—when used in common parlance and given its literal and ordinary meaning—the noun “*abuse*” connotes conduct that is *not* merely “improper” or “incorrect” but that involves “an evil, unjust, or corrupt practice”;¹⁰² “cruel and violent treatment”;¹⁰³ or “misuse, perversion”.¹⁰⁴

54. In short, the imposition by the Tribunal of an unprecedented fine measured in the hundreds of millions or billions of dollars to penalize Google as a wrongdoer that has committed an “abuse of dominance” is more likely than not to inflict levels of reputational harm amounting to stigma. The purpose and effect of the unprecedented fining power in the Impugned Provision is to brand Google in the public square as a bad actor undeserving of Canadians’ trust. That is stigma.

55. **Second, the factors the Tribunal will consider in determining the sanction it imposes under the Impugned Provision mirror those our Courts consider in determining criminal fines.** As the Supreme Court has explained, a sanction is likely to constitute a “true penal consequence” when it is assessed in accordance with “principles of criminal sentencing” rather than “regulatory considerations”.¹⁰⁵ Such an indication is unavoidable here because of the substantial overlap between the factors governing the sentencing of a corporation under the *Criminal Code*¹⁰⁶ and the imposition of sanctions for abuse of dominance under the *Act*.¹⁰⁷ Under both regimes, a court or tribunal tasked with fashioning an appropriate penalty must take into account:¹⁰⁸ (i) the *seriousness* of the impugned conduct;¹⁰⁹ (ii) the *benefits* enjoyed by the sanctioned party as a

¹⁰² *Collins English Dictionary*, 3 ed. (Glasgow: HarperCollins, 1992), p. 7 (“Abuse”), GBOA Tab 3; *see also Canadian OED*, p. 6 (“Abuse”) (“*unjust or corrupt practice ... maltreatment of a person*”), GBOA Tab 2.

¹⁰³ *Paperback Oxford English Dictionary* (Oxford: OUP, 2005), p. 4 (“Abuse”), GBOA Tab 15.

¹⁰⁴ *The Concise Oxford Dictionary of Current English*, 7th ed. (Oxford: OUP, 1986), p. 5 (“Abuse”), GBOA Tab 20; *see also Shorter OED*, Vol. I, p. 9 (“Abuse”) (“*perversion ... a corrupt practice*”), GBOA Tab 21.

¹⁰⁵ *Guindon* ¶75-76, GBOA Tab 46; *JHS* ¶30, GBOA Tab 48.

¹⁰⁶ As enumerated in ss. 718.1 and 718.21 of the *Criminal Code*, R.S.C. 1985, c. C-46 [the “*Code*”].

¹⁰⁷ As enumerated in s. 79(3.2) of the *Competition Act*.

¹⁰⁸ While multi-factorial criteria are common in the penal context, mathematical formulae are often used in the regulatory context (*see Hogg Opinion*, DeCaire Aff., Ex. 56, pp. 5606-5607; *U.S. Steel*, ¶8-9, GBOA Tab 109).

¹⁰⁹ *See*, respectively, s. 718.1 and s. 718.21(b) of the *Code* and s. 79(3.2)(a) of the *Act* (emphasis added). An appendix with statutory excerpts is included for the Tribunal’s convenience as Appendix B.

result of that conduct;¹¹⁰ (iii) the *financial status* of the sanctioned party;¹¹¹ (iv) any *additional financial liabilities* that the sanctioned party faces as a result of its misconduct;¹¹² and (v) evidence that the sanctioned party had previously been, or wishes to become,¹¹³ *a law-abiding citizen*.¹¹⁴

56. Thus, each criterion to be assessed when imposing a sanction under s. 79(3.2) of the *Act* bears a striking resemblance to parallel factors that govern the sentencing of companies under the *Criminal Code*.¹¹⁵ This resemblance is no surprise given the criminal law ancestry of Canadian competition law and its origins in seeking to redress wrongs to “mankind at large”.¹¹⁶

57. **Third, like a criminal fine, money paid to satisfy a sanction authorized by the Impugned Provision will go to the Government’s general revenues.** The Supreme Court has noted that financial penalties that result in funds being paid to the Government’s general revenues are more likely to constitute penal consequences.¹¹⁷ Here, all payments made by a sanctioned party following a finding of abuse of dominance flow into the Government’s general-purpose Consolidated Revenue Fund.¹¹⁸ This is directly analogous to criminal fines paid to the Provincial Treasurer or to the Receiver General of Canada under the *Criminal Code*.¹¹⁹ This is yet another clear indicator that the sanction authorized under the Impugned Provision is “truly penal” in nature.¹²⁰

¹¹⁰ See, respectively, s. 718.21(a) of the *Code* and ss. 79(3.2)(b) and (c) of the *Act* (emphasis added)

¹¹¹ See, respectively, s. 718.21(d) of the *Code* and s. 79(3.2)(d) of the *Act* (emphasis added).

¹¹² See, respectively, ss. 718.21(f) and (i) of the *Code* and s. 79(3.2)(d.1) of the *Act* (emphasis added).

¹¹³ Interestingly—although it has been suggested that a hallmark of regulatory sanctions is their “prospective ... orientation” (see *U.S. Steel* ¶74, GBOA Tab 109)—it is the *Code* that is forward-looking, while the provision of the *Competition Act* looks backwards.

¹¹⁴ See, respectively, s. 718.21(j) of the *Code* and s. 79(3.2)(e) of the *Act* (emphasis added).

¹¹⁵ While the *Act* includes a general “basket clause” that allows the Tribunal to consider “any other relevant factor” in assessing a sanction (see s. 79(3.2)(f)), s. 718.21 of the *Code* lists a handful of sentencing factors that have no specific analogue under the *Act* (see ss. 718.21(c), (e), (g), (h)).

¹¹⁶ See discussion, *supra* at ¶8-9.

¹¹⁷ *Wigglesworth* ¶33, GBOA Tab 100; *Guindon* ¶88, GBOA Tab 46.

¹¹⁸ *DeCaire Aff.*, ¶51-55, 85, 87, 89-90, 92, pp. 2206-2207, 2214-2215.

¹¹⁹ *Code*, s. 734.4.

¹²⁰ *Guindon* ¶76, 88, GBOA Tab 46; *U.S. Steel* ¶76, GBOA Tab 109. Contrast this with the payment mechanisms in *Wigglesworth* ¶33, GBOA Tab 100; and *R. v. Samji*, 2017 BCCA 415 ¶89, leave refused, 2018 CanLII 48394 (SCC) [“*Samji*”], GBOA Tab 93.

TAB 16

Jocelyn Binet *Appellant*

v.

Pharmascience Inc. and Morris S. Goodman *Respondents*

- and -

Attorney General of Quebec *Appellant*

v.

Pharmascience Inc. and Morris S. Goodman *Respondents*

INDEXED AS: PHARMASCIENCE INC. v. BINET

Neutral citation: 2006 SCC 48.

File No.: 30995.

2006: May 9; 2006: October 26.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Law of professions — Ethics — Syndic's powers of investigation — Injunction — Syndic of Ordre des pharmaciens requiring manufacturer of generic drugs to provide him with any documents indicating that rebates, discounts or other benefits had been granted to pharmacists — Whether power of inquiry provided for in s. 122 of Professional Code authorizes syndic of professional order to request information from persons who are not members of that order — Whether, where third party refuses to provide requested information, syndic may seek injunction pursuant to Code of Civil Procedure — Professional Code, R.S.Q., c. C-26, ss. 2, 122, 191 — Code of Civil Procedure, R.S.Q., c. C-25, art. 751.

In 2003, the Quebec media reported that a large number of pharmacists had received rebates, discounts and other financial benefits from generic drug manufacturers in exchange for orders for drugs, a practice that is prohibited by the *Code of ethics of pharmacists*.

Jocelyn Binet *Appellant*

c.

Pharmascience Inc. et Morris S. Goodman *Intimés*

- et -

Procureur général du Québec *Appelant*

c.

Pharmascience Inc. et Morris S. Goodman *Intimés*

RÉPERTORIÉ : PHARMASCIENCE INC. c. BINET

Référence neutre : 2006 CSC 48.

N° du greffe : 30995.

2006 : 9 mai; 2006 : 26 octobre.

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

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit des professions — Déontologie — Pouvoirs d'enquête du syndic — Injonction — Syndic de l'Ordre des pharmaciens exigeant d'un fabricant de médicaments génériques de lui fournir tout document indiquant que des rabais, ristournes ou autres avantages ont été accordés à des pharmaciens — Le pouvoir d'enquête prévu à l'art. 122 du Code des professions permet-il au syndic d'un ordre professionnel de demander des renseignements à des personnes qui ne sont pas membres de l'ordre? — Le refus d'un tiers de fournir les renseignements demandés permet-il au syndic de réclamer une injonction en vertu du Code de procédure civile? — Code des professions, L.R.Q., ch. C-26, art. 2, 122, 191 — Code de procédure civile, L.R.Q., ch. C-25, art. 751.

Les médias québécois révèlent en 2003 qu'un grand nombre de pharmaciens recevraient des rabais, ristournes et autres avantages financiers de la part de fabricants de médicaments génériques en contrepartie de leurs commandes. Le *Code de déontologie des*

D. *Interpretation of Section 122*

In my view, a grammatical analysis of the statutory provision together with a review of the relevant contextual aspects, such as the purpose of the statute and of the provision in issue, confirms that the legislature intended to subject third parties to the syndic's power of inquiry under s. 122 *Prof. C.* This contextual analysis resolves any ambiguity flowing from s. 122 without it being necessary to refer to *Charter* principles or values. This Court has consistently held that the courts may turn to *Charter* values to interpret the meaning of a statutory provision only if an ambiguity persists following a contextual analysis (*Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26; *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563, 2005 SCC 74). In the case at bar, the Court of Appeal did not adhere to this interpretive approach when it referred to *Charter* values without trying to determine the meaning of the text in question by situating it in its context.

1. Effect of a Textual Interpretation

Although the weight to be given to the ordinary meaning of words varies enormously depending on their context, in the instant case, a textual interpretation supports a comprehensive analysis based on the purpose of the Act. Most often, "ordinary meaning" refers "to the reader's first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context" (R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at para. 59). In *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735, Gonthier J. spoke of the "natural meaning which appears when the provision is simply read through".

D. *L'interprétation de l'art. 122*

À mon avis, l'analyse grammaticale du texte législatif, complétée par l'évaluation des aspects contextuels pertinents, comme l'objet de la loi et de la disposition en discussion, confirme l'intention du législateur d'assujettir les tiers au pouvoir d'enquête du syndic prévu à l'art. 122 *C. prof.* Cette analyse contextuelle permet de résoudre toute ambiguïté émanant de l'art. 122 sans qu'il soit nécessaire de recourir ici aux principes ou aux valeurs consacrées par la *Charte*. En effet, selon la jurisprudence constante de notre Cour, il est bien établi que les tribunaux ne doivent se tourner vers les valeurs inscrites dans la *Charte* pour interpréter le sens d'une disposition législative que si une ambiguïté persiste au terme de l'application de la méthode contextuelle (*Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42; *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, [2005] 1 R.C.S. 533, 2005 CSC 26; *Charlebois c. Saint John (Ville)*, [2005] 3 R.C.S. 563, 2005 CSC 74). En l'espèce, la Cour d'appel n'a pas respecté cette méthode d'interprétation, lorsqu'elle a recouru aux valeurs consacrées par la *Charte*, sans chercher à dégager le sens du texte en cause en le replaçant dans son contexte.

1. L'effet du recours à l'interprétation textuelle

Bien que le poids à accorder au sens ordinaire des mots varie énormément suivant le contexte de leur emploi, dans la présente affaire, l'interprétation textuelle appuie l'analyse globale fondée sur l'objet de la loi. Le sens ordinaire réfère la plupart du temps [TRADUCTION] « à la première impression du lecteur, c'est-à-dire au sens qui lui vient spontanément lorsqu'il lit les termes dans leur contexte immédiat » (R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4^e éd. 2002), p. 21, citée dans *Marche c. Cie d'Assurance Halifax*, [2005] 1 R.C.S. 47, 2005 CSC 6, par. 59). Dans *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735, le juge Gonthier parlait du « sens naturel qui se dégage de la simple lecture de la disposition ».

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The ordinary and grammatical sense of the French version of s. 122, which provides that “[l]e syndic et les syndics adjoints peuvent . . . exiger qu’on leur fournisse tout renseignement et tout document” favours the argument that the obligation to co-operate applies to everyone, not just to a defined and limited group of individuals, such as professionals belonging to a given order. Moreover, this is the meaning usually given to the French indefinite pronoun “on”, which is defined as follows:

[TRANSLATION] *on* Indef. pron. (lat. *homo*, man). [Always subject.] 1. Designates an indeterminate person, group of persons; someone, people.

(*Petit Larousse illustré* (2004), at p. 715; trial judgment, at paras. 82-83)

If there were any concern that the significance given to this common meaning might give disproportionate weight to the French version, contrary to the principles of interpretation of bilingual statutes, it should be noted that the ordinary sense of the English version of s. 122, which provides that “[t]he syndic and assistant syndics may . . . require that they be provided with any information or document”, is equally supportive of the appellants’ position. In my view, the primary meaning of s. 122 leans more toward an interpretation according to which the obligation applies to third parties. As this Court recently noted, when the legislature intends to limit the scope of a statutory provision, it usually says so clearly: *Glykis v. Hydro-Québec*, [2004] 3 S.C.R. 285, 2004 SCC 60, at para. 13; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 S.C.R. 425, 2005 SCC 70, at para. 3. The legislature could have drafted s. 122 so as to restrict the obligation to provide information to the professional under investigation. It did not do so.

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Nevertheless, it has to be admitted that textual interpretation has its limits. Before this Court, the parties submitted numerous definitions of the French word “on” taken from dictionaries, grammar books and other encyclopedic sources, and countless examples drawn from statutes in which the legislature used similar or different wordings

Le sens commun et grammatical de l’art. 122, qui prévoit que « [l]e syndic et les syndics adjoints peuvent [. . .] exiger qu’on leur fournisse tout renseignement et tout document » favorise davantage la thèse suivant laquelle toute personne est soumise à l’obligation de coopération et non seulement un groupe défini et restreint d’individus tels les professionnels d’un ordre donné. C’est d’ailleurs là le sens habituellement donné au terme « on », pronom indéfini :

on pron. indéf. (lat. *homo*, homme). [Toujours sujet.] 1. Désigne une personne, un groupe de personnes indéterminées; quelqu’un, des gens.

(*Petit Larousse illustré* (2004), p. 715; jugement de première instance, par. 82-83)

Si l’on redoute que l’importance accordée à ce sens commun puisse attribuer un poids démesuré à la version française, contrairement aux principes d’interprétation des lois bilingues, on constate que le sens ordinaire de la version anglaise de l’art. 122 qui dispose que « [t]he syndic and assistant syndics may [. . .] require that they be provided with any information or document » appuie tout autant la position des appelants. À mon avis, le sens premier de l’art. 122 penche davantage vers l’interprétation qui reconnaît l’assujettissement des tiers. Comme le rappelait récemment notre Cour, lorsqu’il entend limiter le champ d’application d’un article de loi, le législateur s’exprime habituellement de façon claire : *Glykis c. Hydro-Québec*, [2004] 3 R.C.S. 285, 2004 CSC 60, par. 13; *Merk c. Association internationale des travailleurs en ponts, en fer structural, ornemental et d’armature, section locale 771*, [2005] 3 R.C.S. 425, 2005 CSC 70, par. 3. Le législateur aurait pu rédiger l’art. 122 de façon à restreindre l’obligation de fournir des renseignements au professionnel visé par l’enquête. Il ne l’a pas fait.

Il faut toutefois admettre que l’interprétation textuelle connaît des limites. Devant notre Cour, les parties ont présenté de nombreuses définitions du terme « on » tirées de dictionnaires, grammaires ou autres sources encyclopédiques et d’innombrables exemples de lois dans lesquelles le législateur utilisait une formulation similaire ou différente

to indicate the inclusion of all persons or of a specific group of individuals. That is why this Court now considers it important, even when a provision seems clear and conclusive, to nevertheless review the overall context of the provision: *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62, at para. 10.

2. Contextual Interpretation: Structure of the Act and Judicial Policy

As I noted above, the *Professional Code* is the statutory solution chosen by the Quebec legislature to protect the public by means of an appropriate framework for all professionals. Section 2 states this general principle by asserting that the “Code applies to all professional orders and to their members”. Still, this provision cannot be transformed into a rule limiting the effect of statutes governing professionals to members of orders subject to the *Professional Code*. That is one of the errors the Court of Appeal committed in agreeing with one of Pharmascience’s arguments and consequently concluding that s. 2 establishes the scope of application of the *Professional Code* and limits it to members of professional orders (para. 49). In the Court of Appeal’s view, the presence of this section confirms that s. 122 does not apply to third parties.

That conclusion fails to take sufficient account of the public protection objective of the *Professional Code*, which cannot be attained unless certain provisions of the *Professional Code* apply to or affect third parties. For example, ss. 188.1 to 189 prohibit the unlawful practice of a profession by non-member third parties. And s. 188 provides for the imposition of a fine on *every person* who commits an offence. As its wording indicates, s. 2 is intended to establish the general nature of the Code, its status as a framework law for the practice of professions in Quebec, and the precedence of a professional order’s special statute in the event of inconsistency. This is confirmed by the context in which the Code was enacted, which I discussed above. Section 2 does not provide that the Code applies *only to* members of professional orders;

pour signifier l’assujettissement de toute personne ou d’un groupe spécifique d’individus. C’est pourquoi notre Cour considère désormais que, même en présence d’un texte en apparence clair et concluant, il importe néanmoins d’examiner le contexte global dans lequel s’inscrit la disposition sous étude : *Montréal (Ville) c. 2952-1366 Québec Inc.*, [2005] 3 R.C.S. 141, 2005 CSC 62, par. 10.

2. L’interprétation contextuelle : la structure de la loi et la politique judiciaire

Comme je l’ai souligné précédemment, le *Code des professions* représente la solution législative choisie par le législateur québécois afin de protéger le public par un encadrement approprié de tous les professionnels. L’article 2 énonce ce principe général lorsqu’il affirme que le « code s’applique à tous les ordres professionnels et à leurs membres ». On ne saurait toutefois transformer cette disposition en une règle qui limite l’effet des lois professionnelles aux seuls membres des ordres régis par le *Code des professions*. C’est l’une des erreurs commises par la Cour d’appel, lorsqu’elle a accepté l’un des moyens de Pharmascience et a conclu, en conséquence, que l’art. 2 établissait le champ d’application du *Code des professions* et le limitait aux seuls membres des ordres professionnels (par. 49). Pour la Cour d’appel, la présence de cet article confirmait le non-assujettissement des tiers à l’art. 122.

Cette conclusion ne tient pas suffisamment compte de l’objectif de protection du public poursuivi par le *Code des professions*. La réalisation de cet objectif implique nécessairement que les tiers soient visés ou touchés par certaines dispositions du *Code des professions*. Par exemple, les art. 188.1 à 189 prohibent l’exercice illégal de la profession par des tiers non-membres. L’article 188 prévoit quant à lui l’imposition d’amendes à *toute personne* commettant une infraction. Comme son libellé l’indique, l’art. 2 vise à établir le caractère général du Code, son statut de loi cadre pour l’exercice des professions au Québec et la préséance des lois particulières à chaque ordre professionnel en cas d’incompatibilité. Le contexte dans lequel fut adopté le Code, que j’ai rappelé précédemment, confirme ce constat. L’article 2 ne prévoit pas que le Code ne s’applique

33

34

TAB 17

Canada Labour Relations Board *Appellant*

Le Conseil canadien des relations du travail *Appelant*

v.

a c.

Québecair - Air Québec et al. *Respondents*

Québecair - Air Québec et autres *Intimées*

and

b et

**Canadian Air Line Pilots Association et al.,
and CPAL-MEC** *Mis en cause*

**L'Association canadienne des pilotes de
lignes aériennes et autres, et CPAL-MEC**
Mis en cause

c

and

et

The Attorney General of Canada *Intervener*

d **Le procureur général du
Canada** *Intervenant*

and between

et entre

Canada Labour Relations Board *Appellant*

e **Le Conseil canadien des relations du
travail** *Appelant*

v.

c.

**Canadian Pacific Air Lines Ltd. et
al.** *Respondents*

f

**Lignes aériennes Canadien Pacifique Ltée et
autres** *Intimées*

and

g et

**Canadian Air Line Pilots Association et al.,
and CPAL-MEC** *Mis en cause*

**L'Association canadienne des pilotes de
lignes aériennes et autres, et CPAL-MEC**
Mis en cause

h

and

et

The Attorney General of Canada *Intervener*

i **Le procureur général du
Canada** *Intervenant*

and between

et entre

Canada Labour Relations Board *Appellant*

j **Le Conseil canadien des relations du
travail** *Appelant*

- (vi) a collective agreement has been entered into,
- (vii) any person or organization is a party to or bound by a collective agreement, and

- (viii) a collective agreement is in operation.

121. The Board shall exercise such powers and perform such duties as are conferred or imposed upon it by, or as may be incidental to the attainment of the objects of, this Part including, without restricting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Part, with any regulation made under this Part or with any decision made in respect of a matter before the Board.

V — Analysis

An analysis of the power granted to the Board by s. 118(a) of the Code first calls for a consideration of its wording. As the issue goes to the jurisdiction of the Board, the standard governing the judicial review of the Board's order is one of correctness: *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, and most recently *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230. Although s. 118(a) is constituted by one long sentence with a number of elements, its meaning is clear: the Board has the power to compel a person who refuses to provide answers or information by summoning that person to attend, and thereupon require that person to testify and produce the documentary evidence. While this is the natural meaning which appears when the provision is simply read through as a whole, it is also the meaning which commends itself when the structure and nature of the provision are examined.

The authority which is granted to the Board pursuant to s. 118 relates mainly to the powers and duties of the Board in gathering evidence, and to some degree other matters like the governance of the procedure in hearings and the determination of certain questions of fact.

The power at issue is limited by the words of s. 118(a). They do not provide for a power to compel the production of documents, *per se*; this power

- (vi) si une convention collective a été conclue,
- (vii) si quelque personne ou association est partie à une convention collective ou est liée par cette dernière, et
- (viii) si une convention collective est en application.

121. Le Conseil exerce les pouvoirs et fonctions que lui attribue la présente Partie ou qui peuvent être nécessaires à la réalisation des objets de la présente Partie, et notamment, sans restreindre la portée générale de ce qui précède, il rend des ordonnances comportant obligation de se conformer aux dispositions de la présente Partie, de tout règlement pris sous son régime ou de toute décision rendue dans une affaire dont il est saisi.

V — Analyse

L'analyse du pouvoir que confère au Conseil l'al. 118(a) du Code passe d'abord par l'examen du texte de cette disposition. Comme le litige porte sur la compétence du Conseil, la norme qui régit le contrôle judiciaire de l'ordonnance du Conseil est celle de la justesse ou de l'absence d'erreur: *U.E.S., local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, et, plus récemment, *Dayco (Canada) Ltd. c. TCA-Canada*, [1993] 2 R.C.S. 230. Bien que l'al. 118(a) soit constitué d'une longue phrase et renferme un certain nombre d'éléments, son sens est clair: le Conseil peut contraindre une personne qui refuse de fournir des réponses ou des renseignements, en l'assignant à comparaître et en l'obligeant à témoigner et à produire la preuve documentaire recherchée. Bien que ce soit là le sens naturel qui se dégage de la simple lecture de la disposition dans son ensemble, c'est également le sens qui s'impose lorsqu'on en examine la structure et la nature.

Le pouvoir dont l'art. 118 investit le Conseil se rapporte principalement aux pouvoirs et aux obligations du Conseil en matière de collecte d'éléments de preuve et, dans une certaine mesure, à d'autres questions comme celle de la gestion de la procédure des audiences et la détermination de certaines questions de fait.

Le pouvoir ici en cause est restreint par le texte de l'al. 118(a), qui ne confère pas en soi le pouvoir d'exiger la production de documents; ce pouvoir

TAB 18

Patricia McLean *Appellant*

v.

**Executive Director of the British Columbia
Securities Commission** *Respondent*

and

**Financial Advisors Association of Canada and
Ontario Securities Commission** *Interveners*

**INDEXED AS: McLEAN v. BRITISH COLUMBIA
(SECURITIES COMMISSION)**

2013 SCC 67

File No.: 34593.

2013: March 21; 2013: December 5.

Present: LeBel, Fish, Rothstein, Cromwell, Moldaver,
Karakatsanis and Wagner JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Administrative law — Securities — Standard of review — Limitation of actions — Appellant entering into settlement agreement with Ontario Securities Commission in respect to certain possible improper actions — B.C. Securities Commission initiating secondary proceedings based on settlement agreement — B.C. Securities Act establishing limitation period of six years from date of “events” giving rise to proceedings — Whether “events” triggering six-year limitation period are the underlying misconduct giving rise to the settlement agreement, or the settlement agreement itself — Whether the standard of review of the Commission’s decision should be correctness or reasonableness — Having regard to the standard of review, whether there is any basis to interfere with the Commission’s interpretation — Securities Act, R.S.B.C. 1996, c. 418, ss. 159, 161(6)(d).

On September 8, 2008, M entered into a settlement agreement with the Ontario Securities Commission in respect to misconduct that occurred in Ontario, in 2001 or earlier. The Ontario Securities Commission issued an order in the public interest barring her from trading in securities for five years and banning her from acting

Patricia McLean *Appelante*

c.

**Directeur général de la British Columbia
Securities Commission** *Intimé*

et

**Association des conseillers en finances du
Canada et Commission des valeurs mobilières
de l’Ontario** *Intervenantes*

**RÉPERTORIÉ : McLEAN c. COLOMBIE-BRITANNIQUE
(SECURITIES COMMISSION)**

2013 CSC 67

N° du greffe : 34593.

2013 : 21 mars; 2013 : 5 décembre.

Présents : Les juges LeBel, Fish, Rothstein, Cromwell,
Moldaver, Karakatsanis et Wagner.

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

Droit administratif — Valeurs mobilières — Norme de contrôle — Prescription — Règlement intervenu entre l’appelante et la Commission des valeurs mobilières de l’Ontario relativement à de possibles irrégularités — Instance secondaire engagée par la Commission des valeurs mobilières de la C.-B. sur le fondement de ce règlement — Loi sur les valeurs mobilières de la C.-B. prévoyant un délai de prescription de six ans à compter de « l’événement » qui donne lieu à l’instance — L’« événement » à partir duquel commence à courir le délai de six ans correspond-il à l’inconduite qui est à l’origine du règlement ou au règlement lui-même? — La norme de contrôle applicable à la décision de la Commission est-elle celle de la décision correcte ou celle de la décision raisonnable? — Au regard de la bonne norme de contrôle, quelque élément justifie-t-il que l’on réforme l’interprétation de la Commission? — Securities Act, R.S.B.C. 1996, ch. 418, art. 159, 161(6)d).

Le 8 septembre 2008, M a convenu d’un règlement avec la Commission des valeurs mobilières de l’Ontario relativement à une inconduite survenue en Ontario au plus tard en 2001. La Commission des valeurs mobilières de l’Ontario a rendu dans l’intérêt public une ordonnance interdisant à M, pendant cinq ans, toute opération sur

I am hard-pressed to conclude that we would have rejected its decision as unreasonable.

[40] The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with “administer[ing] and apply[ing]” its home statute (*Pezim*, at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.

[41] Accordingly, the appellant’s burden here is not only to show that her competing interpretation is reasonable, but also that the Commission’s interpretation is *unreasonable*. And that she has not done. Here, the Commission, with the benefit of its expertise, chose the interpretation it did. And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review — even in the face of a competing reasonable interpretation.

(2) Ordinary Meaning

[42] Beginning with the ordinary meaning of “the events”, on the surface it would appear that “the even[t]” giving rise to a proceeding under s. 161(6)(d) is the fact of “ha[ving] agreed with a securities regulatory authority” to be subject to regulatory action. By ordinary meaning, I refer simply to the “natural meaning which appears when the provision is simply read through” (*Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735). The ordinary meaning would thus appear to support the Commission’s interpretation.

que nous aurions rejeté sa décision au motif qu’elle était déraisonnable.

[40] L’élément décisif en l’espèce réside dans le privilège dont jouit la Commission en matière d’interprétation : suivant la norme de la raisonnable, nous devons déférer à *toute* interprétation raisonnable du décideur administratif, *même lorsque* d’autres interprétations raisonnables sont possibles. Le législateur ayant confié au décideur administratif, et non à une cour de justice, le mandat d’« appliquer » sa loi constitutive (*Pezim*, p. 596), c’est avant tout à ce décideur qu’appartient le pouvoir discrétionnaire de lever toute incertitude législative en retenant une interprétation que permet raisonnablement le libellé de la disposition en cause. La déférence judiciaire constitue alors en elle-même un principe d’interprétation législative moderne.

[41] Partant, il incombe à l’appelante de prouver non seulement que son interprétation divergente est raisonnable, mais aussi que celle de la Commission est *déraisonnable*. Elle ne l’a pas fait. Forte de son expertise, la Commission a opté pour une interprétation en particulier. Et comme le caractère déraisonnable de celle-ci n’a pas été démontré, rien ne nous permet d’intervenir dans le cadre d’un contrôle judiciaire même si une autre interprétation raisonnable est possible.

(2) Sens ordinaire

[42] Considérons d’abord le sens ordinaire de « l’événement ». À première vue, l’événement qui donne lieu à l’instance fondée sur l’al. 161(6)d) paraît être le fait, pour la personne en cause, de [TRADUCTION] « [convenir] avec un organisme de réglementation des valeurs mobilières » de faire l’objet d’une mesure réglementaire. J’entends seulement par sens ordinaire le « sens naturel qui se dégage de la simple lecture de la disposition » (*Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735). Le sens ordinaire semble donc étayer l’interprétation de la Commission.

[43] However, satisfying oneself as to the ordinary meaning of the phrase “is not determinative and does not constitute the end of the inquiry” (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48). Although it is presumed that the ordinary meaning is the one intended by the legislature, courts are obliged to look at other indicators of legislative meaning as part of their work of interpretation. That is so because

[w]ords that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.

(*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10)

[44] That possibility is realized here. Though the ordinary meaning seems apparent enough, digging deeper into the context and purpose of the provision casts some doubt on that conclusion — and introduces the possibility of another reasonable interpretation.

(3) Drafting History

[45] The limitation period in s. 159 predates the addition of s. 161(6) by roughly a decade. Before s. 161(6) was introduced by the *Securities Amendment Act*, 2006, S.B.C. 2006, c. 32, it was clear that s. 159 ran from the date of the underlying misconduct; see, e.g., *Dennis (Re)*, 2005 BCSECCOM 65, 2004 LNBCSC 705 (QL), at para. 38; *Bapty*, at para. 28. As mentioned, the parties do not contend otherwise.

[46] It was only with the addition of s. 161(6) that the start date for the limitations clock became unclear. Given that the legislature chose not to change the wording of s. 159 after it added s. 161(6), it stands to reason that the legislature intended “the events” in s. 159 to continue to refer to the misconduct at issue, regardless of the addition of s. 161(6). In other words, the original meaning of “the events” did not change overnight. And

[43] Toutefois, arrêter le sens ordinaire du terme « n’est pas déterminant et ne met pas fin à l’analyse » (*ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 48). Même si le sens ordinaire est présumé être celui voulu par le législateur, une cour de justice doit tenir compte d’autres éléments pour interpréter un texte législatif, et ce, pour la raison suivante :

Des mots en apparence clairs et exempts d’ambiguïté peuvent, en fait, se révéler ambigus une fois placés dans leur contexte. La possibilité que le contexte révèle une telle ambiguïté latente découle logiquement de la méthode moderne d’interprétation.

(*Montréal (Ville) c. 2952-1366 Québec Inc.*, 2005 CSC 62, [2005] 3 R.C.S. 141, par. 10)

[44] Cette possibilité se réalise en l’espèce. Bien que le sens ordinaire semble assez manifeste, un examen approfondi du contexte de la disposition et de son objet suscite un certain doute quant à cette interprétation et permet d’envisager l’existence d’une autre interprétation raisonnable.

(3) L’historique de la disposition

[45] Le délai de prescription prévu à l’art. 159 existait depuis environ 10 ans lors de l’adjonction du par. 161(6) en 2006 (*Securities Amendment Act*, 2006, S.B.C. 2006, ch. 32). Il ne faisait jusqu’alors aucun doute que ce délai commençait à courir à compter de l’inconduite reprochée (voir, p. ex., *Dennis (Re)*, 2005 BCSECCOM 65, 2004 LNBCSC 705 (QL), par. 38; et *Bapty*, par. 28). Rappelons que les parties en conviennent.

[46] Ce n’est qu’avec l’adjonction du par. 161(6) que le moment auquel débutait la computation du délai est devenu incertain. Comme le législateur a décidé de ne pas modifier l’art. 159 après cette adjonction, on peut seulement lui prêter l’intention que les mots « l’événement » employés à l’art. 159 continuent de s’entendre de l’inconduite en cause. Autrement dit, le sens initial de « l’événement » n’a pas changé du jour au lendemain. Et comme

TAB 19

Teal Cedar Products Ltd. *Appellant*

v.

**Her Majesty the Queen in Right of the
Province of British Columbia** *Respondent*

- and -

Teal Cedar Products Ltd. *Appellant*

v.

**Her Majesty the Queen in Right of the
Province of British Columbia** *Respondent*

**INDEXED AS: TEAL CEDAR PRODUCTS LTD. v.
BRITISH COLUMBIA**

2017 SCC 32

File No.: 36595.

2016: November 1; 2017: June 22.

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

**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Arbitration — Appeals — Jurisdiction — Standard of review — Commercial arbitration awards — Province reducing forestry company's access to improvements on Crown land used to harvest timber — Parties disagreeing as to amount of compensation owed to forestry company and entering into arbitration — Leave to appeal award sought by parties pursuant to s. 31(2) of the Arbitration Act — Appeal of award dismissed in part but dismissal reversed by Court of Appeal — Whether Court of Appeal erred in construing issues decided by arbitrator as questions of law subject to appellate review — Arbitration Act, R.S.B.C. 1996, c. 55, s. 31.

Contracts — Interpretation — Use of factual matrix — Province reducing forestry company's access to improvements on Crown land used to harvest timber — Parties entering into agreement to negotiate compensation owed to forestry company for loss of access

Teal Cedar Products Ltd. *Appelante*

c.

**Sa Majesté la Reine du chef de la
province de la Colombie-Britannique** *Intimée*

- et -

Teal Cedar Products Ltd. *Appelante*

c.

**Sa Majesté la Reine du chef de la
province de la Colombie-Britannique** *Intimée*

**RÉPERTORIÉ : TEAL CEDAR PRODUCTS LTD. c.
COLOMBIE-BRITANNIQUE**

2017 CSC 32

N° du greffe : 36595.

2016 : 1^{er} novembre; 2017 : 22 juin.

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

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

Arbitrage — Appels — Compétence — Norme de contrôle — Sentences arbitrales commerciales — Réduction par la province de l'accès d'une entreprise forestière aux améliorations situées sur des terres de la Couronne qui servent à couper du bois — Désaccord des parties sur le montant de l'indemnité due à l'entreprise forestière et recours par celles-ci à l'arbitrage — Parties demandant l'autorisation d'interjeter appel de la sentence en vertu de l'art. 31(2) de l'Arbitration Act — Appel de la sentence rejeté en partie mais rejet infirmé par la Cour d'appel — La Cour d'appel a-t-elle fait erreur en considérant les questions tranchées par l'arbitre comme des questions de droit susceptibles de contrôle en appel? — Arbitration Act, R.S.B.C. 1996, c. 55, art. 31.

Contrats — Interprétation — Recours au fondement factuel — Réduction par la province de l'accès d'une entreprise forestière aux améliorations situées sur des terres de la Couronne qui servent à couper du bois — Conclusion par les parties d'une convention en vue de

[111] The modern principle of statutory interpretation is well-established:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)

[112] This principle requires that statutes “be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur”: *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21-22. The plain and ordinary meaning of a statutory provision is the “natural meaning which appears when the provision is simply read through”: *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735. In our view, the plain and ordinary meaning of s. 6(4) of the *FRA*, which accords with the purpose and context of the Act, is this: the licence holder is entitled to receive compensation for the improvements on a basis that reflects its limited interest in the improvements as a licence holder.

(2) The Plain and Ordinary Meaning of Section 6(4) of the *FRA*

[113] The meaning of “compensation” is understood to be a payment that makes a person whole for a loss. Compensation is defined by the *Shorter Oxford English Dictionary* (6th ed. 2007) as “amends, recompense; *spec.* money given to compensate loss or injury” (p. 470). Under s. 6(4) of the *FRA*, Teal is entitled to receive compensation *equal to* the value of improvements made to Crown land. If the compensation is to make Teal whole, the value of the improvements must reflect Teal’s actual loss.

[111] Le principe moderne d’interprétation des lois est bien établi :

[TRADUCTION] Aujourd’hui il n’y a qu’un seul principe ou solution : il faut lire les termes d’une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s’harmonise avec l’économie de la loi, l’objet de la loi et l’intention du législateur.

(E. A. Driedger, *Construction of Statutes* (2^e éd. 1983), p. 87)

[112] Selon ce principe, les lois « doivent être interprétées de manière à donner aux mots leur sens ordinaire le plus évident qui s’harmonise avec le contexte et l’objet visé par la loi dans laquelle ils sont employés » : *CanadianOxy Chemicals Ltd. c. Canada (Procureur général)*, [1999] 1 R.C.S. 743, para. 14; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21-22. Le sens ordinaire d’une disposition législative constitue simplement le « sens naturel qui se dégage de la simple lecture de la disposition » : *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735. À notre avis, le sens ordinaire du par. 6(4) de la *FRA* qui s’harmonise avec l’objet et le contexte de la Loi est le suivant : le titulaire de permis a le droit de recevoir une indemnité pour les améliorations, sur la base de son intérêt limité dans les améliorations en tant que titulaire de permis.

(2) Le sens ordinaire du par. 6(4) de la *FRA*

[113] Le sens du terme [TRADUCTION] « indemnité » (*compensation*) réfère à une somme versée en réparation intégrale d’une perte. Le *Shorter Oxford English Dictionary* (6^e éd. 2007) définit l’indemnité comme une « réparation ou compensation; *spécialt* argent remis en guise de compensation d’une perte ou d’un préjudice » (p. 470). Selon le par. 6(4) de la *FRA*, Teal a droit à une indemnité *égale à* la valeur des améliorations apportées aux terres de la Couronne. Pour que l’indemnité constitue une réparation intégrale, la valeur des améliorations doit correspondre à la perte réelle de Teal.

TAB 20

Rogers Communications Inc. *Appellant*

v.

Voltage Pictures, LLC, Cobbler Nevada, LLC, PTG Nevada, LLC, Clear Skies Nevada, LLC, Glacier Entertainment S.A.R.L. of Luxemburg, Glacier Films 1, LLC and Fathers & Daughters Nevada, LLC
Respondents

and

Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Bell Canada Inc., Canadian Network Operators Consortium Inc., Cogeco Inc., Quebecor Media Inc., Saskatchewan Telecommunications Holding Corporation, Shaw Communications Inc., TekSavvy Solutions Inc., TELUS Communications Inc. and Xplornet Communications Inc. *Interveners*

INDEXED AS: ROGERS COMMUNICATIONS INC. v. VOLTAGE PICTURES, LLC

2018 SCC 38

File No.: 37679.

2018: April 26; 2018: September 14.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Intellectual property — Copyright — Infringement — Norwich order — Costs of compliance — Copyright owners obtaining Norwich order compelling Internet service provider to disclose identity of person suspected of infringing owners' copyright — Owners seeking not to pay costs of disclosure based on provision in statutory notice and notice copyright regime prohibiting Internet service provider from seeking costs for complying with obligations under regime — Whether steps taken by Internet service provider to comply with Norwich order overlap with its

Rogers Communications Inc. *Appelante*

c.

Voltage Pictures, LLC, Cobbler Nevada, LLC, PTG Nevada, LLC, Clear Skies Nevada, LLC, Glacier Entertainment S.A.R.L. of Luxemburg, Glacier Films 1, LLC et Fathers & Daughters Nevada, LLC *Intimées*

et

Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko, Bell Canada Inc., Consortium des Opérateurs de Réseaux Canadiens Inc., Cogeco Inc., Québecor Média Inc., Saskatchewan Telecommunications Holding Corporation, Shaw Communications Inc., TekSavvy Solutions Inc., TELUS Communications Inc. et Xplornet Communications Inc.
Intervenantes

RÉPERTOIRÉ : ROGERS COMMUNICATIONS INC. c. VOLTAGE PICTURES, LLC

2018 CSC 38

N° du greffe : 37679.

2018 : 26 avril; 2018 : 14 septembre.

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Propriété intellectuelle — Droit d'auteur — Violation — Ordonnance de type Norwich — Coûts occasionnés en vue de la conformité — Obtention par des titulaires de droits d'auteur d'une ordonnance de type Norwich obligeant un fournisseur de services Internet à communiquer l'identité d'une personne qui aurait violé leur droit — Titulaires de droits d'auteur demandant de ne pas payer les coûts relatifs à la communication sur le fondement d'une disposition du régime législatif d'avis et avis interdisant aux fournisseurs de services Internet de demander

notice regime without regulations, thereby prohibiting ISPs from charging a fee for complying with their statutory obligations (SI/2014-58 and Explanatory Note, at pp. 2121-23). However, the amendments to the Act were also intended to “clarify Internet service providers’ liability” to copyright owners (*Copyright Modernization Act*, summary; see also Legislative Committee on Bill C-32, *Evidence*, at p. 1, per Craig McTaggart). To that end, Parliament insulated ISPs from liability for the copyright infringement of their Internet subscribers (Act, s. 31.1). Now, to attract liability under the Act, an ISP must fail to satisfy its statutory obligations under the notice and notice regime, or provide a service “primarily for the purpose of enabling acts of copyright infringement” (ss. 27(2.3), 31.1 and 41.26(3)).

(3) The Ordinary Meaning of Section 41.26 in Light of the Scheme and Objects of the Act

[28] Taking the Act’s scheme and objects into account, what is the ordinary and grammatical reading of the text of s. 41.26? Or, as Gonthier J. phrased it in *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735, what is “the natural meaning which appears when [s. 41.26] is simply read through”? (See also R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 30.)

[29] Recall that s. 41.26(1) imposes three express obligations upon an ISP that receives a copyright owner’s notice of claimed copyright infringement: (1) to “forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs” (s. 41.26(1)(a)); (2) to “inform the [copyright owner] of its forwarding or . . . of the reason why it was not possible to forward it” (s. 41.26(1)(a)); and (3) to “retain records that will allow the identity of the person to whom the electronic location belongs to be determined” (s. 41.26(1)(b)). On this, all parties are agreed. The parties also agree that the text of

d’application. Finalement, le Parlement a choisi d’adopter le régime d’avis et avis sans règlement, interdisant ainsi aux FSI d’exiger des droits pour se conformer à leurs obligations légales (TR/2014-58 et note explicative, p. 2121-2123). Cependant, les modifications à la Loi visaient également à « clarifier la responsabilité des fournisseurs de services Internet » envers les titulaires de droits d’auteur (*Loi sur la modernisation du droit d’auteur*, sommaire; voir aussi Comité législatif chargé du projet de loi C-32, *Témoignages*, p. 1, Craig McTaggart). À cette fin, le Parlement a exonéré les FSI de toute responsabilité pour la violation du droit d’auteur commise par leurs abonnés à Internet (art. 31.1 de la Loi). Désormais, pour que la responsabilité du FSI soit engagée selon la Loi, il doit manquer à ses obligations légales dans le cadre du régime d’avis et avis, ou fournir un service « principalement en vue de faciliter l’accomplissement d’actes qui constituent une violation du droit d’auteur » (par. 27(2.3) et 41.26(3) et art. 31.1).

(3) Le sens ordinaire de l’art. 41.26 à la lumière de l’économie et des objets de la Loi

[28] Compte tenu de l’économie et des objets de la Loi, quelle est l’interprétation ordinaire et grammaticale qu’il faut donner au libellé de l’art. 41.26? Ou, comme l’a écrit le juge Gonthier dans l’arrêt *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735, quel est « le sens naturel qui se dégage de la simple lecture de [l’art. 41.26] »? (Voir aussi R. Sullivan, *Sullivan on the Construction of Statutes* (6^e éd. 2014), p. 30.)

[29] Rappelons que le par. 41.26(1) impose trois obligations expresses au FSI qui reçoit un avis de prétendue violation du droit d’auteur de la part du titulaire de ce droit : (1) « transmettre [. . .] par voie électronique une copie de l’avis à la personne à qui appartient l’emplacement électronique identifié par les données de localisation qui sont précisées dans l’avis » (al. 41.26(1)a)); (2) « informer [. . .] le [titulaire du droit d’auteur] de cette transmission ou [. . .] des raisons pour lesquelles elle n’a pas pu l’effectuer » (al. 41.26(1)a)); (3) « conserver [. . .] un registre permettant d’identifier la personne à qui appartient l’emplacement électronique »

TAB 21

Celgene Corporation *Appellant*

v.

Attorney General of Canada *Respondent***INDEXED AS: CELGENE CORP. v. CANADA
(ATTORNEY GENERAL)****2011 SCC 1**

File No.: 33579.

2010: November 10; 2011: January 20.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

**ON APPEAL FROM THE FEDERAL COURT OF
APPEAL**

Legislation — Statutory interpretation — Scope of the Patented Medicine Prices Review Board's price-regulating and remedial authority — Meaning of "sold in any market in Canada" — Whether concept should be interpreted in accordance with commercial law principles or be responsive to surrounding legislative context and purpose — Patent Act, R.S.C. 1985, c. P-4, ss. 80(1)(b), 83(1), 85.

Administrative law — Judicial review — Standard of review — Reasonableness of Patented Medicine Prices Review Board's interpretation of its enabling legislation — Patent Act, R.S.C. 1985, c. P-4, ss. 80(1)(b), 81(1)(a), 83(1), 85.

C is a New Jersey-based distributor of a pharmaceutical sold under the brand name Thalomid. Since 1995, C's sales of this drug to Canadians have been made pursuant to the Special Access Programme ("SAP") as C did not get a Notice of Compliance from Health Canada to sell the medicine in Canada. When a Canadian doctor orders Thalomid under the SAP, the medicine is packed in C's facilities in the U.S. and shipped Free on Board to the doctor in Canada. C prepares an invoice in New Jersey, mails it to Canada, and directs that payment be made in U.S. dollars and couriered or mailed to C in New Jersey. No Canadian taxes are paid on these transactions. The drug is never redistributed in Canada and any unused portions must be returned to C's facility in Pennsylvania.

Celgene Corporation *Appelante*

c.

Procureur général du Canada *Intimé***RÉPERTORIÉ : CELGENE CORP. c. CANADA
(PROCUREUR GÉNÉRAL)****2011 CSC 1**

N° du greffe : 33579.

2010 : 10 novembre; 2011 : 20 janvier.

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Législation — Interprétation législative — Portée des pouvoirs de réglementation des prix et de réparation du Conseil d'examen du prix des médicaments brevetés — Signification de « vente [. . .] sur l[e] march[é] canadien » — Le concept doit-il être interprété en fonction des principes du droit commercial ou doit-il plutôt être défini d'une manière qui tienne compte du contexte et de l'objet de la législation pertinente? — Loi sur les brevets, L.R.C. 1985, ch. P-4, art. 80(1)(b), 83(1), 85.

Droit administratif — Contrôle judiciaire — Norme de contrôle — Caractère raisonnable de l'interprétation par le Conseil d'examen du prix des médicaments brevetés de sa loi habilitante — Loi sur les brevets, L.R.C. 1985, ch. P-4, art. 80(1)(b), 81(1), 83(1), 85.

C, une société établie au New Jersey, est le distributeur d'un médicament vendu sous la marque nominative Thalomid. Depuis 1995, les ventes par C de ce médicament à des Canadiens ont été effectuées par le Programme d'accès spécial (« PAS »), comme C n'avait pas obtenu d'avis de conformité de Santé Canada lui permettant de vendre ce médicament au Canada. Quand un médecin canadien commande du Thalomid au moyen du PAS, le médicament est emballé dans les bureaux de C aux États-Unis et acheminé, franco à bord, au médecin au Canada. C prépare sa facture au New Jersey, l'envoie par la poste au Canada et ordonne que le paiement soit effectué en dollars américains et envoyé par messagerie ou par la poste à ses bureaux du New Jersey. Aucune taxe canadienne n'est perçue sur ces transactions. Le médicament n'est jamais redistribué au Canada et toutes les doses inutilisées doivent être renvoyées à l'établissement de C en Pennsylvanie.

issue in this case is s. 80(1)(b), which states that the Board is entitled to certain pricing information:

80. (1) A patentee of an invention pertaining to a medicine shall, as required by and in accordance with the regulations, provide the Board with such information and documents as the regulations may specify respecting

. . .

(b) the price at which the medicine is being or has been sold in any market in Canada and elsewhere;

[18] Section 83(1) of the *Patent Act* empowers the Board to order the reduction of the price at which a patentee is selling the medicine in any market in Canada when it is of the view that this price is excessive:

83. (1) Where the Board finds that a patentee of an invention pertaining to a medicine is selling the medicine in any market in Canada at a price that, in the Board's opinion, is excessive, the Board may, by order, direct the patentee to cause the maximum price at which the patentee sells the medicine in that market to be reduced to such level as the Board considers not to be excessive and as is specified in the order.

[19] The Board's decision to make a s. 83(1) remedial order depends on the factors listed in s. 85:

85. (1) In determining under section 83 whether a medicine is being or has been sold at an excessive price in any market in Canada, the Board shall take into consideration the following factors, to the extent that information on the factors is available to the Board:

- (a) the prices at which the medicine has been sold in the relevant market;
- (b) the prices at which other medicines in the same therapeutic class have been sold in the relevant market;
- (c) the prices at which the medicine and other medicines in the same therapeutic class have been sold in countries other than Canada;
- (d) changes in the Consumer Price Index; and
- (e) such other factors as may be specified in any regulations made for the purposes of this subsection.

est l'al. 80(1)b), lequel précise que le Conseil a le droit d'exiger des renseignements sur les prix :

80. (1) Le breveté est tenu de fournir au Conseil, conformément aux règlements, les renseignements et documents sur les points suivants :

. . .

b) le prix de vente — antérieur ou actuel — du médicament sur les marchés canadien et étranger;

[18] Le paragraphe 83(1) de la *Loi sur les brevets* habilite le Conseil, s'il juge excessif le prix auquel le breveté vend le médicament sur un marché canadien, à en ordonner la réduction :

83. (1) Lorsqu'il estime que le breveté vend sur un marché canadien le médicament à un prix qu'il juge être excessif, le Conseil peut, par ordonnance, lui enjoindre de baisser le prix de vente maximal du médicament dans ce marché au niveau précisé dans l'ordonnance et de façon qu'il ne puisse pas être excessif.

[19] La décision du Conseil de rendre une ordonnance réparatrice fondée sur le par. 83(1) dépend des facteurs énumérés à l'art. 85 :

85. (1) Pour décider si le prix d'un médicament vendu sur un marché canadien est excessif, le Conseil tient compte des facteurs suivants, dans la mesure où des renseignements sur ces facteurs lui sont disponibles :

- a) le prix de vente du médicament sur un tel marché;
- b) le prix de vente de médicaments de la même catégorie thérapeutique sur un tel marché;
- c) le prix de vente du médicament et d'autres médicaments de la même catégorie thérapeutique à l'étranger;
- d) les variations de l'indice des prix à la consommation;
- e) tous les autres facteurs précisés par les règlements d'application du présent paragraphe.

(2) Where, after taking into consideration the factors referred to in subsection (1), the Board is unable to determine whether the medicine is being or has been sold in any market in Canada at an excessive price, the Board may take into consideration the following factors:

- (a) the costs of making and marketing the medicine; and
- (b) such other factors as may be specified in any regulations made for the purposes of this subsection or as are, in the opinion of the Board, relevant in the circumstances.

(3) In determining under section 83 whether a medicine is being or has been sold in any market in Canada at an excessive price, the Board shall not take into consideration research costs other than the Canadian portion of the world costs related to the research that led to the invention pertaining to that medicine or to the development and commercialization of that invention, calculated in proportion to the ratio of sales by the patentee in Canada of that medicine to total world sales.

[20] The common language in ss. 80(1)(b), 83(1), and 85 is: sold (or selling) in any market in Canada. I acknowledge that these words may lend themselves to different interpretations. The question is whether the one selected by the Board is justified.

[21] The parties both relied on the approach used in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10, which confirmed that statutory interpretation involves a consideration of the ordinary meaning of the words used and the statutory context in which they are found:

It has been long established as a matter of statutory interpretation that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can

(2) Si, après avoir tenu compte de ces facteurs, il est incapable de décider si le prix d’un médicament vendu sur un marché canadien est excessif, le Conseil peut tenir compte des facteurs suivants :

- a) les coûts de réalisation et de mise en marché;
- b) tous les autres facteurs précisés par les règlements d’application du présent paragraphe ou qu’il estime pertinents.

(3) Pour l’application de l’article 83, le Conseil ne tient compte, dans les coûts de recherche, que de la part canadienne des coûts mondiaux directement liée à la recherche qui a abouti soit à l’invention du médicament, soit à sa mise au point et à sa mise en marché, calculée proportionnellement au rapport entre les ventes canadiennes du médicament par le breveté et le total des ventes mondiales.

[20] Les mots communs à l’al. 80(1)b), au par. 83(1) et à l’art. 85 sont « vente », « vend » et « vendu » sur un marché canadien. Je reconnais que ces mots peuvent se prêter à différentes interprétations. La question est de savoir si celle qu’a retenue le Conseil est justifiée.

[21] Les parties ont toutes deux invoqué la démarche adoptée dans l’arrêt *Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 10, qui a confirmé que l’interprétation des lois consiste à examiner le sens ordinaire des mots et le contexte législatif dans lequel ils s’inscrivent :

Il est depuis longtemps établi en matière d’interprétation des lois qu’« il faut lire les termes d’une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s’harmonise avec l’esprit de la loi, l’objet de la loi et l’intention du législateur » : voir *65302 British Columbia Ltd. c. Canada*, [1999] 3 R.C.S. 804, par. 50. L’interprétation d’une disposition législative doit être fondée sur une analyse textuelle, contextuelle et téléologique destinée à dégager un sens qui s’harmonise avec la Loi dans son ensemble. Lorsque le libellé d’une disposition est précis et non équivoque, le sens ordinaire des mots joue un rôle primordial dans le processus d’interprétation. Par contre, lorsque les mots utilisés

support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute.

[22] But although the parties agreed on the proper interpretive approach, they disputed its application. The Attorney General argued that the phrase “sold in any market in Canada” is broad and should not be given the limited, technical interpretation ascribed to it by Celgene. Celgene, on the other hand, argued that the word “sold” is so “precise and unequivocal” that it must play the determinative role in the interpretive process (*Canada Trustco*, at para. 10). Citing *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100, Celgene argued that “sold” is a legal term of art that should presumptively be given its private law, commercial meaning. In its view, the plain meaning of “sold in any market in Canada” connotes a commercial contract of sale occurring in Canada.

[23] *Mattel* is of limited assistance in this case. It involved an interpretation of s. 48(5)(a)(iv) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), a provision concerned with whether royalties paid between two *private* parties in a commercial transaction were “a condition of the sale of the goods for export to Canada”. Major J. concluded that in the particular context of that provision — which assists in calculating customs duties on items imported into Canada — the word “condition” in the phrase “condition of the sale” had a settled meaning in sale of goods law which governed in interpreting this private transaction (see paras. 58-59).

peuvent avoir plus d'un sens raisonnable, leur sens ordinaire joue un rôle moins important. L'incidence relative du sens ordinaire, du contexte et de l'objet sur le processus d'interprétation peut varier, mais les tribunaux doivent, dans tous les cas, chercher à interpréter les dispositions d'une loi comme formant un tout harmonieux.

S'il est clair, le libellé prévaut; sinon, il cède le pas à l'interprétation qui convient le mieux à l'objet prédominant de la loi.

[22] Cependant, bien que les parties soient d'accord à l'égard des règles d'interprétation pertinentes, elles ne s'entendent pas sur leur application. Selon le procureur général, les mots « vente [. . .] sur l[e] march[é] canadien » ont une large portée et ne devraient pas recevoir l'interprétation technique restreinte que leur donne Celgene. En revanche, cette dernière affirme que le mot « vente » est si « précis et non équivoque » qu'il doit jouer un rôle déterminant dans le processus d'interprétation (*Trustco Canada*, par. 10). Renvoyant à l'arrêt *Canada (Sous-ministre du Revenu national) c. Mattel Canada Inc.*, 2001 CSC 36, [2001] 2 R.C.S. 100, Celgene fait valoir que le terme « vente » appartient au vocabulaire juridique et devrait a priori recevoir le sens qui lui est attribué en droit commercial privé. À son avis, le sens ordinaire de « vente [. . .] sur l[e] march[é] canadien » connote l'existence d'un contrat commercial de vente conclu au Canada.

[23] L'arrêt *Mattel* est peu utile en l'espèce. Il portait sur l'interprétation du sous-al. 48(5)a)(iv) de la *Loi sur les douanes*, L.R.C. 1985, ch. 1 (2^e suppl.), une disposition prévoyant que les redevances versées dans le cadre d'une opération commerciale intervenue entre deux parties *privées* peuvent constituer une « condition de la vente des marchandises pour exportation au Canada ». Le juge Major a conclu que, dans le contexte particulier de cette disposition — qui permet de calculer les droits de douane sur les articles importés au Canada —, le mot « condition » utilisé dans l'expression « condition de la vente » possédait, dans le domaine du droit relatif à la vente de marchandises, un sens bien établi qui régissait l'interprétation de cette transaction privée (voir par. 58-59).

[24] I accept that, as *Mattel* demonstrates, words like “sold” may well have a commercial law meaning in some statutory contexts, including, for example, in other parts of the *Patent Act* (see *Dole Refrigerating Products Ltd. v. Canadian Ice Machine Co.* (1957), 28(2) C.P.R. 32 (Ex. Ct.); *Domco Industries Ltd. v. Mannington Mills, Inc.* (1990), 29 C.P.R. (3d) 481 (F.C.A.), leave to appeal refused, [1990] 2 S.C.R. vi).

[25] But that does not mean that the Board misinterpreted the words “sold” and “selling” in the context of ss. 80(1)(b), 83(1) and 85. In rejecting the technical commercial law definition, the Board was guided by the consumer protection goals of its mandate, concluding that Celgene’s approach would undercut these objectives by preventing the Board from protecting Canadian purchasers of Thalomid and other foreign-sold SAP patented medicines.

[26] The Board’s interpretive choice is supported by the legislative history. The Board was established in amendments contained in Bill C-22, *An Act to amend the Patent Act and to provide for certain matters in relation thereto*, which received Royal Assent on November 19, 1987, as S.C. 1987, c. 41. Introducing the Bill for second reading, the Hon. Harvie Andre made the following relevant comments about the Board’s objectives:

In essence, the amendments I propose in Bill C-22 will create a climate favourable to new investment in research and development by giving patent holding pharmaceutical firms in Canada a guaranteed period of protection. These changes will also ensure consumer protection by creating a drug prices review board to monitor drug prices. . . .

. . .

I humbly submit that anybody who takes an objective view of what we are proposing will see that we

[24] Je reconnais que, comme l’illustre l’arrêt *Mattel*, les mots tels que « vente » peuvent fort bien avoir le sens qui leur est attribué en droit commercial dans certains contextes législatifs, y compris, par exemple, dans d’autres parties de la *Loi sur les brevets* (voir *Dole Refrigerating Products Ltd. c. Canadian Ice Machine Co.* (1957), 28(2) C.P.R. 32 (C. de l’É.); *Domco Industries Ltd. c. Mannington Mills, Inc.* (1990), 29 C.P.R. (3d) 481 (C.A.F.), autorisation d’appel refusée, [1990] 2 R.C.S. vi).

[25] Or, cela ne signifie pas que le Conseil a mal interprété les mots « vente », « vend » et « vendu » à l’al. 80(1)(b), au par. 83(1) et à l’art. 85. En rejetant la définition technique de droit commercial, le Conseil était guidé par les objectifs de protection du consommateur de son mandat. Il a conclu que l’interprétation proposée par Celgene était incompatible avec ces objectifs dans la mesure où elle ne lui reconnaissait pas la compétence pour protéger les acheteurs canadiens de Thalomid et d’autres médicaments brevetés vendus à partir de l’étranger dans le cadre du PAS.

[26] L’interprétation choisie par le Conseil est étayée par l’historique législatif. Le Conseil a été constitué par des modifications introduites par le projet de loi C-22, *Loi modifiant la Loi sur les brevets et prévoyant certaines dispositions connexes*, qui a reçu la sanction royale le 19 novembre 1987 (L.C. 1987, ch. 41). Lors de la présentation du projet de loi en deuxième lecture, l’hon. Harvie Andre a fait les observations pertinentes suivantes relativement aux objectifs du Conseil :

Fondamentalement, les modifications que je propose dans le projet de loi C-22 créeront un climat favorable à de nouveaux investissements dans le domaine de la recherche et du développement, en protégeant pendant une période donnée les entreprises pharmaceutiques qui détiennent des brevets au Canada. Ces modifications permettront également de protéger les consommateurs en créant un conseil d’examen du prix des médicaments chargé de surveiller les prix. . .

. . .

À mon humble avis, si l’on examine objectivement notre proposition, on verra que nous avons mis sur pied

have in place enormous checks and balances to ensure that consumer prices of drugs remain reasonable. They should look at what we will get by way of research and development, and at the jobs this will create.

. . .

Whatever costs might be associated with this legislation will be minimal. They will not hit the consumer. [Emphasis added.]

(*House of Commons Debates*, vol. I, 2nd Sess., 33rd Parl., November 20, 1986, at pp. 1369 and 1373)

[27] When the *Patent Act* was further amended in 1993 (*Patent Act Amendment Act*, 1992, S.C. 1993, c. 2), the then Minister of Consumer and Corporate Affairs and Minister of State (Agriculture), the Hon. Pierre Blais, reiterated the Board's consumer protection mandate:

With Bill C-91, we also wanted to strengthen consumer protection, so that consumers can continue to obtain patented medicine at reasonable prices. I think that all Canadians are entitled to that.

. . .

... The board will thus be able to provide all Canadian consumers with even more effective price control. These new powers will authorize the board to order a reduction of prices it considers too high. ...

... I am convinced that these new provisions will assure Canadian consumers, of reasonable prices, like those they have had since 1987.

(*House of Commons Debates*, vol. XII, 3rd Sess., 34th Parl., December 10, 1992, at pp. 14998 and 15001)

[28] The Board's consumer protection purpose was affirmed in *ICN Pharmaceuticals Inc. v.*

un énorme mécanisme de poids et contrepois pour nous assurer que le prix à la consommation des médicaments demeurera raisonnable. On verra que la mesure proposée aura des résultats en matière de recherche et de développement et aussi de création d'emplois.

. . .

Cette mesure législative entraînera des coûts minimes qui ne se répercuteront pas sur le consommateur. [Je souligne.]

(*Débats de la Chambre des communes*, vol. I, 2^e sess., 33^e lég., 20 novembre 1986, p. 1369 et 1373-1374)

[27] Lorsque la *Loi sur les brevets* a été modifiée de nouveau en 1993 (*Loi de 1992 modifiant la Loi sur les brevets*, L.C. 1993, ch. 2), le ministre de la Consommation et des Affaires commerciales et ministre d'État (Agriculture) de l'époque, l'hon. Pierre Blais, a réitéré en ces termes le mandat de protection du consommateur conféré au Conseil :

En proposant le projet de loi C-91, nous avons voulu également renforcer la protection qui est offerte aux consommateurs, afin que ceux-ci puissent continuer de se procurer des médicaments brevetés, qui soient à des prix raisonnables. Et je pense que les Canadiens y ont tous droit.

. . .

... Le conseil pourra ainsi garantir à l'ensemble des consommateurs canadiens un contrôle encore plus efficace des prix. Ces nouveaux pouvoirs autoriseront le conseil à ordonner une réduction des prix qu'il juge trop élevés. ...

... Je suis persuadé que ces nouvelles dispositions assureront aux consommateurs canadiens des prix raisonnables, comme ceux dont ils bénéficient depuis 1987.

(*Débats de la Chambre des communes*, vol. XII, 3^e sess., 34^e lég., 10 décembre 1992, p. 14998 et 15001)

[28] L'objectif du Conseil en matière de protection des consommateurs a été confirmé dans

Patented Medicine Prices Review Board (1996), 108 F.T.R. 190, aff'd [1997] 1 F.C. 32 (C.A.), where Cullen J. said:

Sections 79 to 103 of the *Patent Act*, creating the Patented Medicine Prices Review Board, were enacted in response to the abolition of the compulsory licensing regime. Parliament's intent was certainly to address the "mischief" that the patentee's monopoly over pharmaceuticals during the exclusivity period might cause prices to rise to unacceptable levels. Accordingly, the words of these sections of the *Patent Act* should be read purposively [Emphasis added; para. 24.]

[29] This is the approach to its mandate that the Board applied, one that took into paramount account its responsibility for ensuring that the monopoly that accompanies the granting of a patent is not abused to the financial detriment of Canadian patients and their insurers:

The mandate of the Board includes balancing the monopoly power held by the patentee of a medicine, with the interests of purchasers of those medicines. The patentee of a medicine sold in Canada is subject to the jurisdiction of the Board, and this jurisdiction requires the patentee to report information to the Board concerning the price at which it has been selling the patented medicine in any market in Canada. The Board compares this price to the price of comparable medicines, and to the price at which the medicine is sold in other countries, to determine whether or not its price in Canada is excessive. In consultation with industry, government and consumer stakeholders, the Board has developed detailed guidelines that patentees and Board Staff use to ensure that the prices of patented medicines in Canada are not excessive [Emphasis added; para. 5.]

[30] The Board therefore concluded that in order to comply with that mandate, sales "in any market in Canada" for the purposes of the relevant provisions, should be interpreted to "include sales of medicines that are regulated by the public laws

ICN Pharmaceuticals, Inc. c. Canada (Personnel du Conseil d'examen du prix des médicaments brevetés), [1996] A.C.F. n° 206 (QL) (C.F. 1^{re} inst.), conf. par [1997] 1 C.F. 32 (C.A.), où le juge Cullen a dit ceci :

Les articles 79 à 103 de la *Loi sur les brevets*, qui prévoient la constitution du Conseil d'examen du prix des médicaments brevetés, ont été adoptés en réponse à l'abolition du régime de délivrance de licences obligatoires. Le législateur avait certainement l'intention de pallier le « préjudice » découlant du fait que le monopole accordé au breveté en matière de produits pharmaceutiques durant la période d'exclusivité pouvait entraîner une hausse des prix à des niveaux inacceptables. Par conséquent, les termes employés dans ces dispositions de la *Loi sur les brevets* doivent recevoir une interprétation fondée sur l'objet visé . . . [Je souligne; par. 24.]

[29] C'est ainsi que le Conseil a exercé son mandat, c'est-à-dire en accordant une importance prépondérante à sa responsabilité qui consiste à veiller à ce que le breveté n'abuse pas financièrement du monopole découlant de la délivrance d'un brevet, au détriment des patients canadiens et de leurs assureurs :

Le Conseil est investi du mandat de protéger les intérêts des acheteurs dans une situation où le titulaire d'un brevet lié à un médicament pourrait exercer un monopole. Le titulaire d'un brevet canadien lié à un médicament vendu au Canada est assujéti à la compétence du Conseil, en vertu de laquelle il doit faire rapport au Conseil de l'information concernant le prix auquel il a vendu son médicament breveté sur un marché au Canada. Le Conseil compare ce prix aux prix des médicaments de comparaison ainsi qu'aux prix auxquels le médicament est vendu dans les pays de comparaison afin de déterminer si le prix du médicament sous examen est ou non excessif. En consultation avec ses intervenants, à savoir l'industrie, les gouvernements et les consommateurs, le Conseil a formulé des lignes directrices que suivent les brevetés et les membres du personnel du Conseil afin que les prix au Canada des médicaments brevetés ne soient pas excessifs . . . [Je souligne; par. 5.]

[30] Le Conseil a donc conclu que pour respecter ce mandat, il fallait, pour l'application des dispositions pertinentes, considérer que les ventes « sur l[e] march[é] canadien » ou « sur un marché canadien » « couvrent les ventes des médicaments régis par le

of Canada, that will be delivered in Canada, to be dispensed in Canada, and where, in particular, the cost of the medicine will be borne by Canadians — patients or taxpayers, as the case may be” (para. 34). All of these prerequisites are satisfied in the case of Celgene’s sales of Thalomid to Canadians through the SAP.

[31] The Board also found, and I agree, that a strict commercial law interpretation of “sold” in s. 80(1)(b) would give the Board authority over sales which, while technically made “in Canada”, are destined for other countries, a result incongruous with the legislative purpose of regulating the price at which patented medicines are sold in *Canadian*, not foreign, markets:

... the Board does not have a statutory mandate to protect European purchasers of patented medicines, regardless of the *locus* of the sale at common law. The *locus* of the sale at common law, does not give rise to jurisdiction when the *locus* is Canada, and does not deprive the Board of jurisdiction when the *locus* is outside of Canada. [para. 36]

[32] In my view, therefore, the legislative context and the consumer protection purpose of ss. 80(1)(b), 83(1) and 85 of the *Patent Act* support the Board’s conclusion that, based on the language of those provisions, it has authority over Celgene’s sales of Thalomid to Canadians through the SAP.

[33] A final observation. In this Court, neither party presented any argument on the standard of review. Both had proceeded throughout the judicial review process on the basis that the applicable standard of review was correctness. While the parties should not be able, by agreement, to *contract out* of the appropriate standard of review, like *Evans J.A.* I am of the view that the Board’s decision would be upheld under either standard.

droit public au Canada, qui sont livrés au Canada, qui sont administrés au Canada ainsi que les prix lorsque le coût du médicament est à la charge des Canadiens — qu’il s’agisse de patients ou de contribuables » (par. 34). Les ventes de Thalomid aux Canadiens effectuées par Celgene dans le cadre du PAS remplissent toutes ces conditions.

[31] Le Conseil est également arrivé à la conclusion, à laquelle je souscris, qu’une interprétation stricte, fondée sur le droit commercial, du mot « vente » figurant à l’al. 80(1)(b) lui donnerait compétence à l’égard de ventes qui, bien que techniquement réalisées au Canada, sont destinées à d’autres pays. Un tel résultat serait incompatible avec l’objectif de la loi, à savoir la réglementation du prix des médicaments brevetés vendus sur le marché *canadien*, non pas sur le marché étranger :

... la Loi n’a pas conféré au Conseil le mandat de protéger les intérêts des acheteurs européens de médicaments brevetés, sans égard au lieu où la vente a été effectuée au sens qu’en donne le Common Law. Dans le Common Law, le lieu où la vente a été effectuée ne crée pas une compétence pour le Conseil même si le lieu de vente est le Canada et, inversement, il ne prive pas non plus le Conseil de sa compétence lorsque le lieu de vente se trouve à l’extérieur du Canada. [par. 36]

[32] Par conséquent, je suis d’avis que le contexte législatif, ainsi que l’objectif de protection du consommateur de l’al. 80(1)(b), du par. 83(1) et de l’art. 85 de la *Loi sur les brevets* étayaient la conclusion du Conseil selon laquelle, d’après le libellé de ces dispositions, il a compétence sur les ventes de Thalomid par Celgene à des Canadiens dans le cadre du PAS.

[33] Enfin, une dernière observation. Devant notre Cour, les parties n’ont présenté aucun argument concernant la norme de contrôle applicable. Toutes deux ont considéré, aux diverses étapes du contrôle judiciaire, que la norme de la décision correcte s’appliquait. Les parties ne devraient certes pas avoir la faculté de *se soustraire*, d’un commun accord, à l’application de la norme de contrôle appropriée, mais, à l’instar du juge *Evans*, j’estime que la décision du Conseil serait confirmée, peu importe la norme appliquée.

TAB 22

Her Majesty The Queen *Appellant*

v.

John H. Craig *Respondent*

INDEXED AS: CANADA v. CRAIG

2012 SCC 43

File No.: 34144.

2012: March 23; 2012: August 1.

Present: LeBel, Deschamps, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Taxation — Income Tax — Deduction of farming losses — Taxpayer drawing income from farming and other sources — Taxpayer deducting farming losses from total income — Whether farm income combined with other income constitutes chief source of income — Whether totality of farming losses deductible from income — Income Tax Act, R.S.C. 1985, c. 1 (5th Suppl.), s. 31(1)(a).

Courts — Decisions — Stare decisis — Whether subordinate courts may overrule higher court precedent — Circumstances in which prior Supreme Court of Canada decisions will be reconsidered or revised.

Section 31(1) of the *Income Tax Act* limits deductible losses “[w]here a taxpayer’s chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income”. In *Moldowan v. The Queen*, [1978] 1 S.C.R. 480, this Court found that a predecessor to s. 31(1) contemplated three classes of taxpayer involved in farming. In the first class are taxpayers for whom farming provides the bulk of income or the centre of work routine. Loss deductions are not limited for this class. In the second are taxpayers who do not look to farming, or to farming and some subordinate source of income, for their livelihood, but carry on farming as a sideline business. For this class, s. 31(1) limits loss deductions. The third class consists of taxpayers who carry on some farming

Sa Majesté la Reine *Appelante*

c.

John H. Craig *Intimé*

RÉPERTORIÉ : CANADA c. CRAIG

2012 CSC 43

Nº du greffe : 34144.

2012 : 23 mars; 2012 : 1^{er} août.

Présents : Les juges LeBel, Deschamps, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit fiscal — Impôt sur le revenu — Déduction des pertes agricoles — Revenu tiré par le contribuable de l'agriculture et d'autres sources — Pertes agricoles déduites par le contribuable de son revenu total — La combinaison du revenu agricole et d'un autre revenu constitue-t-elle la principale source de revenu? — La totalité des pertes agricoles est-elle déductible du revenu? — Loi de l'impôt sur le revenu, L.R.C. 1985, ch. 1 (5^e suppl.), art. 31(1)a).

Tribunaux — Décisions — Stare decisis — Les cours inférieures peuvent-elles écarter un précédent établi par une cour supérieure? — Circonstances dans lesquelles les arrêts antérieurs de la Cour suprême sont réexaminés ou révisés.

Le paragraphe 31(1) de la *Loi de l'impôt sur le revenu* limite la déductibilité des pertes « [l]orsque le revenu d'un contribuable, pour une année d'imposition, ne provient principalement ni de l'agriculture ni d'une combinaison de l'agriculture et de quelque autre source ». Notre Cour a conclu dans *Moldowan c. La Reine*, [1978] 1 R.C.S. 480, qu'une version antérieure du par. 31(1) envisageait trois catégories de contribuables agriculteurs. La première catégorie regroupe les contribuables qui tirent la plus grande partie de leur revenu de l'agriculture ou pour qui l'agriculture constitue le centre de leur travail habituel. Cette catégorie n'est assujettie à aucune limite pour ce qui est des pertes déductibles. La deuxième catégorie est formée des contribuables qui ne considèrent pas l'agriculture,

In my view, the combination question should be interpreted to require only an examination of the cumulative effect of the aggregate of the capital invested in farming and a second source of income, the aggregate of the income derived from farming and a second source of income, and the aggregate of the time spent on farming and on the second source of income, considered in the light of the taxpayer's ordinary mode of living, farming history, and future intentions and expectations. This would avoid the judge-made test that requires farming to be the predominant element in the combination of farming with the second source of income, which in my view is a test that cannot stand with subsequent jurisprudence. It would result in a positive answer to the combination question if, for example, the taxpayer has invested significant capital in a farming enterprise, the taxpayer spends virtually all of his or her working time on a combination of farming and the other principal income-earning activity, and the taxpayer's day to day activities are a combination of farming and the other income-earning activity, in which the time spent in each is significant. [para. 83]

[37] All of these authorities support the idea that s. 31(1) does not contemplate a simple aggregation of two sources of income, but requires a wider inquiry into the amount of capital, time, effort, commitment and general emphasis on the part of the taxpayer with respect to the sources of income. There is no requirement that the two sources of income must be connected in order to meet the combination test.

[38] However, before going further, two considerations must be borne in mind. First, it is necessary to interpret the provision having regard to its text, context and purpose (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 55). Nonetheless, purposive interpretation cannot justify finding unexpressed legislative intentions. (See *Shell*, at para. 43.) Second, the question as to whether the combination of farming and some other source of income constitutes the taxpayer's chief source of income is a fact-based determination.

[39] I see nothing in the words or context in s. 31(1) to support the proposition that farming must be the predominant source of income when viewed in combination with another source, in order to avoid the loss deduction limitation of the section.

À mon avis, la question de la combinaison doit être interprétée de manière à n'exiger qu'un examen de l'effet cumulatif du total du capital investi dans l'agriculture et dans une deuxième source de revenu, du total du revenu tiré de l'agriculture et d'une deuxième source de revenu, et du total du temps consacré à l'agriculture et à la seconde source de revenu, compte tenu du mode de vie ordinaire du contribuable, de son expérience de l'agriculture, enfin de ses intentions et de ses attentes. On évitera ainsi d'appliquer le critère jurisprudentiel selon lequel l'agriculture doit être l'élément prédominant de la combinaison de l'agriculture et de la seconde source de revenu, un critère qui à mon avis a été mis à mal par la jurisprudence ultérieure. Il y aurait une réponse positive à la question de la combinaison si, par exemple, le contribuable a investi une somme appréciable dans une entreprise agricole, s'il consacre la quasi-totalité de son temps de travail à la fois à l'agriculture et à l'autre activité principale lucrative, et si ses activités quotidiennes combinent l'agriculture et l'autre activité lucrative, le temps consacré à chacune étant important. [par. 83]

[37] Toutes sources doctrinales et jurisprudentielles étayaient l'idée que le par. 31(1) n'envisage pas simplement l'addition de deux sources de revenu mais exige un examen plus étendu du capital, du temps, des efforts que le contribuable a consacré à ses sources de revenu ainsi que de l'intérêt et de l'importance qu'il y attache. Le respect du critère de la combinaison n'exige pas que les deux sources de revenu soient reliées entre elles.

[38] Avant d'aller plus loin, cependant, deux observations s'imposent. Premièrement, la disposition doit s'interpréter en fonction de son texte, de son contexte et de son objet (*Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 55). L'interprétation téléologique ne saurait toutefois justifier de conclure à l'existence d'intentions législatives non exprimées. (Voir *Shell*, par. 43.) Deuxièmement, la question de savoir si la combinaison de l'agriculture et d'une autre source de revenu constitue la principale source de revenu d'un contribuable est tranchée en fonction des faits.

[39] Rien dans le libellé ou le contexte du par. 31(1) ne permet selon moi d'affirmer que, pour que la déductibilité des pertes agricoles ne soit pas limitée, il faut que, dans la combinaison avec une autre source de revenu, l'agriculture prédomine. Il

It is also not possible to relegate s. 31(1) to applying only to “hobby” or “gentleman” farmers because, for a loss to be deductible at all, farming must be a source of income. A taxpayer who is engaged in farming in a non-commercial manner, with no profit or intention to profit, does not have a source of income from farming and therefore no loss for income tax purposes, limited or not (*Stewart v. Canada*, 2002 SCC 46, [2002] 2 S.C.R. 645, at paras. 51-54).

[40] The provision is addressed to losses from farming businesses. There is no loss deduction limitation where farming is the taxpayer’s chief source of income. That implies that such a taxpayer is investing significant funds and spending considerable time in that business. Otherwise, it is difficult to see such a business as a chief source of income.

[41] I do not think that characterization of farming changes under the combination test. The provision still contemplates that the taxpayer will devote significant time and resources to the farming business, even if he or she will also devote significant time and possibly resources to another business or employment. It seems to me that, as long as the taxpayer devotes considerable time and resources to the farming business, the fact that another source of income produces greater income than the farm does not mean that such a combination is not a chief source of income for the taxpayer.

[42] The approach to the combination question described by Mr. Felesky, Dickson J. and Sharlow J.A., makes sense. It is grounded in the words of s. 31(1), which limits only a taxpayer’s losses “from all farming businesses” where the taxpayer’s chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income. With respect to the combination, a simple aggregation of income from two sources cannot have been contemplated by the section, meaning that factors other than two sources of income alone must be taken into account. The

n’est pas non plus possible de restreindre l’application du par. 31(1) aux contribuables pour qui l’agriculture n’est qu’un « passe-temps » ou un « loisir », parce que, pour qu’une perte agricole soit déductible, il faut d’abord que l’agriculture soit une source de revenu. Or, du point de vue fiscal, elle n’est pas une source de revenu si les activités agricoles du contribuable ne sont pas commerciales, ne génèrent pas de profit ou ne visent pas la réalisation d’un profit, de sorte qu’il ne peut y avoir perte agricole, limitée ou non (*Stewart c. Canada*, 2002 CSC 46, [2002] 2 R.C.S. 645, par. 51-54).

[40] La disposition concerne les pertes d’entreprises agricoles. Leur déductibilité n’est pas limitée lorsque l’agriculture est la principale source de revenu du contribuable; cela suppose que celui-ci y consacre des capitaux substantiels et beaucoup de temps, car il est difficile, autrement, de considérer une telle entreprise comme une source principale de revenu.

[41] Je ne crois pas que le critère de la combinaison modifie cette définition de l’activité agricole. On voit encore dans la disposition que le contribuable doit consacrer beaucoup de temps et de ressources à l’entreprise agricole, même s’il doit également consacrer un temps appréciable et, peut-être, des ressources substantielles à une autre entreprise ou un emploi. Dès lors que le contribuable consacre beaucoup de temps et de ressources à l’entreprise agricole, le fait qu’une autre source de revenu soit plus lucrative ne signifie pas, il me semble, que le revenu du contribuable ne provient pas principalement d’une telle combinaison.

[42] Cette conception de la combinaison exposée par M. Felesky et par les juges Dickson et Sharlow est logique. Elle est fondée sur le texte du par. 31(1), qui ne limite les pertes d’un contribuable « provenant de toutes les entreprises agricoles » que lorsque son revenu pour une année d’imposition ne provient principalement ni de l’agriculture ni d’une combinaison de l’agriculture et de quelque autre source. Relativement à la combinaison, la disposition n’a pu l’envisager comme la simple addition de revenus provenant de deux sources, de sorte que d’autres facteurs que les deux sources doivent aussi

TAB 23

**9354-9186 Québec inc. and
9354-9178 Québec inc. *Appellants***

v.

**Callidus Capital Corporation,
International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier
*Respondents***

and

**Ernst & Young Inc.,
IMF Bentham Limited (now known as
Omni Bridgeway Limited),
Bentham IMF Capital Limited (now known
as Omni Bridgeway Capital (Canada)
Limited), Insolvency Institute of Canada and
Canadian Association of Insolvency and
Restructuring Professionals *Interveners***

- and -

**IMF Bentham Limited (now known as Omni
Bridgeway Limited) and
Bentham IMF Capital Limited (now known
as Omni Bridgeway Capital (Canada)
Limited) *Appellants***

v.

**Callidus Capital Corporation,
International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier
*Respondents***

and

**9354-9186 Québec inc. et
9354-9178 Québec inc. *Appelantes***

c.

**Callidus Capital Corporation,
International Game Technology,
Deloitte S.E.N.C.R.L., Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx et François Pelletier *Intimés***

et

**Ernst & Young Inc.,
IMF Bentham Limited (maintenant
connue sous le nom d’Omni Bridgeway
Limited), Corporation Bentham IMF
Capital (maintenant connue sous le nom de
Corporation Omni Bridgeway Capital
(Canada)), Institut d’insolvabilité du Canada
et Association canadienne des professionnels
de l’insolvabilité et de la réorganisation
*Intervenants***

- et -

**IMF Bentham Limited (maintenant
connue sous le nom d’Omni Bridgeway
Limited) et Corporation Bentham IMF
Capital (maintenant connue sous le nom de
Corporation Omni Bridgeway Capital
(Canada)) *Appelantes***

c.

**Callidus Capital Corporation,
International Game Technology,
Deloitte S.E.N.C.R.L., Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx et François Pelletier *Intimés***

et

**Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Insolvency Institute of Canada and
Canadian Association of Insolvency
and Restructuring Professionals** *Interveniers*

**Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Institut d'insolvabilité du Canada et
Association canadienne des professionnels
de l'insolvabilité et de la réorganisation** *Intervenants*

**INDEXED AS: 9354-9186 QUÉBEC INC. v.
CALLIDUS CAPITAL CORP.**

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

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

**ON APPEAL FROM THE COURT OF APPEAL
FOR QUEBEC**

Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose — Whether supervising judge can approve third party litigation funding as interim financing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("CCAA") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the

**RÉPERTORIÉ : 9354-9186 QUÉBEC INC. c.
CALLIDUS CAPITAL CORP.**

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

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

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Pouvoir discrétionnaire du juge surveillant dans une instance introduite sous le régime de la Loi sur les arrangements avec les créanciers des compagnies — Contrôle en appel des décisions du juge surveillant — Le juge surveillant a-t-il le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement si ce créancier agit dans un but illégitime? — Le juge surveillant peut-il approuver le financement de litige par un tiers à titre de financement temporaire? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.2.

En novembre 2015, les compagnies débitrices déposent une requête en délivrance d'une ordonnance initiale sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« LACC »). La requête est accueillie, et l'ordonnance initiale est rendue par un juge surveillant, qui est chargé de surveiller le déroulement de l'instance. Depuis, la quasi-totalité des éléments d'actif de la compagnie débitrice ont été liquidés, à l'exception notable des réclamations réservées en dommages-intérêts contre le seul créancier garanti des compagnies. En septembre 2017, le créancier garanti propose un plan d'arrangement, qui n'obtient pas subséquemment l'appui nécessaire des créanciers. En février 2018, le créancier garanti propose un autre plan d'arrangement, presque identique au premier. Il demande aussi au juge surveillant la permission de voter sur ce nouveau plan dans la même catégorie que

commonly referred to as a “fairness hearing” to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies’ Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at §45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (CCAA, s. 6(1)).

[58] Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the CCAA barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

[59] Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the CCAA reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the CCAA scheme with s. 54(3) of the BIA, which provides that “[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal.” The appellants point out that, under s. 50(1) of the BIA, only debtors can sponsor plans; as a result, the reference to “debtor” in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the CCAA must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are “related to the company”, as the provision states, but to any

en faveur du plan, le juge surveillant peut homologuer celui-ci (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, par. 34; voir la LACC, art. 6). Le juge surveillant tiendra ce qu’on appelle communément une [TRADUCTION] « audience d’équité » pour décider, entre autres choses, si le plan est juste et raisonnable (Wood, p. 490-492; Sarra, *Rescue! The Companies’ Creditors Arrangement Act*, p. 529; Houlden, Morawetz et Sarra, §45). Une fois homologué par le juge surveillant, le plan lie chaque catégorie de créanciers qui a participé au vote (LACC, par. 6(1)).

[58] Les créanciers qui ont une réclamation prouvable contre le débiteur et dont les intérêts sont touchés par un plan d’arrangement proposé ont habituellement le droit de voter sur un tel plan (Wood, p. 470). En fait, aucune disposition expresse de la LACC n’interdit à un créancier de voter sur un plan d’arrangement, y compris sur un plan dont il fait la promotion.

[59] Nonobstant ce qui précède, les appelantes soutiennent qu’une interprétation téléologique du par. 22(3) de la LACC révèle que, de façon générale, un créancier ne devrait pas pouvoir voter sur son propre plan. Le paragraphe 22(3) prévoit :

Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l’acceptation de la transaction ou de l’arrangement.

Les appelantes font remarquer que le par. 22(3) devait permettre d’harmoniser le régime de la LACC avec le par. 54(3) de la LFI, qui dispose que « [u]n créancier qui est lié au débiteur peut voter contre, mais non pour, l’acceptation de la proposition. » Elles soulignent que, en vertu du par. 50(1) de la LFI, seuls les débiteurs peuvent faire la promotion d’un plan; ainsi, le « débiteur » auquel renvoie le par. 54(3) s’entend de *tous* les promoteurs de plan. Elles soutiennent que, si le par. 54(3) vise tous les promoteurs de plan, le par. 22(3) de la LACC doit également les viser. Pour cette raison, les appelantes nous demandent d’étendre la restriction au droit de

creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot “dilute” or overtake the votes of other creditors.

voter imposée par le par. 22(3) de manière à ce qu’elle s’applique non seulement aux créanciers « lié[s] à la compagnie », comme le prévoit la disposition, mais aussi à tous les créanciers qui font la promotion d’un plan. Elles soutiennent que cette interprétation donne effet à l’intention sous-jacente aux deux dispositions, intention qui, de dire les appelantes, est de faire en sorte qu’un créancier qui est en conflit d’intérêts ne puisse pas « diluer » ou supplanter le vote des autres créanciers.

[60] We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are “related to the [debtor] company”. These words are “precise and unequivocal” and, as such, must “play a dominant role in the interpretive process” (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In our view, the appellants’ analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

[60] Nous n’acceptons pas cette interprétation forcée du par. 22(3). Il n’est nullement question dans cette disposition de conflit d’intérêts entre les créanciers et les promoteurs d’un plan en général. Les restrictions au droit de voter imposées par le par. 22(3) ne s’appliquent qu’aux créanciers qui sont « lié[s] à la compagnie [débitrice] ». Ce libellé est « précis et non équivoque », et il doit ainsi « jouer un rôle primordial dans le processus d’interprétation » (*Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 10). À notre avis, l’analogie que les appelantes font avec la *LFI* ne suffit pas à écarter le libellé clair de cette disposition.

[61] While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at §33, *Red Cross; Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 59; see also *Third Eye*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

[61] Bien que les appelantes aient raison de dire que l’adoption du par. 22(3) visait à harmoniser le traitement réservé aux parties liées par la *LACC* et la *LFI*, son historique montre qu’il ne s’agit pas d’une disposition générale relative aux conflits d’intérêts. Avant qu’elle soit modifiée et qu’on y incorpore le par. 22(3), la *LACC* permettait clairement aux créanciers de présenter un plan d’arrangement (voir Houlden, Morawetz et Sarra, §33, *Red Cross; Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). À l’opposé, en vertu de la *LFI*, seuls les débiteurs pouvaient déposer une proposition. Il faut présumer que le législateur était au fait de cette différence évidente entre les deux lois (voir *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 59; voir aussi *Third Eye*, par. 57). Le législateur a malgré tout importé dans la *LACC*, avec les adaptations nécessaires, le texte de la disposition de la *LFI* portant sur les créanciers liés. Aller au-delà de ce libellé suppose d’accepter que le législateur n’a pas choisi les bons mots pour donner effet à son intention, ce que nous ne ferons pas.

TAB 24

Unofficial English Translation

R. c. Darby**2012 QCCS 26**

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF SAINT-FRANÇOIS

No.: 450-73-000743-108

DATE: January 9, 2012

THE HONOURABLE MARTIN BUREAU, J.S.C., PRESIDING

THE QUEEN

Prosecutrix

v.

DONALD DARBY

Accused

SENTENCING DECISION

[1] On November 7, 2011, the accused Donald Darby pleaded guilty to the following indictment:

[TRANSLATION]

1.- Between January 4 and April 18, 2006, at Sherbrooke, district of Saint-François, Laval, district of Laval, Drummondville, district of Drummondville, Montreal, district of Montreal, St-Jean-sur-le-Richelieu, district of Iberville, and elsewhere in the province of Quebec, did conspire, combine or agree with the following persons: Carole Aubut, Robert Beaurivage, Claude Bédard, Richard Bédard, France Benoît, Louise Bonami, Céline Bonin, Pierre Bourassa, Fabien

450-73-000743-108

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Chouinard, Jean-Claude Clément, Henry Colby, Harold Côté, Julie Côté, Luc Couturier, Yves Daigneault, Francis Dubreuil, Michel Dubreuil, Gisèle Durand, Jean-Pierre Durand, Nycole Durand, Lucie Francis, Luc Forget, Sylvie Fréchette, Yves Gosselin, Stéphane Grant, Gérald Groux, Jean-Pierre Héту, Valérie Houde, Johanne Jutras, Denis Laflamme, Fernand Laflamme, Daniel Leblond, Jean-Guy Léveillé, Renaud Loignon, Richard Michaud, Christian Payette, Martin Proulx, Michel Rioux, Tina Rouleau, Guy Roy, René Roy, Léo-Paul Therrien, Serge Therrien, Sylvie Turgeon, Yvon Vadnais, Couche-Tard Inc., Global Fuels Inc., Jean-Guy Léveillé Libre-Service Inc., Gaz-de-l'Estrie Inc., Gaz-O-Pneus Inc., Gérald Groulx Station Service Inc., Les Pétroles Therrien Inc., Les Distributions Pétrolières Therrien Inc., Service Autogarde D.D. inc., Université Galt Service Inc., 134553 Canada inc., 9038-6095 Québec Inc., 9045-0586 Québec inc., 9064-4360 Québec inc., 9046-0601 Québec inc., 9131-4716 Québec inc., 2311-5959 Québec inc., 9010-1460 Québec inc., as well as with other persons heretofore unknown; in order to prevent or lessen, unduly, competition in the retail sale of regular gasoline in the Sherbrooke market by price-fixing, thereby committing the criminal offence provided in section 45(1)(c) of the *Competition Act*.

[2] It is now up to the Court to determine the appropriate sentence.

[3] The Crown recommends a fine of between \$7,500 and \$10,000. The accused seeks an absolute discharge and has offered to donate an amount of at least \$10,000 to charity.

[4] To spare the Crown from having to prove certain relevant facts during submissions as to sentence, and for no other reason, the parties have admitted various facts in a document entitled [TRANSLATION] "joint statement of facts for the purpose of submissions as to sentence".

JOINT STATEMENT OF FACTS

[5] For better understanding, the Court reproduces large excerpts from this joint statement below:

[TRANSLATION]

I. THE ACCUSED

1. At the time of the offence, **Donald Darby** was director, president and majority shareholder of Service Autogarde D.D. inc., a company that operated two service stations under the Shell banner, at 1945 Galt Street West and 3265 King Street West in Sherbrooke. This company is a legal person constituted since December 23, 1987, under Part 1A of the *Companies Act*.

VI. FACTORS SPECIFIC TO DONALD DARBY

25. **Donald Darby's** guilty plea permits the legal system to avoid additional costs that otherwise would have been incurred for investigation and subsequent prosecution.
26. **Donald Darby** has no criminal record.

APPLICABLE LEGISLATIVE PROVISIONS AND MAIN SENTENCING PRINCIPLES

[6] It is mainly sections 718 to 718.2 of the *Criminal Code* that establish the applicable principles and purposes. It is useful to reproduce the text of these legislative provisions here:

718. Purpose – The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.01 Objectives – offences against children – When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

718.02 Objectives – offence against peace officer or other justice system participant – When a court imposes a sentence for an offence under subsection 270(1), section 270.01 or 270.02 or paragraph 423.1(1)(b), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

718.1 Fundamental principle – A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 Other sentencing principles – A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

TAB 25

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- a g a i n s t -

MITSUBISHI CORPORATION

AMENDED

REASONS FOR SENTENCE

DELIVERED BY THE HONOURABLE MADAM JUSTICE CHAPNIK on Tuesday,
May 12th, 2005 at 361 University Avenue, Toronto, Ontario.

APPEARANCES:

D. Schippers, Esq.

Counsel for the Attorney General of Canada

J.B. Laskin, Esq.

Counsel for the Accused Corporation

M. Plumptre, Ms.

S.46(1) of the *Competition Act*, R.S. 1985, c. C-34 reads as follows:

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

Section 21(1) of the *Criminal Code of Canada* reads:

“Every one is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.”

What then is the appropriate penalty for the court to impose in these particular circumstances?

In assessing whether the joint submission of a fine in the amount of \$1 million is a proper and just disposition, I have considered and will review the aggravating and mitigating circumstances and the question of parity within the context of the usual sentencing principles as set out in the jurisprudence and in the *Criminal Code of Canada*.

TAB 26

R. c. Mouyal

2007 QCCQ 6141

COURT OF QUEBEC

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
"Penal & Criminal Division"

No: 500-73-001866-025
500-73-001865-027

DATE: May 28, 2007

IN THE PRESENCE OF: THE HONOURABLE ELIZABETH CORTE, Q.C.J.

THE QUEEN

v.
MICHAEL MOUYAL

DECISION ON SENTENCING

[1] Michael Mouyal plead guilty to, while engaged in telemarketing between 1994 and 2001, having illegally made false or misleading representations in a material aspect, to wit, conveying the general impression that there existed a contractual link, a business relationship, or both, in the present or the past, between them and their clients or potential clients, concerning the distribution of commercial supplies , contrary to article 52 of the Competition Act.

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500-73-001865-027

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[34] Obviously Michael Mouyal's sentence should be more important than the fines first suggested by the Crown for Pold and Misiurak, because of his greater responsibility, involvement and earnings. The parity principle, or more precisely, the principle of proportionality would thus be respected.

The guilty plea

[35] Crown submits that the Court should not give too much weight to the accused's guilty plea since it is tardy in the process and does not, in this case, indicate remorse.

[36] The Court cannot agree with this argument. Michael Mouyal's trial was scheduled to last 5 weeks, and this was a conservative estimate. It is an understatement to say that the Courts could not offer trials in a reasonable delay if all the trials were to proceed and everyone used the full advantages of our adversarial system. It is also common knowledge that one can never be sure of the outcome of a trial nor predict how long it really would last.

[37] So not only did the accused collaborate with the justice system by saving the Court's time but by pleading guilty the accused admitted the offence he is charged with thus saving the crown the onus of proving his guilt.

Aggravating factors in the Competition Act

[38] The Competition Act states that the sentencing judge will consider as aggravating the amount of proceeds realized by the person from the telemarketing. The evidence shows that \$136 millions was generated by the accused's companies. The evidence does not establish what part of this amount came from legitimate sales and what part of this amount represents the returns and credit notes. This has to be taken into consideration.

[39] The use of lists of persons previously deceived by means of telemarketing also is stated as an aggravating factor. In this case the people contacted were part of the Michael Mouyal's client data bank and not part of a list constituted of people previously victims of fraudulent telemarketing. Evidence does show that some clients were solicited by the Mouyal Group of companies more than once. While not constituting an aggravating factor, this is to be considered.

Reasons

[40] As serious as the accusations are, Michael Mouyal was charged of contravening the Competition Act, not the criminal code and the sentence that is to be imposed has to reflect that very important distinction, since all sentences need to be coherent to be fair.

[41] The maximum penalty is of 5 years of imprisonment and of course some of these offences can warrant a jail term.

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[42] The Court finds that the principles of denunciation and deterrence should be given priority in this case. Telemarketing operations using deceptive or false representations are in the best case scenario a horrible nuisance and often, as in this case, causes monetary losses to clients and damages to the economy and other lawful businesses.

[43] In this case rehabilitation of the accused is not in issue: he has no criminal record and the crown has not proven any likelihood of him re offending; but providing reparations for harm done to victim or to the community, and promoting a sense of responsibility in offenders, and acknowledgement of the harm done to victims and the community, are also sentencing objectives that need to be considered in this case.

[44] The question is the following: is a jail sentence the only sentence that will attain these objectives?

[45] It is not to be forgotten that even if imprisonment certainly meets the objectives of denunciation and deterrence, it is not the only sentence that does. The amendments in 1996 of the sentencing provisions of the criminal code and the following Supreme Court decision of R.vs Proulx reinforced the notion that imprisonment should be a last resort, reserved when other punishments would not be appropriate, I will read the criminal code section 718.2 (d): " an offender should not be deprived of his liberty if less restrictive sanctions may be appropriate in the circumstances" and section 718.2 (e) : all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders...."

[46] The accused has no criminal record. He has a life in the United States that is interrupted by his conviction. He suffered from the publicity of the case with his photograph published in Montreal and Toronto newspapers.

[47] He plead guilty to the charges laid against him personally saving the Courts time and energy.

[48] He is able to pay a fine of 1million dollars and is willing to do community work.

[49] Deciding on the fair sentence requires (as always) a delicate balancing of all factors, aggravating and mitigating while applying sentencing principles. The punishment is to be proportional to the gravity of the crime and the responsibility of the accused. Especially a first sentence is to be as lenient as possible while respecting the sentencing objectives.

[50] The Court considers that a fine of 1 million dollars combined with a probation order with conditions of community work and compensation and the requested prohibition order is a sentence that meets with all sentencing objectives: victim's losses will be reimbursed, society will benefit from the fine and, hopefully, Michael Mouyal will also benefit from the community work, that is punitive by nature.

TAB 27

2012 FC 1117, 2012 CF 1117
Federal Court

R. v. Maxzone Auto Parts (Canada) Corp.

2012 CarswellNat 3686, 2012 CarswellNat 5058, 2012 FC 1117, 2012 CF 1117, [2012]
A.C.F. No. 1206, [2012] F.C.J. No. 1206, 103 W.C.B. (2d) 892, 418 F.T.R. 256 (Eng.)

Her Majesty the Queen and Maxzone Auto Parts (Canada) Corp., Accused

Paul S. Crampton C.J.

Heard: May 3, 2012

Judgment: September 24, 2012

Docket: T-798-12

Counsel: Mr. Gary Caracciolo, Ms. Nicola Pfeifer, for Her Majesty the Queen
Mr. D. Martin Low, Mr. Casey W. Halladay, for Accused

Subject: Corporate and Commercial; Civil Practice and Procedure; Criminal

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Price maintenance — Principles of sentencing

Corporate accused sentenced to fine of \$1.5 million, as jointly recommended by parties, after it pleaded guilty to Competition Act offence — Sentencing judge expressed some hesitation towards accepting joint submission — Accused was involved in manufacture and supply of automobile headlights and entered into price fixing agreement with major competitor — Price Fixing Agreement included, but was not limited to, coordinated pricing formula, maintenance of price discipline to avoid price war, coordination of responses to new market entrants, maintenance of common discount program, and sharing of price data — Over course of relevant period, accused and competitor occasionally did not comply with that agreement — Jointly recommended sentence was arithmetically determined by reference to volume of accused's commerce in Canada during relevant period, which was \$15 million — Accused received 50 percent reduction in applicable fine under leniency program — Court had issues with lack of detail that went into calculation of fine and stated that it would need better evidence in future, especially on issue of how much accused profitted from agreement — Accused was no longer doing business in Canada and agreed to submit to jurisdiction of Canadian Courts.

Table of Authorities

Cases considered by *Paul S. Crampton C.J.*:

55 Indeed, such agreements have a greater adverse economic impact on society than do theft and fraud. This is because, in addition to leading to a transfer of wealth from victims of the agreement to the participants in the agreement, they also generally result in further detrimental effects on the economy. Such further effects include what is often referred to as the "deadweight loss" to the economy that results when higher prices lead buyers at the margin to switch to less valued substitutes, thereby bringing about a misallocation of resources. This misallocation of resources typically reduces aggregate wealth in the economy by an amount that is equivalent to a significant percentage of the wealth transfer mentioned above.

56 Price fixing and other hard core cartel agreements therefore ought to be treated at least as severely as fraud and theft, if not even more severely than those offences.

57 When, as in the case at bar, a price fixing agreement affects a market that comprises sales in the tens of millions, it should be treated as a major fraud, and denounced accordingly. At a minimum, this requires the imposition of a fine that (i) ensures that the accused corporation does not profit from its illegal conduct, and (ii) includes an additional significant amount to communicate the Court's recognition of the very serious nature of such illegal conduct, its substantial adverse impact on the economy, and society's abhorrence of the crime.

58 Unfortunately, an evidentiary record such as that which was before me in these proceedings is not sufficient to enable the Court to be satisfied that a sentence determined in the manner that was embraced in this case would reflect either of these principles. The Court will expect more in the future.

C. Deterrence

59 Courts in Canada have consistently identified general and specific deterrence as an important objective in sentencing for offences under the Act. (See, for example, *Kason*, above, at para 8; *R. v. Mitsubishi Corp.*, [2005] O.J. No. 2394 (Ont. S.C.J.), at para 22; *R. v. UCAR Inc.* (1999), 164 F.T.R. 85 (Fed. T.D.), at para 21; *Kanzaki*, above, at para 5; *R. v. McNamara (No. 2)*, [1981] O.J. No. 3260 (Ont. C.A.), at para 21; *Albany Felt*, above, at 206-7(Qc SC); *R. v. Hoffmann-La Roche Ltd.* (1980), 53 C.P.R. (2d) 189 (Ont. S.C.), at 190 -91; *R. v. Canadian General Electric Co.*, [1977] O.J. No. 509 (Ont. H.C.), at para 4 ("*Large Lamps*"); *R. v. Armco Canada Ltd.* (1975), 19 C.P.R. (2d) 273 (Ont. H.C.), at 274, varied on different grounds (1976), 13 O.R. (2d) 32n (S.C.C.), leave to appeal refused (1976), 30 C.C.C. (2d) 183 (Ont. C.A.); *R. v. Aetna Insurance Co.* (1975), 24 C.P.R. (2d) 160 (N.S. C.A.), at 162, rev'd on other grounds (1977), [1978] 1 S.C.R. 731 (S.C.C.); *Browning Arms*, above, at 303; and *R. v. St. Lawrence Corp.* (1966), 51 C.P.R. 170 (Ont. H.C.), at 190 -91; aff'd [1969] O.J. No. 1326 (Ont. C.A.).

60 As noted in *Mitsubishi*, above, at para 20, and in the Crown's sentencing submissions, the courts have also repeatedly emphasized that fines in criminal price-fixing cases must be set

sufficiently high to ensure that they are more than a mere license fee or a cost of doing business. (See, for example, *Kanzaki*, above, at para 5; *R. v. Davis Wire Industries Ltd.* (1992), 47 C.P.R. (3d) 394 (B.C. S.C.), at 397; *Albany Felt*, above, at 206; *Armco*, above, at 275; *Browning Arms*, above, at 300-01,303; and *R. v. Ocean Construction Supplies Ltd.* (1974), 15 C.P.R. (2d) 224 (B.C. S.C.), at 229. See also *R. v. Shell Canada Products Ltd.* (1990), 75 C.R. (3d) 365 (Man. C.A.), at 375; *R. v. Rolex Watch Co. of Canada* (1980), 50 C.P.R. (2d) 222 (Ont. C.A.), at 228; *R. v. A. & M. Records of Canada Ltd.* (1980), 51 C.P.R. (2d) 225 (Ont. Co. Ct.), at 230; *R. v. Kito Canada Ltd.* (1976), 25 C.P.R. (2d) 145 (Man. C.A.), at 146; *R. v. Superior Electronics Inc.* (1979), 45 C.P.R. (2d) 234 (B.C. C.A.), at 236; *R. v. Northern Electric Co.* (1956), 26 C.P.R. 73 (Ont. H.C.), at 74 -5; *R. v. Goodyear Tire & Rubber Co. of Canada Ltd.*, [1956] S.C.R. 303 (S.C.C.), at 311; and *R. v. Dominion Steel & Coal Corp.* (1956), 27 C.P.R. 57 (Ont. H.C.), at 76). To be sufficient to achieve effective general deterrence, fines imposed in respect of criminal anti-competitive agreements must be substantial and exemplary, but not crippling or vindictive (*McNamara*, above, at para 26).

61 As is increasingly recognized in international competition law circles, fines are unlikely to deter persons contemplating becoming a party to a price fixing or other hard core cartel agreement unless they are set at a level that is likely to render the expected value of such action negative. This means that fines must take account of the low probability of detection, prosecution and conviction. To give a simple example, if the expected additional profits from a cartel overcharge ("Overcharge") were estimated to be \$1 million, and the combined probability of detection, prosecution and conviction was 50%, the fine would need to exceed \$2 million to render the expected value of joining the prospective cartel negative. In other words, to be an effective deterrent in this example, the fine would need to be more than double the expected gain from the Overcharge.

62 As counsel to the Crown observed during the sentencing hearing in this case, and has been recognized in the jurisprudence (see, for example, *Mitsubishi*, above, at para 9; *R. c. Ciment Québec Inc.*, [1996] J.Q. No. 2580 (C.S. Que.), at para 22, and *McNamara*, above, at para 26), "cartels are very hard to detect." Common sense suggests that the combined probability of detection, prosecution and conviction for participating in a price fixing or other hard core cartel agreement is much less than 50%. If this uncontroversial proposition is accepted, it follows that fines for engaging in such conduct should be a multiple of more than double the expected gain from the Overcharge to be an effective deterrent.

63 I am not aware of any studies that have estimated the combined probability of detection, prosecution and conviction for price fixing in Canada. Accordingly, it is not possible for me to comment upon the level of the multiple that would achieve the optimal deterrent. The Competition Committee of the Organisation for Economic Co-operation and Development ("OECD"), which is comprised of the heads of the competition enforcement agencies in the OECD's 34 member countries, has noted that "[s]ome believe that as few as one in six or seven cartels are detected and prosecuted, implying a multiple of at least six" and that a "multiple of three is more commonly

cited" (OECD, *Hard Core Cartels — Recent Progress and Challenges Ahead* (Paris: 2003), at 27). In another report, the Competition Committee noted that studies supporting multiples of larger than three exist (OECD, *Fighting Hard-Core Cartels — Harm, Effective Sanctions and Leniency Programmes* (Paris: 2002), at 91).

64 A multiple of three implies that the combined probability of detection, prosecution and conviction is 33.3%. Once again, common sense suggests that the true figure is likely less than this, and that therefore a multiple of three would be a very conservative rule of thumb to adopt in attempting to calculate the level at which a fine would have to be set to be an effective deterrent for those who may be tempted to consider participating in a price fixing or other hard core cartel agreement.

65 Unfortunately, accurately calculating the true Overcharge, in order to then apply a conservative multiple in an attempt to establish a fine that will serve as an effective deterrent, is notoriously difficult. Among other things, it is generally very difficult to establish what the price of the cartelized product(s) would have been in the absence of an impugned price fixing agreement (OECD 2002, above, at 77; International Competition Network, Cartels Working Group, *Setting of Fines for Cartels in ICN Jurisdictions* (Kyoto: April 2008), at 7). In addition, cartel agreements often do not work out as well as expected.

66 That said, in establishing a fine that is likely to serve as an effective deterrent, the fact that a proposed price fixing agreement "did not work out as well as the conspirators expected is ... of little consequence" (*McNamara*, above, at para 17). As with other forms of conspiracy, the "gist of the offence" of price fixing is the entering into the prohibited agreement itself (*R. v. Cotroni*, [1979] 2 S.C.R. 256 (S.C.C.), at 276; *R. v. Cominco Ltd.*, [1980] A.J. No. 524 (Alta. T.D.), at para 20).

67 For the purposes of achieving effective deterrence, it is the *expected* gain from the agreed upon Overcharge that is most relevant, together with the level of the multiple required to render negative, in approximate terms and on average, that gain.

68 Among other things, the Leniency Bulletin states that the Competition Bureau "will make its leniency recommendation to the PPSC only after an applicant has completed its proffer and provided all relevant information pertinent to leniency and sentencing" (paragraph 26). It also states that plea agreements entered into with the PPSC "will require the leniency applicant to provide full, frank, timely and truthful disclosure of all non-privileged information, records or other materials in its possession, under its control or available to it, wherever located, that in any manner relate to the anti-competitive conduct for which leniency is sought" (paragraph 28). The Interpretation section of that document adds that it "should be read in conjunction with the Leniency Program's Frequently Asked Questions" (FAQs). In turn, at Question #17, the FAQs state that, at the proffer stage, the Bureau "will not accept a bare outline of the conduct", but rather will require applicants for leniency to "report [the details of the offence and their role] as completely

Act does not include a term of imprisonment for one or more directors, officers or employees of an accused corporation, the Court will expect the parties' sentencing submissions to explain why a fine alone would suffice to achieve general and specific deterrence, to appropriately denunciate the crime, and to reflect the other objectives and principles set forth in section 718, 718.1, 718.2 and 718.21 of the *Criminal Code*. For the reasons explained at paragraphs 107 and 108 below, this includes situations in which one or more individuals associated with an affiliated entity have been sentenced to prison in the U.S. or another jurisdiction in respect of separate offences committed in that jurisdiction.

83 In addition to the foregoing, and as contemplated by paragraph 718.2(b) of the *Criminal Code*, the Court will want to understand how a sentence that is jointly recommended compares to sentences that have been imposed on similar offenders for similar offences committed under similar circumstances, including sentences imposed for theft and fraud of a magnitude similar to that which was contemplated by the illegal agreement. In addition, the Court will want to have at least some sense that the recommended fine disgorges any financial gain that the director, officer or employee may have received as a result of the illegal agreement, for example by way of compensation linked to the financial performance of the company.

84 The Court will also want to be satisfied that a fine alone would be consistent with Parliament's intent in recently amending section 45 to increase the maximum term of imprisonment from five years to fourteen years. More broadly, the Court will want to be satisfied that a fine alone would not be both contrary to the public interest and such as to bring the administration of justice into disrepute.

D. Reparations for Harm Done to Victims or to the Community

85 Paragraph 718(e) of the *Criminal Code* lists providing reparations for harm done to victims or to the community as one of the objectives of sentencing.

86 For the reasons explained at paragraph 55 of these reasons, the harm resulting from price fixing and other agreements proscribed by section 45 and referred to in section 46 of the Act includes the wealth transfer from victims to the perpetrators of the offence, as well as the deadweight loss that such agreements bring about for the Canadian economy. As noted at paragraph 65 above, it is often very difficult to accurately estimate both of these effects of such agreements. Nevertheless, it remains incumbent upon the Court to ensure that a sentence imposed is sufficient, even if only approximately so, to appropriately reflect this sentencing objective.

87 In the Crown's sentencing submissions, it was observed that there was no evidence that Maxzone Canada had paid any restitution in relation to the offence for which it was charged.

88 I recognize that there may be legitimate reasons why a party to a joint sentencing recommendation may wish to plead guilty and receive its sentence before having dealt with

the matter of restitution. However, the Court cannot assume that full restitution, or indeed any restitution, ultimately will be paid by a party who has pleaded guilty and has been convicted for contravening section 45 or section 46 of the Act. Indeed, the Court must be alive to the possibility that a failure to have provided restitution to victims reflects an absence of remorse and implies an intention to profit from wrongdoing (Clayton C Ruby et al, *Sentencing*, 7th ed. (Markham: LexisNexis Canada, 2008), at § 19.53).

89 Where restitution has not been paid prior to the sentencing hearing, the Court will be in a much more difficult position than would otherwise be the case. Among other things, this may make it more difficult for the Court to ensure that a recommended sentence will, on balance, achieve the purposes set forth in section 718 of the *Criminal Code*. In addition, the Court will have little alternative but to recognize that the Overcharge remains an advantage realized as a result of the offence, as contemplated by paragraph 718.21, even if the precise extent of the Overcharge cannot be accurately determined.

E. Promoting a Sense of Responsibility in Offenders, and Acknowledgement of the Harm Done to Victims and to the Community

90 Another objective of sentencing, as set forth in paragraph 718(f) of the *Criminal Code*, is promoting a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

91 This objective was not specifically addressed in the Crown's sentencing submissions in the case at bar.

92 In my view, this objective reinforces the objectives of denunciation, deterring the offender and other persons from committing similar offences, and providing reparations for harm done to victims and to the community. At a minimum, in the context of sections 45 and 46 of the Act, this objective contemplates that a sentence should (i) ensure that a convicted party does not profit from the anti-competitive agreement in question, and (ii) include an additional substantial component to promote a sense of responsibility in the offender, and an acknowledgement of the harm done to the victims and to the community. As with the objectives of denunciation and deterrence, this objective may well require at least some term of imprisonment, particularly for parties who were not the first to begin cooperating under the Competition Bureau's Leniency Program.

F. Factors Set forth in section 718.21 of the Criminal Code

93 As noted at paragraph 28 of these reasons, section 718.21 contains a list of ten factors to be taken into consideration by a court in imposing a sentence on an organization.

TAB 28

Competition Tribunal



Tribunal de la concurrence

REVISED PUBLIC VERSION¹

Reference: *Canada (Commissioner of Competition) v Cineplex Inc*, 2024 Comp Trib 5

File No.: CT-2023-003

Registry Document No.: 84

IN THE MATTER OF an Application by the Commissioner of Competition for an order under sections 74.01 and 74.1 of the *Competition Act*, RSC 1985, c C-34.

BETWEEN:

Commissioner of Competition
(applicant)

and

Cineplex Inc
(respondent)



Dates of hearing: February 14-16, 20-21 and 28-29, 2024

Before: Mr Justice Andrew D. Little (Chairperson)

Date of Reasons for Order and Order: September 23, 2024

REASONS FOR ORDER AND ORDER

¹ Revised as of February 14, 2025, pursuant to the Errata Note published on same day.

B. Determination on Remedies**(1) An Order under paragraph 74.1(1)(a)?**

[430] I agree with the Commissioner that the Tribunal should make an order under paragraph 74.1(1)(a) requiring Cineplex not to engage in the reviewable conduct or substantially similar reviewable conduct. The Commissioner did not provide proposed language for this part of the Tribunal's order. It will be drafted in accordance with paragraph 74.1(1)(a) and provide Cineplex with sufficient notice having regard to the potential implications for its future conduct: see section 66.

[431] As contemplated by subsection 74.1(2), this part of the Tribunal's order shall apply for a period of ten (10) years. Cineplex did not argue otherwise.

(2) Provisions Affecting an Order under paragraphs 74.1(1)(b), (c) and (d)

[432] Section 74.1 includes guidance about the purpose of an order under paragraphs 74.1(1)(b), (c) and (d) and imposes certain limitations.

[433] Subsection 74.1(4) provides that the terms of an order made against a person under paragraph (1)(b), (c) or (d) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of Part VII.1 of the *Competition Act*. The same subsection expressly proscribes that a remedy be imposed with a view to punishment of the respondent.

[434] The remedies that may be imposed by the Tribunal are also limited in quantum by subparagraph 74.1(1)(c)(ii) and the language in paragraph 74.1(1)(d). For an order that is not a "subsequent order" (as is the case here; there is no prior order) the maximum AMP payable by a corporation is the greater of \$10 million, and three times the value of the "benefit derived from the deceptive conduct" if that amount can be reasonably determined: clause 74.1(1)(c)(ii)(B). The amount to be distributed under paragraph 74.1(1)(d) shall not exceed the total of the "amounts paid to the [respondent] person for the products" in respect of which the conduct was engaged in. It may be observed that in both cases, the quantum is related to the financial amount obtained by the respondent through the reviewable conduct.

[435] There are three additional comments at the outset. First, the *Competition Act* contains indications that the remedies under paragraphs 74.1(1)(b), (c) and (d) can and should work together – they must achieve a common purpose under subsection 74.1(4), and one factor to take into account in determining the amount of an AMP under paragraph 74.1(1)(c) is any decision in relation to an application for an order under paragraph 74.1(1)(d): see paragraph 74.1(5)(j).

[436] Second, both paragraphs 74.1(1)(c) and (d) contemplate that the Tribunal has discretion in how to fashion its order. A respondent may be ordered to pay an AMP under paragraph (c) “in any manner that the court specifies”, subject to the quantum limitations. Paragraph (d) contemplates an order to pay an amount to be distributed “in any manner that the court considers appropriate”.

[437] Third, to promote conduct in conformity with the *Competition Act* as subsection 74.1(4) contemplates, the Tribunal may in appropriate circumstances make an order under paragraphs 74.1(1)(c) and/or (d) with a view to ensuring that a respondent does not profit or otherwise reap a financial gain from its false or misleading conduct.

[438] I will elaborate on this third point. The purposes of Part VII.1 have been described above. The focus is on the consumer and on the accuracy of representations to the public to preserve the informational integrity of markets and to avoid the *per se* harm to competition that follows from false or misleading information: *Premier Career Management Group FCA*, at para 61. In my view, a Tribunal order should seek to align the future incentives of a respondent with attaining the objectives of the deceptive marketing provisions and to support compliance with the *Competition Act*. In many cases, that will imply an AMP or restitution order (or a combination of both) that gives precedence to the amount obtained by the respondent through the reviewable conduct as a means to carry out the requirements of subsection 74.1(4), short of punishing the respondent. In other words, in those cases, the respondent should not keep any of the financial gains it made by its false or misleading representations.

[439] The Tribunal’s assessment of remedial options for reviewable conduct under Part VII.1 should also consider whether the possible financial consequences of a Tribunal order would operate as a form of licence fee (e.g., where the financial gains outweigh the possible negative consequences of the reviewable conduct). A remedy for proven reviewable conduct under Part VII.1 should not be a cost of doing business. That would undermine, rather than advance, the

objectives of the deceptive marketing provisions and would not promote conformity with the statute.

(3) An Order under paragraph 74.1(1)(d)?

[440] The Commissioner submitted in oral argument that an order for “restitution” is available in the *Competition Act* as a remedy to encourage compliance with the *Competition Act*. I agree that a remedy under paragraph 74.1(1)(d) can do so.

[441] Paragraph 74.1(1)(d) provides that the Tribunal may order a respondent:

Determination of reviewable conduct and judicial order

74.1 (1) [...]

(d) in the case of conduct that is reviewable under paragraph 74.01(1)(a), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate.

Décision et ordonnance

74.1 (1) [...]

d) s’agissant du comportement visé à l’alinéa 74.01(1)a), de payer aux personnes auxquelles les produits visés par le comportement ont été vendus — sauf les grossistes, détaillants ou autres distributeurs, dans la mesure où ils ont revendu ou distribué les produits — une somme — ne pouvant excéder la somme totale payée au contrevenant pour ces produits — devant être répartie entre elles de la manière qu’il estime indiquée.

[442] The Commissioner’s proposed remedy under paragraph 74.1(1)(d) sought “restitution” based on the gain made by Cineplex while engaging in the reviewable conduct. Both parties also referred to the use of the word “restitution” in the *Competition Act*.

[443] Paragraph 74.1(1)(d) refers to payment of an “amount” to be distributed among the persons to whom the products were sold. That paragraph does not characterize the “amount” or its function, nor does it use the term “restitution”. However, as Cineplex noted during oral argument, paragraph

74.1(5)(k) and subsection 74.1(7) refer to “restitution” (“*restitution*”), a “refund” (“*remboursement*”) and “other compensation” (“*de toute autre forme de dédommagement*”) as orders under paragraph 74.1(1)(d). These are some of the options evidently open to the Tribunal.

[444] The amount to be paid under paragraph 74.1(1)(d) shall not exceed “the total of the amounts paid to the person for the products in respect of which the conduct was engaged in”. The aggregate amount paid by moviegoers to Cineplex for Online Booking Fees was \$11,678,336 in 2022 and \$27.3 million in 2023, for a total of \$38.978 million from its implementation in June 2022 until December 31, 2023. The maximum amount that could be ordered under paragraph 74.1(1)(d) – on the evidence and arguments made in this case – is therefore \$38.978 million.

[445] I agree with the Commissioner that the present case has attributes that could support an order that Cineplex pay an amount to be distributed amongst those who paid the Online Booking Fee – a refund to consumers. For example, as the Commissioner observed, the aggregate amount of the Online Booking Fees charged to consumers is not in dispute and is easily distinguished from amounts paid by consumers that are referable solely to the movie tickets. The money paid by consumers for the Online Booking Fee is directly linked to the reviewable conduct. The affected consumers can also be identified, as every consumer who purchased tickets online first had to create a Cineplex Connect Account. As Mr Zimmerman’s evidence showed, one must log into that account before one can see prices or buy tickets on the website or the App. Cineplex also confirmed in answers to undertakings, which were read into the record at the hearing, that it has an online purchase history for consumers dating back to June 15, 2022, including the number of tickets purchased, the date of purchase and whether the person was a Scene+ or CineClub member at the time. Cineplex could generate information to determine who paid any Online Booking Fee since June 2022 and the total amount of such fees charged to each consumer. It would need some time to do so.

[446] I am not persuaded by Cineplex’s submission that an order under paragraph 74.1(1)(d) is inappropriate on the basis that consumers got “the value that they were told they were getting”, which was the benefit of the advanced seat selection. Mr McGrath and Dr Amir opined that consumers received value when they paid the Online Booking Fees because they purchased movie tickets and a reserved seat in advance, without having to travel to the theatre. In my view, this

position merits little weight. If Cineplex's argument seeks to prevent an order entirely under paragraph 74.1(1)(d), I am unable to accept it. Receipt of some "value" does not excuse reviewable conduct. Nor should it preclude any possibility of such a remedy in a case in which the consumer actually receives the product or service but paid more than the represented price. Accepting such an argument would also appear to preclude a refund or similar remedy when a displayed price is unattainable due to only a small fixed obligatory charge or fee. Alternatively, if Cineplex's argument seeks not to prevent an order under paragraph 74.1(1)(d) but instead to mitigate the quantum payable, it cannot succeed in this case because Cineplex did not attempt to quantify its impact on the quantum to be ordered, either in the evidence or in argument. Cineplex also did not point to any legal or principled basis to consider its argument in the context of a material representation to the public that was false or misleading.

[447] I pause to recognize that paragraph 74.1(1)(d) will often be read to enable an order determined by the aggregate amount paid for a single product purchased by many consumers. It is also true that the reasons in this case have raised doubt as to whether the movie ticket and the online seat selection were, in fact, separable into two different products, as Cineplex and Dr Amir contended. However, paragraph 74.1(1)(d) comfortably captures the present factual circumstances. The provision refers to "the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold". Cineplex's representations about Online Booking Fees enabled it to generate additional revenue through the sale of movie tickets online and the fee obviously refers to the online booking of movie tickets. The amounts generated by the Online Booking Fee (distinct from the price of the related movie tickets) have been readily determined in an aggregate quantum that is not contested. (Neither party contended that the products "in respect of which" the conduct was engaged in included the actual movie tickets so that the maximum "amount" under paragraph 74.1(1)(d) should include the aggregate paid for the tickets.)

[448] In light of these factors, a refund to consumers could be an appropriate and significant part of an overall order in this proceeding, to promote conduct by Cineplex that is in conformity with the purposes of the deceptive marketing provisions of the *Competition Act*. The aggregate amount to be refunded for conduct up to December 31, 2023, would be \$38.978 million and Cineplex could be ordered to pay that sum under paragraph 74.1(1)(d).

[449] However, I have concluded that it is not appropriate to make an order under paragraph 74.1(1)(d) in this case. There are a number of interconnected factors that lead to this conclusion, in part owing to the practical implementation of such an order.

[450] In my view, an order under paragraph 74.1(1)(d) should presumptively be in the form of money returned into the hands of the affected consumers by way of refund. The question is then how the funds could be distributed to affected consumers. While the aggregate “amount” of a possible full refund was not disputed in this case, there has been no proposal or evidence on how to distribute individual refunds to consumers. We do not know precisely how many consumers are affected, but there are at least tens of thousands. Some may have paid a single Online Booking Fee and be entitled to a refund of just \$1.50, while others may be regular moviegoers or consumers who paid for others’ tickets (and Online Booking Fees), who would presumably be entitled to a larger refund. We have no concrete sense of the true scale of the refund process.

[451] The parties did not address the cost of distributing refunds to consumers. There would be costs incurred by Cineplex itself in providing data related to affected consumers. Then there is the cost of an administrator to distribute the funds to affected consumers. The Commissioner did not offer an administration protocol or any evidence on how it might work. The cost of administering the distribution to tens of thousands of consumers could well be very significant.

[452] Thus there is the prospect of a very large number of small refunds, and high administration costs in distributing them to consumers.

[453] The parties’ submissions did not address the many practical issues mentioned in subsection 74.1(8) related to the implementation of an order under paragraph 74.1(1)(d). It appears that the Tribunal has the ability to order another hearing and to make one or more additional orders, consistent with subsection 74.1(8) and the power to require payment and distribution of an amount “in any manner that the [Tribunal] considers appropriate” under paragraph 74.1(1)(d). See comparably: *Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7, at paras 769-781, 786, and the resulting order made soon after (2016 Comp Trib 8). In this case, it is clear that the Tribunal would require additional evidence and submissions on how to implement an order under paragraph 74.1(1)(d) and would have to convoke at least one more hearing (and

perhaps several) on the logistics of a refund order. That will take up more of the parties' and the Tribunal's resources, and interfere with the finality of the Tribunal process.

[454] Similarly, if the Commissioner sought an order requiring Cineplex itself to make the refunds to its consumers, the evidence is still not sufficient. Assuming such an order could be made to authorize a refund (and not a credit to consumers) by a respondent itself – something not addressed by either party – there is insufficient evidence about whether it would in fact work, in practical terms, back to June 2022. For example, what would have to be done to provide a refund to credit cards or debit cards (some of which may have expired)? What role would the court or an administrator play in ensuring the refunds are actually paid and received?

[455] There are also concerns about whether all consumers will take up their (small) refunds. The parties would have to consider the scenario in which some of the \$38.978 million is not distributed (refunded) to consumers who paid Online Booking Fees within a reasonable period of time. In class proceedings, there are statutory provisions and case law for guidance on *cy-près* issues: see, e.g., *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 SCR 545, at paras 25-26; *Breckon v Cermaq Canada Ltd*, 2024 FC 225, at paras 49-54; *Sorenson v easyhome Ltd*, 2013 ONSC 4017, at paras 23-28; *Class Proceedings Act*, 1992, SO 1992, c 6, sections 24 and 27.2.

[456] There are a couple of other points relating to remedial fairness that affect the decision to make an order under paragraph 74.1(1)(d). One is that Cineplex continued to make the representations and to collect Online Booking Fees after December 31, 2023, up to the time of the hearing. There was no suggestion at the hearing that it had stopped or would stop doing so after the hearing. The evidence justifies an inference that these amounts will have been significant in quantum, but I am loathe to estimate them with sufficient precision to make an order under paragraph 74.1(1)(d). Similarly, since August 2022, Cineplex has allowed consumers to redeem their Scene+ points towards the payment of Online Booking Fees. While those consumers were affected by the reviewable conduct, the Commissioner did not argue that the *Competition Act* gives the Tribunal jurisdiction to reverse those redemptions. In both circumstances, an order under paragraph 74.1(1)(d) that refunds some consumers but not all affected consumers, for conduct that is presumably continuing, suggests unfairness to more recent consumers and Scene+ members. (I

recognize that it is not inconceivable that these issues could also be addressed by some future order or other means.)

[457] In all the circumstances, I will not make an order under paragraph 74.1(1)(d) in this case.

(4) Should the Tribunal Order an AMP?

[458] I turn to a possible order for an AMP. Paragraph 74.1(1)(c) provides that the Tribunal may order a corporation that engages in reviewable conduct to pay an AMP “in any manner that the [Tribunal] specifies”, in an amount not exceeding the greater of (A) \$10 million (and \$15 million for each subsequent order) and (B) three times the value of the benefit derived from the deceptive conduct. If the latter amount cannot be reasonably determined, the amount in (B) is 3% of the corporation’s worldwide gross revenues. Prior to the recent amendments in 2022, the maximum AMP for a corporation was set at \$10 million (and \$15 million for each subsequent order), before part (B) was added: see S.C. 2022, c. 10, s. 260; S.C. 2009, c. 2, subs. 424(2).

[459] The maximum AMP in this case is the greater of \$10 million and three times the benefit derived from the reviewable conduct (three times \$38.978 million or approximately \$116.9 million). The possible range for an AMP is therefore \$0 to \$116.9 million.

[460] As noted, the purpose of an AMP is to promote conduct by the respondent that is in conformity with the deceptive marketing provisions: subsection 74.1(4). Subsection 74.1(5) sets out aggravating and mitigating factors, evidence of which shall be taken into account. As mentioned, one of the factors is any decision in relation to an application for an order under paragraph 74.1(1)(d).

[461] There is some guidance from prior cases in applying the factors listed by Parliament to reach an appropriate quantum. Where there is guidance, the decisions suggest that the circumstances should be analyzed to determine whether a factor is aggravating, mitigating or neutral. None of the prior decisions considered the current monetary range of AMPs enacted in 2022, and several were decided before the amendments to the *Competition Act* in 2009 that raised the maximum AMP from \$100,000 to \$10 million: S.C. 2009, c. 2, subs. 424(2). None of the decisions involved making or analyzing a possible concurrent order under paragraph 74.1(1)(d). See *Chatr 2014*, at paras 54-77; *Yellow Page Marketing*, at paras 57-69; *Commissioner of*

Competition v Premier Career Management Group Corp and Minto Roy, 2010 Comp Trib 17; *Commissioner of Competition v Sears Canada Inc*, 2005 Comp Trib 13; *PVI International Inc*, at paras 65-66; *Gestion Lebski inc*, at paras 310-313, 318-319.

[462] In the present case, the following are important aggravating factors:

- (a) The reviewable conduct occurred on the Cineplex's website and App and affected consumers across Canada and in all of Cineplex's theatres. As of December 31, 2023, Cineplex owned, leased or had a joint venture in 1,631 screens in 158 theatres.
- (b) The reviewable conduct occurred every day starting in mid-June 2022 and continued up to the commencement of the hearing.
- (c) The reviewable conduct affected tens of thousands of consumers.

[463] The representations at issue were material to consumers. As an element of the reviewable conduct, this factor is related to the amounts paid as Online Booking Fees. There is no specific evidence that the representations were material to consumers' purchase of movie tickets (distinct from materiality to the Online Booking Fee).

[464] There is no evidence before the Tribunal that the affected consumers had characteristics that made them vulnerable or that they were specifically exploited by the reviewable conduct. No party sought to distinguish amongst the categories of consumers represented by General Admission, Seniors and Children.

[465] Cineplex is a large business enterprise. It is Canada's largest film exhibitor. The Agreed Statement of Facts advised that in 2022, Cineplex had revenues of approximately \$1.269 billion and in 2023, revenues of approximately \$1.389 billion. Cineplex did not make submissions or refer to specific evidence on its financial position or ability to pay (despite some evidence in the record in Cineplex's Management's Discussion and Analysis for 2022 and 2023, the latter dated February 7, 2024).

[466] The gross revenue from sales affected by the reviewable conduct is \$38.978 million up to December 31, 2023. This is very significant revenue. Absent other concerns, this amount could

have been the subject of an order under paragraph 74.1(1)(d). The Commissioner offered no specific evidence of additional revenue from Online Booking Fees after December 31, 2023, up to the end of the hearing or the anticipated fees generated after the hearing.

[467] The Commissioner did not adduce evidence of adverse effects or a substantial lessening of competition in any specific competition market (recognizing that there is *per se* harm to competition from reviewable conduct under paragraph 74.01(1)(a): *Premier Career Management Group FCA*, at para 61).

[468] Cineplex submitted that it offered the online booking of seats to provide a choice to consumers, which was said to be welfare enhancing. Cineplex also argued that consumers obtained value for their purchases, including the option of choosing their preferred seats among those available at the time of purchase, in advance of their showings.

[469] I consider these points to favour Cineplex, but only mildly. Its position must be tempered by the fact that Cineplex began to offer the online seat bookings in 2020, well before it decided in 2022 to impose the Online Booking Fee. In addition, Cineplex implemented the Online Booking Fee after engaging in a process designed to find alternatives to drive revenue and margin. The Online Booking Fee effectively increased ticket prices, as Cineplex was aware at the time in June 2022. I am not persuaded that Cineplex's submissions on these issues should be given much weight, particularly because of the nature of the representations and that it implemented the Online Booking Fee well after advance seat selection was available online in order to raise revenues, and in a manner that obscured their existence and quantum.

[470] For similar reasons, Cineplex's subjective belief on its compliance with the *Competition Act* and the absence of complaints to alert Cineplex have little weight. The responsibility to comply with the *Competition Act* was on Cineplex. With respect to complaints, Cineplex did not change its conduct after the Commissioner commenced this proceeding, so it is doubtful that it would have done anything different in response to complaints.

[471] The Commissioner did not suggest that Cineplex has any history of non-compliance with the *Competition Act*, which is an attenuating factor.

[472] Relatedly, while Cineplex continued its representations (i.e., did not self-correct) in the face of the Commissioner's application, there is no evidence that leads me to believe Cineplex will not self-correct by appropriately modifying its website and App after it learns that the Tribunal has found that it has engaged in reviewable conduct.

[473] As analyzed above, the Tribunal will not make an order under paragraph 74.1(1)(d), owing mainly to practical concerns about the implementation of such an order. The Tribunal's decision not to do so, and why, is relevant as a factor related to the amount of an AMP under paragraph 74.1(5)(j). In assessing an AMP, I have accounted for the facts and arguments already analyzed under paragraph 74.1(1)(d). In this case, these considerations complement and support an AMP in the amount of the Online Booking Fees collected by Cineplex.

[474] The Ontario Superior Court in *Chatr 2014* held that the amount of an AMP to be paid by a respondent must be considered through a lens of proportionality: *Chatr 2014*, at paras 12-16. Justice Marrocco stated:

[15] Proportionality also requires keeping in mind the counterbalancing effects of the respondents' reviewable conduct, such as loss of reputation. Genuine companies like the respondents are loathe to see their reputations damaged and it can be assumed they will take steps to prevent this from happening again in the future. In this way, the counterbalancing effects of reviewable conduct will generally have a conformist effect and thus will reduce the amount of the monetary penalty.

[16] In applying the principle of proportionality the court also has to keep in mind that there is no notion of general deterrence in subsection 74.1(4).

[475] I accept that Cineplex's reputation will be negatively affected by the outcome of this proceeding and the orders that will be made.

[476] The most influential factors related to an AMP are: the quantum Cineplex collected from its reviewable conduct (which could have been the subject of a concurrent order under paragraph 74.1(1)(d) but is not in this case, for reasons already discussed); the geographic scope, frequency, extent and duration of the reviewable conduct (including the absence of self-correction after this proceeding started) all of which are aggravating factors; and the relative size of Cineplex's

business. I recognize that there is some conceptual overlap within these items (such as the geographic scope of the conduct and the size of Cineplex's business).

[477] Finally, I return to the Commissioner's submissions. In final argument, he submitted that the Tribunal should impose an AMP in the amount Cineplex has gained from engaging in the misleading conduct. As a matter of fairness to Cineplex during the Tribunal process, I will not impose an AMP in this case that exceeds the proven financial gains it collected through the Online Booking Fee from June 2022 to December 31, 2023.

[478] Considering the parties' submissions, the purpose of an order and limitations on it under subsection 74.1(4), the factors under subsection 74.1(5), and the range of minimum and maximum monetary penalty that may be ordered, I conclude that the Tribunal should impose an AMP in the amount of \$38.978 million under paragraph 74.1(1)(c).

(5) Subsection 74.1(4) and Overall Proportionality of the Tribunal's Order

[479] In my view, the Tribunal's overall order is proportional and respects Parliament's directions in subsection 74.1(4). In my view, its terms are proportional to the nature of Cineplex's reviewable conduct (including its severity, frequency, duration, materiality, and geographic scope), the number and proportion of Cineplex consumers affected, the quantum of Online Booking Fees collected, and Cineplex's financial position. In addition:

- (a) This is not a case in which the conduct was designed deliberately to deceive members of the public, nor were the representations directed at a vulnerable segment of the public.
- (b) Cineplex will suffer harm to its reputation and, as in *Chatr 2014*, will likely take steps to end the reviewable conduct.
- (c) No evidence suggested that Cineplex has any history of non-compliance with the *Competition Act*.
- (d) While the reviewable conduct had been occurring for more than 19 months at the time of the hearing, Cineplex requested a prompt hearing on the merits of the Commissioner's application, which occurred.

TAB 29

CITATION: Canada (Commissioner of Competition) v. Chatr Wireless Inc., 2014 ONSC 1146
COURT FILE NO.: CV-10-8993-00 CL
DATE: 20140221

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
THE COMMISSIONER OF	)	<i>J. Thomas Curry, Jaan Lilles,</i>
COMPETITION	)	<i>Paul Erik Veel, for the Applicant</i>
	)	
Applicant	)	
	)	
– and –	)	
	)	<i>Kent Thomson, Anita Banicevic,</i>
CHATR WIRELESS INC. AND ROGERS	)	<i>James Bunting, Sean Campbell,</i>
COMMUNICATIONS INC.	)	<i>for the Respondents</i>
	)	
Respondents	)	
	)	
	)	
	)	
	)	HEARD: January 14, 2014

REASONS FOR PENALTY

MARROCCO A.C.J.S.C.

[1] This court found that the respondents had failed to conduct adequate and proper tests prior to claiming that Chatr Wireless Inc. (“Chatr Wireless”) dropped fewer calls than Wind Mobile in Calgary and Edmonton and Public Mobile in Toronto and Montréal.

[2] The “fewer dropped calls” claim appeared on Chatr Wireless’ website, in press releases, in media statements, in social media and in the fine print on Chatr handset packaging.

[3] Failure to conduct an adequate and proper test prior to making a performance claim to the public is defined as reviewable conduct in section 74.01(1)(b) of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”). Section 74.01 is located in Part VII.1 which is entitled Deceptive Marketing Practices.

[49] I am not persuaded by the evidence, including the evidence to which I have made specific reference, that the respondents were duly diligent.

Should the court impose an administrative monetary penalty?

[50] The applicant seeks an order that the respondents pay an administrative monetary penalty in the range of \$5-7 million. I did not find this submission helpful because it failed to take into account two key aspects that distinguish this case from others – that the false or misleading advertising portion of the application was not established and that subsequent testing substantiated the fewer dropped calls claim.

[51] As with any order under s. 74.1(4), an administrative monetary penalty must be imposed for the purpose of promoting compliance with the *Competition Act*. An administrative monetary penalty cannot be imposed with a view to punishment or deterring others who might contemplate making unsubstantiated performance claims.

[52] A monetary penalty in the range of \$5-7 million might have been justified on the facts of this case if the fewer dropped calls claim had been false or misleading.

[53] Section 74.1(5) of the *Competition Act* provides a number of factors to be taken into account in determining the amount of any administrative monetary penalty, many of which are relevant to this case:

- (a) the reach of the conduct within the relevant geographic market;
- (b) the frequency and duration of the conduct;
- (c) the vulnerability of the class of persons likely to be adversely affected by the conduct;
- (d) the materiality of any representation;
- (e) the likelihood of self-correction in the relevant geographic market;
- (f) the effect on competition in the relevant market;
- (g) the gross revenue from sales affected by the conduct;
- (h) the financial position of the person against whom the order is made;
- (i) the history of compliance with this Act by the person against whom the order is made;
- ...
- (j) any other relevant factor.

These criteria are analyzed below.

[54] While post-claim substantiation cannot justify the respondents' decision to expose consumers, competitive firms and competition to the prohibited risk that the untested fewer dropped calls claim might have been false, it does not follow that post-claim substantiation cannot affect the weight attached to the factors in section 74.1(5). The respondents did not make a claim they knew to be false. Rather, they made a claim they suspected to be true without adequately and properly testing that claim and, after testing, the claim proved to be true. This is relevant to determining the quantum of the administrative monetary penalty.

The reach of the conduct within the relevant geographic market and the frequency and duration of that conduct

[55] The representations were part of an extensive advertising campaign that ran from July 28, 2010 to November 30, 2010. The reach, frequency and duration of the publication of the performance claim do not aggravate the amount of the administrative monetary penalty in this case because the claim was substantiated.

The vulnerability of the class of persons likely to be adversely affected by the conduct

[56] This criterion is similarly not aggravating because post-claim testing substantiated the claim.

The materiality of the representation

[57] Comparative performance claims are always material. However this factor is not aggravating because the representation was substantiated.

The likelihood of self-correction

[58] The respondents did not immediately self-correct in the face of concern expressed by the applicant, Public Mobile and Wind Mobile, although it should be remembered that the applicant's original concern was that the fewer dropped calls claim was false or misleading.

[59] The respondents withdrew the first set of ads prior to this application. The second version (the "no worries" version) had the same central theme, namely fewer dropped calls and therefore a more reliable network. The respondents did provide the applicant with a draft of the "no worries" version of the fewer dropped calls claim prior to publishing it and asked if it was appropriate. The applicant did not respond.

[60] The respondents knew the extent to which they had tested the fewer dropped calls claim prior to making it. The fact that the respondents had a drive testing programme in place and had ample time to conduct testing between the launch of the new wireless carriers and the July 28, 2010 campaign start date, but did not properly test, does not suggest a likelihood of self-correction. This is somewhat counterbalanced by the desire to avoid a repeat of the reputational risk created by this application which is referred to elsewhere.

The effect on competition

[61] The fewer dropped calls claim may have been harmful to the new wireless carriers but, if that was the case, the harm was not inflicted in a manner which caused harm to consumers because the claim was substantiated. Equally, because the claim was substantiated, any harm inflicted on Wind Mobile and Public Mobile was appropriate. The evidence suggests that Public Mobile probably had the worst performing network of any wireless carrier in Canada during the period with which we are concerned.

[62] However competition was adversely affected because, contrary to Parliament's expressed intention, the market was exposed to the risk that the untested performance claim might be false. This aggravates the amount of the administrative monetary penalty.

Gross revenue from sales affected by the reviewable conduct

[63] This factor has only a marginal effect on the amount of the administrative monetary penalty. Any increase in gross revenue as a result of the fewer dropped calls claim was an increase in gross revenue that occurred as a result of a performance claim which was ultimately substantiated. Members of the public who relied upon the claim and became Chatr Wireless customers ultimately joined a network which dropped fewer calls than Wind Mobile and Public Mobile.

The financial position of the respondents

[64] This is a significant relevant consideration when setting the administrative monetary penalty. There is a need for regulatory sanctions to create economic incentives to foster compliance. An administrative monetary penalty will not foster compliance if the financial position of the noncompliant person is ignored: see *Rowan (Re)* (2010), 33 O.S.C.B. 91, at para. 74. According to Rogers' 2010 Annual Report, the Wireless Division generated operating revenue of \$6.968 billion. Its adjusted wireless operating profit margin as a percentage of network revenue was 48.2%.

[65] I do not accept the submission that the respondents simply determined the benefit of making an unsubstantiated claim outweighed the cost of violating the *Competition Act*. I reject this submission because the reputational risk to a genuine business, such as Rogers', in an application such as this is so significant that a properly conducted cost-benefit analysis will lead to the conclusion that it is better to comply with the *Competition Act*.

The respondent's history of compliance

[66] There are no previous findings that the respondents have engaged in reviewable conduct. The applicant referred to an injunction application in the case of the *TELUS Communications Co. v. Rogers Communications Inc.*, 2009 BCCA 1610, 99 B.C.L.R. (4th) 229. This was a case in which the Court of Appeal of British Columbia upheld a motion judge's decision to grant an injunction against Rogers restraining it from publicly representing that it had "Canada's Most

Reliable Network”. Rogers had made the claim without testing its network against Telus’ HSPA/HSPA + network. The court stated that Telus had a very strong case and was entitled to an injunction. While this was not a trial decision, this finding is some evidence that Rogers has been willing to make aggressive representations prior to testing when it believes those untested representations are true. This is precisely what Parliament has forbidden in section 74.01(1)(b). Rogers’ previous history is a relevant consideration in this application and it aggravates the amount of the administrative monetary penalty.

Other relevant factors

(1) Penalties given in past cases

[67] In *The Commissioner of Competition v. Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group)* (2008), 65 C.P.R. (4th) 123, the Competition Tribunal was asked to impose an administrative monetary penalty for a breach of section 74.01(1)(b). The Imperial Brush Company claimed that its fire logs reduced the risk of chimney fires in circumstances where the Competition Tribunal could not find evidence of any adequate and proper testing of the claim. The circumstances were inherently dangerous because the unsubstantiated claim gave consumers false comfort about the likelihood of a fire. The representations at issue had persisted for years and were never substantiated. The administrative monetary penalty ordered was \$25,000 when the maximum penalty for a corporation was \$100,000. The financial position of Imperial Brush Company was not disclosed in the order.

[68] In *P.V.I. International Inc. v. Canada (Commissioner of Competition)*, 2004 FCA 197, 31 C.P.R. (4th) 331, the respondents made fuel saving and emission reduction performance claims about something called a “platinum vapor injector”. These claims were found to be false or misleading. The Federal Court of Appeal upheld the Competition Tribunal’s award of \$75,000 against the corporate respondent and \$25,000 each against two individual respondents, when the maximum penalty was \$100,000 against a corporation and \$50,000 against an individual.

[69] Subsequent to these two decisions, Parliament amended the *Competition Act* in 2009 to increase the maximum administrative monetary penalty payable by a corporation by a factor of 100, from \$100,000 to \$10 million. This amendment expressed Parliament’s decision that the previous maximum penalty was not sufficient to promote corporate conduct in conformity with the purposes of Part VII.1 of the *Competition Act*. I agree with the applicant that the increase in the maximum monetary penalty makes cases decided prior to the 2009 amendments less persuasive.

[70] In *Commissioner of Competition v. Yellow Page Marketing*, 2012 ONSC 927, a judge of this Court ordered an \$8 million administrative monetary penalty. This decision was upheld by the Ontario Court of Appeal. The applicant submits that this decision reflects Parliament’s intention that deceptive marketing practices should attract more significant administrative monetary penalties. The respondents suggest that this case is not helpful because it is a case of fraud. Yellow Page Marketing had been fined and shut down by regulators in other jurisdictions

and countries. The respondents claimed that imposing a similar penalty would unfairly stigmatize them as a similar company.

[71] The applicant also referred to consent agreements to illustrate what market participants have considered appropriate monetary penalties since the 2009 amendments. Most notably, Bell Canada agreed to stop making representations that the Competition Bureau had concluded were misleading about the prices offered for its services and agreed under the terms of a Consent Agreement filed with the Competition Tribunal to pay an administrative monetary penalty of \$10 million. While the conduct to which the Competition Bureau objected began in 2007, the settlement agreement was not announced until June 28, 2011, after the 2009 amendments. This particular consent agreement is not helpful, however, because the representations were misleading, a fact not present in this application.

(2) The harm caused to the respondents by the conduct of the complainants

[72] In circumstances where the untested performance claim is later substantiated, the harm caused to the respondents by the conduct of the complainants can be relevant in assessing the quantum of the administrative monetary penalty. Public Mobile took advantage of the fact that the applicant commenced this proceeding by making false statements about the respondents. Alex Krstajic, the President and Chief Executive Officer of Public Mobile, stated at a MobileMonday Toronto Conference in December 2010, attended by more than 500 people, that the Competition Commissioner had determined after its investigation that Public Mobile's network dropped fewer calls than the respondents' network. This statement was false. The applicant gave no such assurance to Public Mobile.

[73] The Chair of the Board of Wind Mobile made a speech to the Toronto Board of Trade in which he stated that the fewer dropped calls claim was so misleading that Wind Mobile had lodged a complaint with the Competition Bureau. His remarks were reported in the media. The fewer dropped calls claim was not misleading or false as far as Wind Mobile was concerned, although the Chair of the Board may have thought so when he spoke to the Toronto Board of Trade.

[74] Mobilicity, to which very little reference was made in these proceedings, publicly complained to the Competition Bureau about the fewer dropped calls claim, publicly celebrated the commencement of this application and then declined to cooperate with the applicant. Mobilicity's conduct suggests that it did not doubt that the claim was true and that it was interested in provoking the initiation of proceedings to gain a short-term public relations advantage.

[75] In addition, material information affecting dropped calls such as the "hard handoff" or the fact that Public Mobile had no roaming agreement with Rogers was not readily provided to consumers by either Wind Mobile or Public Mobile during the relevant timeframe.

[76] The harm caused to the respondents by the conduct of the complainants in this matter mitigates the amount of the administrative monetary penalty.

Conclusions on an administrative monetary penalty

[77] When I consider all of the evidence, including the evidence to which I referred, I am satisfied that an administrative monetary penalty ought to be imposed in this case and that an appropriate administrative monetary penalty is \$500,000.

Should the court impose a prohibition order that Rogers not engage in substantially similar reviewable conduct?

[78] Section 74.1(2) of the *Competition Act* states that a prohibition order lasts for 10 years unless otherwise ordered. The applicant seeks an order that the respondents not engage in substantially similar reviewable conduct for a period of 10 years.

[79] The applicant submitted that a prohibition order is directed at ensuring compliance because it draws the significance of compliance with the *Competition Act* to the firm's attention. In the applicant's view the prohibition order is a reprimand and a reminder not to engage in the reviewable conduct again. The applicant pointed to decisions such as *Commissioner of Competition v. Sears Canada Inc.* (2005), 37 C.P.R. (4th) 65, as authority for the proposition that prohibition orders are routinely made even where the reviewable conduct persisted only for a limited duration. The applicant submitted that there was no reason to depart from the normal practice of making such orders following a finding of reviewable conduct.

[80] The respondents maintained that a prohibition order was a mandatory injunction rather than a reprimand. The respondents pointed out that no precedent exists for making such an order where the claim was true but untested prior to publication. The respondents also point out that the Competition Bureau has never previously asked for such a remedy where the representation was truthful. The respondents' view is that a prohibition order is an unfair punishment, in part because it exposes the respondents to a \$15 million administrative monetary penalty for subsequent reviewable conduct, as well as damages or fines pursuant to sections 36(1)(b) and 66 of the *Competition Act*. The respondents argue that such consequences are excessive given the extensive drive testing conducted by Rogers and the fact that the fewer dropped calls claim was ultimately substantiated.

[81] The respondents also point out that they have suffered reputational harm as a result of these proceedings and that a prohibition order would unfairly compound that harm.

[82] The commencement of proceedings harmed the respondents because it contained an allegation of false or misleading advertising. Commencement of these proceedings was covered by at least 63 different broadcast media outlets. A national newspaper erroneously reported that the respondents had been ordered to pay \$10 million because they had made misleading wireless claims.

TAB 30

Reference: *Commissioner of Competition v. Gestion Lebski inc.*, 2006 Comp. Trib. 32
File no.: CT-2005/007
Registry document no.: 0079a

OFFICIAL ENGLISH TRANSLATION

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

AND IN THE MATTER OF an inquiry under subparagraph 10(1)(b)(ii) of the *Competition Act* relating to the marketing practices of Gestion Finance Tamalia et al;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order under section 74.1 of the *Competition Act*.

BETWEEN

The Commissioner of Competition
(Applicant)

and

Gestion Lebski inc.
La Société de Financement Vanoit inc.
Maigrissimo inc.
Gestion Finance Tamalia inc.
9083-8434 Québec inc.
Sylvain Leblanc
(Respondents)

Dates of hearing: 20060501-20060505, 20060508-20060512, 20060515-20060517,
20060523-20060524

Judicial Member: Edmond Blanchard J.

Date of Order: September 8, 2006

Order signed by: Mr. Justice Edmond Blanchard

REASONS AND ORDER

III. PRELIMINARY MOTIONS

A. CONSTITUTIONAL CHALLENGE

[30] The respondents brought a motion in which they raised a constitutional challenge. In the motion, the Tribunal is asked to declare paragraphs 74.01(1)(a) and 74.01(1)(b) and section 74.1 of the Act of no force or effect as they are inconsistent with section 7 and paragraphs 11(d) and 2(b) of the *Canadian Charter of Rights and Freedoms* (the “Charter”), pursuant to subsection 52(1) of the *Constitution Act, 1982*.

[31] The respondents submit that paragraphs 74.01(1)(a) and 74.01(1)(b) are unconstitutional for the following three reasons: (a) paragraph 74.01(1)(b) is inconsistent with the presumption of innocence guaranteed by paragraph 11(d) of the Charter, in that it reverses the onus of proof by requiring the respondent to establish that there was adequate and proper testing; (b) the provisions infringe upon the respondents’ rights to liberty and security and are vague and imprecise, contrary to the rights guaranteed in section 7 of the Charter; and (c) the provisions constitute an interference with the respondents’ freedom of expression, contrary to paragraph 2(b) of the Charter.

(1) Challenge under section 11

[32] The respondents submit that the provisions concerning reviewable conduct in paragraphs 74.01(1)(a) and 74.01(1)(b) of the Act in fact create criminal offences. Accordingly, the respondents are of the view that they should be entitled to the protection offered by section 11 of the Charter, and more specifically by paragraph 11(d), the right to be presumed innocent.

[33] Section 11 of the Charter reads as follows:

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

11. Tout inculpé a le droit :

a) d’être informé sans délai anormal de l’infraction précise qu’on lui reproche;

b) d’être jugé dans un délai raisonnable;

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l’infraction qu’on lui reproche;

d) d’être présumé innocent tant qu’il n’est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l’issue d’un procès public et

I share the concern expressed by Wilson J. in *R. v. Wigglesworth* about an overbroad application of s. 11. I agree with her conclusion (at p. 558) that “it is preferable to restrict s. 11 to the most serious offences known to our law, i.e., criminal and penal matters and to leave other ‘offences’ subject to the more flexible criteria of ‘fundamental justice’ in s. 7.”

[38] In *Wigglesworth*, Justice Wilson set out a two-pronged test for determining whether a person is a “person charged with an offence” within the meaning of section 11. First, is the offence criminal in nature? Second, does the offence have true penal consequences? If either question is answered in the affirmative, then section 11 applies. That approach has been adopted by the Supreme Court of Canada in cases following that decision, and in particular in *Shubley, supra*; *Martineau v. Canada (M.N.R.)*, [2004] 3 S.C.R. 737; and *R. v. Rodgers*, 2006 SCC 15.

(a) *Offence is criminal in nature*

[39] In *Wigglesworth*, at page 559, Justice Wilson defined which criminal offences would engage the protection guaranteed by section 11, by contrasting them with offences that would not:

In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity: see, for example, *Re Law Society of Manitoba and Savino, supra*, at p. 292, *Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission* (1986), 54 O.R. (2d) 544 (H.C.), at p. 549, and *Re Barry and Alberta Securities Commission, supra*, at p. 736, *per* Stevenson J.A. There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of “offence” proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of “offence” proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply. [Emphasis added]

[40] Justice Wilson cited examples of cases intended “to regulate conduct within a limited private sphere of activity”, and specifically two decisions relating to securities commissions: *Re Barry* and *Re Malartic Hygrade Gold Mines*. In those two cases, a company was charged with violating a provision of the *Securities Act*. The penalty in both cases was a loss of Stock Exchange privileges. The companies argued that they were entitled to the protection of section 11. In both cases, the judges refused to recognize such a right, on the ground that the law that imposed the penalty was not penal, but rather was intended to regulate conduct in order to protect the public. The penalties contemplated were in fact intended to prevent companies from engaging in conduct that could be harmful to the public; they were not punitive.

[41] In *Martineau*, *supra*, Mr. Justice Fish further explained how to determine whether a case is criminal in nature. At paragraph 24, he said that the case must be reviewed in light of the following criteria: (a) the objectives of the Act and the provisions in question; (b) the purpose of the sanction; and (c) the process leading to imposition of the sanction.

[42] *Martineau* dealt with a notice of ascertained forfeiture under section 124 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.). Speaking for the Court, Justice Fish concluded that the proceeding was a civil collection mechanism and not a criminal proceeding. He then stated the opinion that the purpose of the notice of ascertained forfeiture was to provide a timely and effective means of enforcing the *Customs Act* and to produce a deterrent effect, but not to punish the offender. Justice Fish further said that the notice of ascertained forfeiture procedure involved a four-step administrative process that has nothing to do with a criminal proceeding. On that point, he said, at paragraph 45 of his decision:

This process thus has little in common with penal proceedings. No one is charged in the context of an ascertained forfeiture. No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the notice of ascertained forfeiture is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of a civil action.

Justice Fish accordingly concluded that the proceeding was not criminal in nature.

[43] The respondents argued a number of factors that, in their submission, create a distinction between the proceeding that was challenged in *Martineau* and the proceeding in this case, and concluded that paragraphs 74.01(1)(a) and (b) and subsection 74.1(1) of the Act constitute an offence that is criminal in nature. I will briefly summarize my understanding of the respondents' arguments.

[44] First, the respondents submit that unlike the facts in *Martineau*, in which the purpose of the impugned provision was to facilitate the collection of duty and taxes on imported goods, the objective of paragraphs 74.01(1)(a) and (b) and subsection 74.1(1) of the Act is to regulate a matter that is public in nature: advertising.

[45] Second, the respondents argue that while it was held in *Martineau* that the notice of ascertained forfeiture did not seem to be a sanction intended to redress a wrong done to society, the opposite is true for 74.1 of the Act. Corrective notices ordered under paragraph 74.1(b) and administrative monetary penalties under paragraph 74.1(b) are clearly, in the respondents' submission, imposed in order to redress a wrong done to society in general, rather than to maintain discipline in a limited sphere of activity.

[46] Third, the respondents argue that unlike the process in *Martineau*, the process in this case is essentially judicial and not administrative. They pointed, in particular, to the fact that a "court" (defined in section 74.09 of the Act as the Competition Tribunal, the Federal Court or the superior court of a province) is responsible for determining whether a person has engaged in reviewable conduct under section 74.01 and for imposing a penalty under section 74.1.

[47] Having regard to all these factors, the respondents are of the view that the proceeding in this case is criminal in nature and therefore meets the first component of the test in *Wigglesworth*.

[48] While I agree with the respondents that it is possible to distinguish the proceeding in *Martineau* from the proceeding in this case, that is not sufficient, in my view, to find that paragraphs 74.01(1)(a) and (b) are criminal in nature. I agree that the conduct for which the impugned provisions impose penalties is public in nature and that the proceeding is public.

[49] However, in my view, the public nature of the proceeding still does not make the respondents persons charged with an offence within the meaning of section 11 of the Charter. If we consider the rights protected by section 11, we see that a number of the concepts that make up that section do not apply in this case: bail, trial by jury, acquittal, self-incrimination.

[50] If we apply the factors listed by Justice Fish in *Martineau*, the objective of the Act and the provisions in question, the purpose of the sanction, and the process that leads to the imposition of the sanction, we find that they indicate, in this case, that the proceeding is civil rather than criminal in nature.

[51] The provisions set out in Part VII.1 of the Act, Deceptive Marketing Practices, are not intended for punishing people for harm caused to society in general; rather, as Justice Wilson put it in *Wigglesworth*, they are for “the protection of the public in accordance with the policy of a statute”. In this case, they are for the protection of the public against the adverse consequences of deceptive advertising and fraudulent commercial practices.

[52] In fact, Parliament’s stated intention in enacting Part VII.1 was to establish a civil regime. Part VII.1 was introduced by Bill C-20. When the then Minister of Industry, the Hon. John Manley, introduced the bill in the House of Commons at second reading, he made it plain that Parliament’s intention was to establish a civil regime to address violations relating to deceptive marketing practices:

The changes before us will create a combination criminal-civil regime to address misleading advertising and deceptive marketing practices. They will foster quick and efficient compliance through a series of measures that allow a great deal of flexibility. This flexibility will enable the competitive [sic] bureau to tailor its approach and use the tools that are most effective for each different situation. Criminal sanctions will remain in place but only for the most serious cases of misleading advertising.

Most existing misleading advertising and deceptive marketing offences will fall under the less cumbersome provisions of the civil law as reviewable matters. Remedial orders could be granted by a judicial member of the competition tribunal, by the Federal Court of Canada or by a provincial superior court.

Remedies available to the court would include cease and desist orders, interim cease and desist orders, administrative monetary penalties, information notices and consent orders. (House of Commons Debates, Edited Hansard, No. 74, March 16, 1998)

[53] Here the proceeding does not give rise to a charge being laid and cannot not lead to a criminal conviction or a criminal record. The proceeding is civil in nature, and the Tribunal must decide the issues before it on a balance of probabilities.

[54] The objective of the sanctions provided for in Part VII.1 is the protection of the public, not punishment. The first sanction consists of a cease and desist order, and the second is publication of a corrective notice. The third does involve a monetary penalty, but subsection 74.1(4) of the Act specifically provides that it “shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment”. As well, the administrative monetary penalty creates a debt that may be collected, as may any debt, in a civil court.

[55] After examining the impugned provisions, I find that the procedure that results from the provisions of paragraphs 74.01(1)(a) and (b) is civil in nature and cannot trigger the application of section 11 of the Charter. The precision with which the Act applies, and the narrow framing of the sanctions provided for, show that the Act operates within a limited sphere of activity. The provisions concerning deceptive commercial practices where there is no *mens rea* are meant solely to protect consumers and to regulate vendors' conduct accordingly.

(b) True penal consequences

[56] Under the second component of the test set out in *Wigglesworth*, the Tribunal must determine whether the sanctions imposed under section 74.1, in cases of reviewable conduct within the meaning of paragraph 74.01(1)(a) or (b), constitute “true penal consequences”. If so, section 11 applies.

[57] Justice Wilson considered the question of what distinguishes a penal consequence from a sanction of an administrative nature, and concluded as follows:

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

[58] As I said earlier, under subsection 74.1(1) of the Act the Tribunal may order the respondents to cease engaging in the conduct in question, publish a corrective notice or pay an administrative monetary penalty. The maximum amount of that penalty is \$50,000 for an individual and \$100,000 for a corporation in the case of a first order; the amounts rise to \$100,000 and \$200,000, respectively, for a subsequent order.

[59] The respondents submit that these sanctions are penal in nature, rather than administrative. In support of that position, they cite the duration of the prohibition order made under subsection 74.1(2) – ten years, unless the Tribunal specifies a shorter period. In the respondents’ submissions, the corrective notices result in public stigmatization and may ruin the company or the reputation of an individual or a company, particularly if the

individual or company is well known. As well, it is expensive to publish a corrective notice. The respondents further submit that the administrative monetary penalties are penal in nature because they are substantial amounts of money, and are determined by the Tribunal based on aggravating or mitigating factors, and not by a simple mathematical calculation. For all those reasons, the sanctions provided constitute true penal consequences.

[60] In my opinion, that argument cannot stand. First, unlike the facts in *Wigglesworth*, imprisonment is not one of the sanctions contemplated. Second, Parliament clearly states in subsection 74.1(4) that the corrective notices and administrative monetary penalties are imposed not to punish but to promote compliance with the Act:

74.1 (4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

74.1 (4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b) ou c) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.

[61] With respect to the order to cease engaging in conduct that violates paragraph 74.01(1)(a) or (b), I am of the opinion that such an order is not penal in nature. An order intended to prohibit that conduct is not, in my view, punitive. Rather, its purpose is to prevent the conduct and deter businesses and businesspeople from using practices that are contrary to the objectives of the Act.

[62] I am of the opinion that an order to publish a corrective notice is not a true penal consequence. I note that in fact the consequences alleged to result from publication of such a notice, in terms of public stigmatization, reputation or profits, were not proved. I cannot conclude, based on these factors, that there is a penal consequence, since there is no evidence to show this.

[63] The final point, in relation to administrative monetary penalties, is that the amounts are not so large that they may be regarded as true penal consequences. The Act prescribes a maximum amount that the Tribunal may not exceed, but it may reduce that amount based on the factors that it considers under subsection 74.1(5). Once again, the objective stated by Parliament should not be forgotten: to promote a conduct, and not to punish the offender.

[64] In the tax law context, numerous courts have ruled with respect to the monetary penalties imposed in an administrative proceeding, and have stated the opinion that notwithstanding the sometimes substantial amounts of the penalties imposed, such sanctions are not criminal fines. They are essentially administrative sanctions, the amounts of which are limited by law, and which are intended to secure compliance with the provisions of tax laws and not to redress a general harm caused to society. In *Lavers v. British Columbia (Minister of Finance)* (1989), 90 DTC 6017, the British Columbia Court of Appeal explained the distinction between a “civil” sanction and a “criminal” sentence for acts that

differ in their degree of seriousness. Mr. Justice Wallace, writing for the majority, stated, at page 6020:

In my view, the distinction in the severity of the respective penalties indicates that Parliament intended that the imposition of the statutory penalty following assessments by the Minister would reflect a sufficiently significant monetary punishment to deter taxpayers from failing to comply with the Income Tax Acts and would thereby achieve the objective of this administrative procedure. It is also an incentive to diligence for those who might be grossly negligent but not truly criminal. On the other hand, the severity of the public sentence which could be imposed following a conviction under s. 239 clearly points to Parliament's intention to provide a punishment designed to redress a public wrong. I do not consider this distinction in the nature and purpose of the two punishments to be diminished by the fact that all fines end up in the consolidated revenue fund, via the Receiver General of Canada. In the circumstances this is the only appropriate office to which such payments could be made. In summary, therefore, the penalty assessment, while not trivial, is not so severe as to amount to a "true penal consequence".

[65] In this case, I agree that the monetary penalties are not insignificant, but I am of the opinion that the maximum amounts are not so large that we can describe them as a true penal consequence.

[66] In *Petroleum Products Act (P.E.I.) (Re)*, [1986] P.E.I.J. No. 118, 33 D.L.R. (4th) 680, the Prince Edward Island Court of Appeal held that the provisions of the *Petroleum Products Act* did not create a criminal offence, notwithstanding the fact that a monetary penalty could be imposed. One of the facts relied on by the Court was that the penalty was to be collected in the usual way for collection of a civil debt.

[67] In that regard, sections 74.15 and 66 of the Act should be noted; they provide as follows:

74.15 The amount of an administrative monetary penalty imposed on a person under paragraph 74.1(1)(c) is a debt due to Her Majesty in right of Canada and may be recovered as such from that person in a court of competent jurisdiction.

74.15 Les sanctions administratives pécuniaires imposées au titre de l'alinéa 74.1(1)c) constituent des créances de Sa Majesté du chef du Canada, dont le recouvrement peut être poursuivi à ce titre devant tout tribunal compétent.

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

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

66. Quiconque contrevient à une ordonnance rendue en vertu de la partie VII.1, sauf l'alinéa 74.1(1)c), ou de la partie VIII commet une infraction et encourt, sur déclaration de culpabilité :

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

to both; or

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

ces peines;

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

[68] In other words, as in the *Petroleum Products Act*, the administrative monetary penalty creates a debt recoverable through civil proceedings, and failure to comply with an order to pay the administrative monetary penalty cannot result in a criminal prosecution, unlike any other order made by the Tribunal under Part VII.1 or Part VIII of the Act.

[69] I am therefore of the opinion that the administrative monetary penalty may not be considered to be a true penal consequence.

[70] Having determined that paragraphs 74.01(1)(a) and (b) are not criminal proceedings and that the sanctions provided for in subsection 74.1(1) are not true penal consequences, I find that a person against whom the Commissioner initiates a proceeding under paragraphs 74.01(1)(a) and (b) is not a person “charged with an offence” within the meaning of section 11, and accordingly that the respondents may not rely on section 11 of the Charter to challenge the constitutionality of paragraphs 74.01(1)(a) and (b).

(2) Challenge under section 7

[71] The respondents also rely on section 7 of the Charter, which reads as follows:

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

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

[72] The cases decided by the Supreme Court of Canada under section 7 of the Charter provide for a two-stage analysis: first, has there been an infringement of the right to life, liberty or security of the person; and second, is that infringement consistent with the principles of fundamental justice?

[73] In this case there is no threat to life or liberty. The respondents submit that there is a threat to security, since the negative publicity arising out of the allegations made against them create a real risk that Mr. Leblanc will be assaulted or have his home vandalized. The respondents also argue that Mr. Leblanc could suffer stigmatization because it is alleged that he deceived his customers. The respondents claim, lastly, that paragraphs 74.01(1)(a) and (b) are void and of no effect because they are vague and imprecise and thus contrary to the principles of fundamental justice.

[74] The respondents' submissions are limited. The allegations regarding the threat to Mr. Leblanc's security are entirely speculative. No evidence was adduced to support those assertions, nor was any evidence adduced regarding the stigmatization effect, which, according to the Supreme Court of Canada, generally attaches to criminal convictions (see *Reference re Motor Vehicle Act (British Columbia)* s. 94(2), [1985] 2 S.C.R. 486). I find that the risk to Mr. Leblanc's security is too speculative for section 7 to be triggered.

[75] It is therefore pointless to consider the second stage of the section 7 analysis, which is whether the infringement is in accordance with the principles of fundamental justice. The Tribunal therefore need not consider whether the provisions in question are vague. While the Supreme Court of Canada has recognized that vagueness in legislation may be contrary to the principles of fundamental justice, there must nevertheless be a threat to the rights guaranteed by section 7 – life, liberty and security of the person (see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606). Since the respondents have not established an infringement of any of those rights, there is no need to consider whether the provisions are vague.

[76] I therefore find that the respondents have not established an infringement of section 7 of the Charter.

(3) Challenge under section 2

[77] The respondents submit that paragraphs 74.01(1)(a) and 74.01(1)(b) infringe their right to freedom of expression, which is guaranteed by paragraph 2(b) of the Charter, which reads as follows:

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

...

2. Chacun a les libertés fondamentales suivantes :

...

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

...

[78] The Commissioner argues, in her memorandum, that paragraphs 74.01(1)(a) and 74.01(1)(b) of the Act do not infringe the respondents' freedom of expression, and if they do, that the infringement is justified under section 1 of the Charter.

[79] 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

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

TAB 31

Her Majesty The Queen *Appellant*

v.

Henry Morgentaler *Respondent*

and

The Attorney General of Canada, the
Attorney General for New Brunswick,
REAL Women of Canada and the Canadian
Abortion Rights Action League *Interveners*

INDEXED AS: R. v. MORGENTALER

File No.: 22578.

1993: February 4; 1993: September 30.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé,
Sopinka, Gonthier, Cory, McLachlin, Iacobucci and
Major JJ.ON APPEAL FROM THE NOVA SCOTIA SUPREME
COURT, APPEAL DIVISION*Constitutional law — Distribution of powers — Abor-
tion — Provincial legislation prohibiting abortions
outside hospitals — Whether legislation ultra vires prov-
ince as being in pith and substance criminal law —
Constitution Act, 1867, s. 91(27) — Medical Services
Act, R.S.N.S. 1989, c. 281 — Medical Services Designa-
tion Regulation, N.S. Reg. 152/89.*

In March 1989, in order to prevent the establishment
of free-standing abortion clinics in Halifax, the Nova
Scotia government approved regulations prohibiting the
performance of an abortion anywhere other than in a
place approved as a hospital as well as a regulation
denying medical services insurance coverage for abor-
tions performed outside a hospital (the "March regula-
tions"). The government later revoked these regulations
and adopted the *Medical Services Act* and the *Medical
Services Designation Regulation*, which continued the
prohibition of the performance of abortions outside hos-
pitals and the denial of health insurance coverage for
abortions performed in violation of the prohibition.
Despite these actions, the respondent opened his clinic
and performed 14 abortions. He was charged with 14

Sa Majesté la Reine *Appelante*

c.

^a Henry Morgentaler *Intimé*

et

^b Le procureur général du Canada, le
procureur général du Nouveau-Brunswick,
REAL Women of Canada et l'Association
canadienne pour le droit à
^c l'avortement *Intervenants*

RÉPERTORIÉ: R. c. MORGENTALER

N° du greffe: 22578.

^d 1993: 4 février; 1993: 30 septembre.Présents: Le juge en chef Lamer et les juges La Forest,
L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin,
Iacobucci et Major.^e EN APPEL DE LA SECTION D'APPEL DE LA COUR
SUPRÊME DE LA NOUVELLE-ÉCOSSE*Droit constitutionnel — Partage des pouvoirs —
Avortement — Textes législatifs provinciaux interdisant
les avortements en dehors des hôpitaux — Les textes
législatifs échappent-ils à la compétence de la province
parce que ressortissant, de par leur caractère véritable,
au droit criminel? — Loi constitutionnelle de 1867, art.
91(27) — Medical Services Act, R.S.N.S. 1989, ch. 281
— Medical Services Designation Regulation, N.S. Reg.
152/89.*

En mars 1989, afin d'empêcher l'établissement de cli-
niques d'avortement autonomes à Halifax, le gouverne-
ment de la Nouvelle-Écosse a approuvé des règlements
qui interdisaient de pratiquer un avortement ailleurs que
dans un hôpital approuvé ainsi qu'un règlement excluant
l'assurance-maladie pour les avortements pratiqués ail-
leurs que dans les hôpitaux (les «règlements de mars»).

^h Le gouvernement a, par la suite, abrogé ces règlements
et adopté la *Medical Services Act* et le *Medical Services
Designation Regulation*, qui ont reconduit l'interdiction
de pratiquer des avortements ailleurs que dans un hôpi-
tal et l'exclusion de l'assurance-maladie pour les avorte-
ments pratiqués en contravention de l'interdiction. Mal-
gré ces actions, l'intimé a ouvert sa clinique et pratiqué
14 avortements. Il a été inculpé, sous 14 chefs, d'infractions

Hospitals Act. At the same time it made a regulation (N.S. Reg. 32/89) pursuant to the *Health Services and Insurance Act*, R.S.N.S. 1989, c. 197, denying medical services insurance coverage for abortions performed outside a hospital. These regulations are referred to collectively as the "March regulations".

On May 8, 1989, one of the interveners in the present case, the Canadian Abortion Rights Action League (CARAL), launched a court challenge to the constitutionality of the March regulations. The matter was set for hearing on June 22, 1989. The case was adjourned and ultimately dismissed for lack of standing, primarily because the same issues would be determined in the present case: *Canadian Abortion Rights Action League Inc. v. Nova Scotia (Attorney General)* (1990), 96 N.S.R. (2d) 284 (A.D.), aff'g (1989), 93 N.S.R. (2d) 197 (T.D.), leave to appeal refused, [1990] 2 S.C.R. v.

CARAL's court challenge to the March regulations was still outstanding on June 6, 1989, when the Minister of Health and Fitness introduced the *Medical Services Act* for first reading. The Act progressed rapidly through the legislature. It received third reading and Royal Assent on June 15, the last day of the legislative session. The relevant portions of the Act are as follows:

2 The purpose of this Act is to prohibit the privatization of the provision of certain medical services in order to maintain a single high-quality health-care delivery system for all Nova Scotians.

3 In this Act,

(a) "designated medical service" means a medical service designated pursuant to the regulations;

4 No person shall perform or assist in the performance of a designated medical service other than in a hospital approved as a hospital pursuant to the *Hospitals Act*.

approuvé au sens de la *Hospitals Act*. En même temps, il a pris un règlement (N.S. Reg. 32/89) en application de la *Health Services and Insurance Act*, R.S.N.S. 1989, ch. 197, excluant l'assurance-maladie pour les avortements pratiqués ailleurs que dans les hôpitaux. Ces règlements sont appelés collectivement les «règlements de mars».

Le 8 mai 1989, l'un des intervenants en l'espèce, l'Association canadienne pour le droit à l'avortement (ACDA) a attaqué devant les tribunaux la constitutionnalité des règlements de mars. L'affaire a été mise au rôle du 22 juin 1989. L'action a été ajournée, une fin de non-recevoir ayant par la suite été opposée à la demanderesse parce qu'elle n'avait pas la qualité pour agir, surtout parce que les mêmes questions seraient tranchées dans le présent pourvoi: *Canadian Abortion Rights Action League Inc. c. Nova Scotia (Attorney General)* (1990), 96 N.S.R. (2d) 284 (S.A.), conf. (1989), 93 N.S.R. (2d) 197 (1^{re} inst.), autorisation de pourvoi refusée, [1990] 2 R.C.S. v.

La contestation judiciaire des règlements de mars par l'ACDA était encore en instance le 6 juin 1989 quand le ministre de la Santé et de la Condition physique a présenté le projet de la *Medical Services Act* en première lecture. Le projet de loi a franchi rapidement toutes les étapes. Il a reçu la troisième lecture et la sanction royale le 15 juin, dernier jour de la session. Voici les parties pertinentes de la Loi:

[TRADUCTION] 2 La présente loi a pour objet d'interdire la privatisation de certains services médicaux afin que soit maintenu un seul système de santé de qualité supérieure pour tous les habitants de la Nouvelle-Écosse.

3 Les définitions qui suivent s'appliquent à la présente loi:

a) «service médical désigné» Service médical désigné conformément au règlement;

4 Nul ne doit fournir un service médical désigné ailleurs que dans un hôpital approuvé en conformité avec la *Hospitals Act* ni aider à la fourniture d'un tel service.

health, hospitals, the practice of medicine and health care policy.

ment aux matières telles que la santé, les hôpitaux, la pratique de la médecine et la politique de la santé.

C. *Application of the Principles to the Case at Bar* a C. *L'application des principes à l'espèce*

An examination of the terms and legal effect of the *Medical Services Act* and the *Medical Services Designation Regulation*, their history and purpose and the circumstances surrounding their enactment leads to the conclusion that the legislation's central purpose and dominant characteristic is the restriction of abortion as a socially undesirable practice which should be suppressed or punished. Although the evidence of the legislation's practical effect is equivocal, it is not necessary to establish that its immediate or future practical impact will actually be to restrict access to abortions in order to sustain this conclusion.

L'examen des termes et de l'effet juridique de la *Medical Services Act* et du *Medical Services Designation Regulation*, de leur historique, de leur objet et des circonstances de l'adoption de la Loi et de la prise du règlement m'amène à conclure que l'objet central et la caractéristique dominante des textes législatifs sont la limitation de l'avortement en tant qu'acte socialement indésirable qu'il convient de supprimer ou de punir. Certes, la preuve de l'effet pratique des textes législatifs est équivoque, mais il n'est pas nécessaire, pour étayer cette conclusion, d'établir que son impact pratique, immédiat ou futur, sera réellement de limiter les avortements.

(1) Legal Effect: the Four Corners of the Legislation

(1) L'effet juridique: la teneur des textes législatifs

Starting with the terms of the legislation, the *Medical Services Act* makes it an offence subject to significant fines (s. 6) to perform abortions or other services designated by the *Medical Services Designation Regulation* outside a hospital approved as such under the *Hospitals Act* (s. 4). It is impossible to tell from the legislation itself whether this amounts to a total prohibition of abortion (which all parties concede would be *ultra vires* the province), since extrinsic evidence is necessary to establish that abortions are available in Nova Scotia hospitals. The Act also denies public health insurance coverage for the performer and recipient of such services (s. 5), and provides for injunctive relief against violations of its terms (s. 7). It is entitled "An Act to Restrict the Privatization of Medical Services", and its purpose is expressed to be the prohibition of the privatization of certain medical services in order to maintain a single high-quality health care delivery system in the province (s. 2). The allegation of *ultra vires* and the decisions in the courts below focused on the offence provisions of the legislation. No argument was directed toward the "de-insurance" section in this Court (s. 5). Although the "de-insurance" and

Voyons d'abord la teneur des textes législatifs. Aux termes de la *Medical Services Act*, constitue une infraction qui rend passible d'une forte amende (art. 6) le fait de pratiquer un avortement ou de fournir d'autres services désignés dans le *Medical Services Designation Regulation* ailleurs que dans un hôpital approuvé en conformité avec la *Hospitals Act* (art. 4). À la lecture des textes, il est impossible de dire si cela représente l'interdiction totale de l'avortement (ce qui excéderait la compétence de la province, de l'aveu de toutes les parties), car il faut recourir à la preuve extrinsèque pour établir si l'on pratique des avortements dans les hôpitaux de la Nouvelle-Écosse. La Loi prive du droit à l'assurance-maladie les personnes qui fournissent des services de cette nature et celles à qui ils sont fournis (art. 5), et elle dispose qu'en cas de contravention à ses dispositions, une injonction peut être décernée (art. 7). Elle s'intitule [TRA-DUCTION] «Loi tendant à limiter la privatisation des services médicaux» et son objet expressément énoncé est d'interdire la privatisation de certains services médicaux dans le but de maintenir un seul système de santé de qualité supérieure dans la province (art. 2). L'allégation selon laquelle elle est

injunction provisions clearly enhance the practical clout of the prohibition, they do not require independent consideration in the context of this case. It is sufficient for the purposes of characterizing this legislation to concentrate on the prohibition of the performance of a designated service outside a hospital. It is apparent from the combined effect of the offence and the regulation that one purpose of the legislation is to prohibit the establishment of free-standing abortion clinics.

The majority in the Court of Appeal conceded that the province had the legislative authority to pass a law in the present form. I acknowledge that the legislation has the legal effect of preventing privatization by prohibiting the private (i.e., outside a hospital) provision of the designated services. But the legislation expressly prohibits the performance of abortions in certain circumstances with penal consequences, a subject, as I have said, traditionally regarded as part of the criminal law. In *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, a majority of this Court held provincial legislation creating an offence of arbitrary arrest or detention and a right to relief in the form of *habeas corpus* to be suspect on its face since arbitrary arrest or detention and the availability of *habeas corpus* in such circumstances have been dealt with by Parliament in the criminal law "almost since the advent of Confederation" (at p. 240). Likewise, one of the reasons behind this Court's invalidation of a municipal by-law prohibiting street prostitution in *Westendorp v. The Queen*, [1983] 1 S.C.R. 43, was that conduct relating to prostitution has long been regarded as criminal. The present legislation, prohibiting traditionally criminal conduct, is therefore of questionable validity on its face: cf. *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing*

ultra vires, ainsi que les décisions des tribunaux d'instance inférieure, ont mis l'accent sur les dispositions prévoyant les infractions. Devant notre Cour, on n'a fait valoir aucun argument relatif à l'article prévoyant que les services ne seraient plus assurés (art. 5). Bien que les dispositions concernant l'exclusion de l'assurance et l'injonction augmentent nettement la rigueur de l'interdiction dans la pratique, elles n'exigent pas d'examen séparé en l'espèce. Il suffit, pour la qualification de ces textes législatifs, de s'en tenir à l'interdiction de la fourniture d'un service désigné ailleurs que dans un hôpital. Il ressort à l'évidence de l'effet cumulatif de l'infraction et du règlement que les textes législatifs avaient pour seul objet d'interdire l'implantation de cliniques d'avortement autonomes.

La Cour d'appel, à la majorité, a concédé que la province avait l'autorité législative pour adopter une loi sous cette forme. Je reconnais que les textes législatifs ont pour effet, sur le plan juridique, d'empêcher la privatisation en interdisant la fourniture privée (c'est-à-dire ailleurs que dans un hôpital) des services désignés. Mais les textes législatifs interdisent expressément l'avortement dans certaines circonstances et assortissent cette interdiction de conséquences pénales; or cette matière relève traditionnellement, je le répète, du domaine du droit criminel. Dans l'arrêt *Scowby c. Glendinning*, [1986] 2 R.C.S. 226, notre Cour a décidé, à la majorité, qu'une loi provinciale créant une infraction d'arrestation ou de détention arbitraires et un recours en *habeas corpus* est suspecte à première vue car l'arrestation ou la détention arbitraires et la possibilité de recourir à l'*habeas corpus* en pareille situation ont été l'objet de lois fédérales en matière criminelle «presque depuis la Confédération» (à la p. 240). De la même façon, dans l'arrêt *Westendorp c. La Reine*, [1983] 1 R.C.S. 43, notre Cour a invalidé un règlement municipal interdisant la prostitution dans les rues, entre autres, parce que les actes participant de la prostitution ont depuis longtemps été considérés comme criminels. La validité des textes législatifs en l'espèce, qui interdisent un acte traditionnellement tenu pour criminel, est donc douteuse à première vue: voir *Rio Hotel Ltd. c. Nouveau-Brunswick (Commission des licences et permis d'alcool)*,

Board), [1987] 2 S.C.R. 59, at p. 80, *per* Estey J. (concurring in the result).

This conclusion makes it unnecessary to invoke the “colourability doctrine”, but since it figured prominently in the courts below and in argument before us, I will address it briefly. The respondent attacks the legislation on the basis that it is colourable criminal law. The “colourability doctrine” in the distribution of powers is invoked when a law looks as though it deals with a matter within jurisdiction, but in essence is addressed to a matter outside jurisdiction: *Starr v. Houlden*, *supra*, at p. 1403; *Reference re Upper Churchill Water Rights Reversion Act*, *supra*, at p. 332; *Ladore v. Bennett*, [1939] A.C. 468 (P.C.), at p. 482. There is no need to invoke the doctrine in this case because while the Act states in its title and s. 2 that its aim is to prohibit the privatization of medical services, there are doubts about the legislation’s *vires* on its face due to the fact that it appears to occupy ground historically occupied by the criminal law. Moreover the ordinary approach to pith and substance entitles the Court to look beyond the terms of the legislation. As Rand J. declared in the *Margarine Reference*, *supra*, at p. 48, a statement of purpose is at most “a fact to be taken into account, the weight to be given to it depending on all the circumstances”.

In any event, the colourability doctrine really just restates the basic rule, applicable in this case as much as any other, that form alone is not controlling in the determination of constitutional character, and that the court will examine the substance of the legislation to determine what the legislature is really doing:

[t]he legislative bodies cannot, by statutory recitals, settle the classification of their own statutes for purposes of the distribution of powers Selection of the aspect that matters is the exclusive prerogative of the court, and the so-called doctrine of colourability is simply an instance of this rule

[1987] 2 R.C.S. 59, à la p. 80, le juge Estey (souscrivant au résultat).

Étant donné cette conclusion, il n’est pas nécessaire d’invoquer la «théorie du détournement de pouvoir», mais comme on en a beaucoup fait état devant les tribunaux d’instance inférieure et devant nous, je vais en dire quelques mots. L’intimé attaque les textes législatifs parce qu’il s’agirait de droit criminel déguisé. La «théorie du détournement de pouvoir», en ce qui a trait au partage des compétences, est invoquée lorsqu’une loi semblant porter sur un sujet relevant de la compétence d’un gouvernement porte en réalité sur un sujet qui ne relève pas de cette compétence: *Starr c. Houlden*, précité, à la p. 1403; *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, précité, à la p. 332; *Ladore c. Bennett*, [1939] A.C. 468 (C.P.), à la p. 482. Point n’est besoin d’invoquer la théorie en l’espèce parce que, bien que la Loi dise dans son intitulé et à l’art. 2 que son but est d’interdire la privatisation des services médicaux, la validité des textes législatifs est douteuse à première vue à cause du fait qu’ils semblent occuper un champ traditionnellement réservé au droit criminel. Par surcroît, le tribunal peut d’ordinaire aller au-delà des termes de la loi pour évaluer son caractère véritable. Comme le dit le juge Rand dans le *Renvoi sur la margarine*, précité, à la p. 48, l’énoncé de l’objet est tout au plus [TRADUCTION] «un fait qu’il faut prendre en considération, le poids qu’il convient de lui accorder dépendant de l’ensemble des circonstances».

Quoi qu’il en soit, la théorie du détournement de pouvoir ne fait que réaffirmer la règle fondamentale, applicable dans la présente espèce comme dans toute autre, que la forme seule n’est pas déterminante de la qualification constitutionnelle et que le tribunal examinera le fond de la loi pour déterminer sa portée véritable:

[TRADUCTION] . . . les corps législatifs ne peuvent pas, par un préambule, fixer la qualification de leurs propres lois pour l’application du partage des pouvoirs [. . .] Le choix de l’aspect qui est important est l’apanage des tribunaux et la théorie dite du détournement de pouvoir n’est qu’un cas d’application de cette règle . . .

See W. R. Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada" (1965), reprinted in Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), 266, at p. 282; see also A. S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 *U.T.L.J.* 487, at p. 494; *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.), at p. 337; and *Central Canada Potash Co. v. Saskatchewan*, [1979] 1 S.C.R. 42, at p. 76. Under either the basic approach to pith and substance or the "colourability doctrine", therefore, we need to look beyond the four corners of the legislation to see what it is really about. As stated by Laskin C.J. in *Potash*, *supra*, at p. 76, "[i]t is nothing new for this Court, or indeed, for any Court in this country seized of a constitutional issue, to go behind the words used by a Legislature and to see what it is that it is doing".

(2) Beyond the Four Corners

(a) Duplication of Criminal Code Provisions

Once the legal effect of legislation is ascertained, it can be compared with that of any relevant legislation passed by the other level of government. The majority of the Court of Appeal found that the present legislation effectively duplicated s. 251 (now s. 287) of the *Criminal Code*. Freeman J.A. held, at pp. 367 and 371-72, that:

Using s. 251 as a starting point, even a cursory examination discloses that the *Medical Services Act* has an impact and effect on abortions in private clinics virtually indistinguishable from that of s. 251.

If a distinction exists, it is a philosophical one too subtle to alter the outcome. Under either piece of legislation, a doctor who performed an abortion in a private clinic might find a policeman in the waiting room. He or she could be convicted on precisely the same evidence under either enactment.

Voir W. R. Lederman, «The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada» (1965), réédité dans Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), 266, à la p. 282; voir aussi A. S. Abel, «The Neglected Logic of 91 and 92» (1969), 19 *U.T.L.J.* 487, à la p. 494; *Attorney-General for Ontario c. Reciprocal Insurers*, [1924] A.C. 328 (C.P.), à la p. 337, et *Central Canada Potash Co. c. Saskatchewan*, [1979] 1 R.C.S. 42, à la p. 76. En conséquence, que nous abordions le caractère véritable du point de vue classique ou suivant la «théorie du détournement de pouvoir», nous devons aller au-delà de la teneur même des textes législatifs pour découvrir leur objet véritable. Comme le dit le juge en chef Laskin dans l'arrêt *Potash*, précité, à la p. 76, «[c]e n'est pas la première fois que cette Cour, comme tout tribunal canadien saisi d'une question constitutionnelle, doit chercher ce qui se cache derrière les termes utilisés par une législature et déterminer leur portée véritable».

(2) Au-delà de la teneur

a) Chevauchement avec des dispositions du Code criminel

Une fois déterminé l'effet juridique des textes législatifs, on peut le comparer à celui de tout texte pertinent adopté par l'autre palier de gouvernement. La Cour d'appel à la majorité a jugé que les textes législatifs en l'espèce reprenaient effectivement les termes de l'art. 251 (maintenant l'art. 287) du *Code criminel*. Le juge Freeman a conclu aux pp. 367, 371 et 372:

[TRADUCTION] Si l'on prend l'art. 251 comme point de départ, même un examen superficiel nous révèle que la *Medical Services Act* a un impact sur les avortements dans les cliniques privées qui est presque identique à celui de l'art. 251.

S'il y a une différence, c'est une distinction philosophique trop subtile pour modifier le résultat. Sous le régime de l'une et l'autre lois, le médecin qui pratiquerait un avortement dans une clinique privée pourrait se trouver face à un policier dans la salle d'attente. Il pourrait être déclaré coupable en fonction de la même preuve sous les deux régimes.

Provincial legislation has been held invalid when it employs language "virtually indistinguishable" from that found in the *Criminal Code*: *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at p. 699; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, *supra*, at pp. 70-71 and 80; and *Starr v. Houlden*, *supra*, at pp. 1402 and 1405-6. However, even when the legal effect of federal and provincial legislation is virtually identical this does not necessarily determine validity, since the provinces can enact provisions with the same legal effect as federal legislation provided this is done in pursuit of a provincial head of power: *O'Grady v. Sparling*, [1960] S.C.R. 804; *Smith v. The Queen*, [1960] S.C.R. 776; *Stephens v. The Queen*, [1960] S.C.R. 823; *R. v. Chiasson* (1982), 39 N.B.R. (2d) 631 (C.A.), at p. 636, *aff'd* [1984] 1 S.C.R. 266. The duplication of *Criminal Code* language may raise an inference that the province has stepped into the realm of the criminal law; the more exact the reproduction, the stronger the inference that this is the dominant purpose of the enactment.

The guiding principle is that the provinces may not invade the criminal field by attempting to stiffen, supplement or replace the criminal law (*Reference re Freedom of Informed Choice (Abortions) Act* (1985), 44 Sask. R. 104 (C.A.)) or to fill perceived defects or gaps therein (*Scowby v. Glendinning*, *supra*, at p. 238). The legal effect of s. 251 and the present legislation, each taken as a whole, is quite different: among other things, s. 251 made it an offence for a woman to obtain an abortion, and prescribed the burdensome "therapeutic abortion committee" system and the "life or health" criterion for a legal abortion, none of which are present in the Act and regulation; and the present legislation prohibits other services besides abortion and directly concerns public health insurance coverage. Freeman J.A. was clearly right, however, that in so far as it prohibits abortion clinics the legal effect of the medical services legislation is completely embraced by s. 251 and, had the latter provision not been struck down, the present legislation would have been redundant in that respect. Section 251 is now, of course,

Des lois provinciales ont été déclarées invalides parce qu'elles contenaient des termes «presque identiques» à ceux employés dans le *Code criminel*: *Nova Scotia Board of Censors c. McNeil*, [1978] 2 R.C.S. 662, à la p. 699; *Rio Hotel Ltd. c. Nouveau-Brunswick (Commission des licences et permis d'alcool)*, précité, aux pp. 70, 71 et 80; *Starr c. Houlden*, précité, aux pp. 1402, 1405 et 1406. Toutefois, même si l'effet juridique des textes provinciaux et fédéraux sont presque identiques, cela ne détermine pas nécessairement la validité, car les provinces peuvent édicter des dispositions ayant le même effet juridique que celui d'un texte fédéral à la condition que ce soit dans l'exercice d'un chef de compétence provincial: *O'Grady c. Sparling*, [1960] R.C.S. 804; *Smith c. The Queen*, [1960] R.C.S. 776; *Stephens c. The Queen*, [1960] R.C.S. 823; *R. c. Chiasson* (1982), 39 N.B.R. (2d) 631 (C.A.), à la p. 636; *conf. par* [1984] 1 R.C.S. 266. On peut inférer de la similitude avec les termes du *Code criminel* que la province a empiété sur le domaine du droit criminel; plus la reproduction est exacte, plus on doit en conclure que c'est là l'objet principal de la loi.

Le principe directeur veut que les provinces ne puissent s'ingérer dans les sphères criminelles en essayant de renforcer, de compléter ou de remplacer le droit criminel (*Reference re Freedom of Informed Choice (Abortions) Act* (1985), 44 Sask. R. 104 (C.A.)) ou de remédier à ce qu'elles considèrent comme des défauts ou des failles (*Scowby c. Glendinning*, précité, à la p. 238). L'effet juridique de l'art. 251 et celui des textes législatifs en l'espèce, pris dans chaque cas dans leur ensemble, est tout à fait distinct: entre autres, l'art. 251 criminalisait le fait pour une femme d'obtenir un avortement et instaurait le système lourd du «comité de l'avortement thérapeutique», ainsi que le critère de «la vie ou de la santé» selon lequel l'avortement pouvait être tenu pour légal, tous des éléments absents dans la Loi et le règlement; de plus, les textes législatifs en l'espèce interdisent d'autres services outre l'avortement et ils concernent directement le régime public d'assurance-maladie. Toutefois, le juge Freeman avait manifestement raison de dire que, dans la mesure où les textes sur les services médicaux interdisent les cliniques d'avor-

inoperative. The absence of operative federal legislation does not enlarge provincial jurisdiction, though. It simply means that if the provincial legislation is found to be *intra vires*, no problem of paramountcy arises.

In my opinion the overlap of legal effects between the now defunct criminal provision and the Nova Scotia legislation is capable of supporting an inference that the legislation was designed to serve a criminal law purpose. It is a piece in the puzzle which along with the other evidence may demonstrate the true purpose of the legislation.

(b) *Background and Surrounding Circumstances*

The events leading up to and including the enactment of the Act and regulation do not support the appellant's assertions that the pith and substance of the legislation relate to provincial jurisdiction over health. On the contrary, they strengthen the inference that the impugned Act and regulation were designed to serve a criminal law purpose.

(i) The Course of Events

It is clear that the catalyst for government action was the rumour and later announcement of Dr. Morgentaler's intention to open his clinic. The Crown concedes this. The respondent was clearly, as the trial judge concluded, a "mischief" against which the legislation was directed. The government knew of Dr. Morgentaler's intention to open a clinic by some time in January 1989. It responded with the March regulations, which prohibited abortions outside hospitals and "de-insured" such services. The direct and exclusive aim of this action was to stop the Morgentaler clinic and no one disputes that. The Minister of

tement, leur effet juridique est entièrement englobé par l'art. 251 et, si celui-ci n'avait pas été invalidé, les textes législatifs en l'espèce auraient été redondants à cet égard. L'article 251 est maintenant opérant, bien sûr. L'absence de loi fédérale opérante n'élargit cependant pas la compétence provinciale. Elle signifie simplement que, si les textes provinciaux sont jugés *intra vires*, aucun problème de prépondérance ne se pose.

À mon avis, le chevauchement de l'effet juridique de la disposition criminelle maintenant annulée et de celui des textes législatifs de la Nouvelle-Écosse permet d'inférer que les textes étaient conçus pour atteindre un objectif touchant le droit criminel. C'est une pièce du puzzle qui, jointe aux autres éléments de preuve, peut indiquer l'objet véritable des textes.

b) *Le contexte et les circonstances*

L'adoption de la Loi et la prise du règlement, ainsi que les faits qui les ont précédés, ne justifient pas les assertions de l'appelante selon lesquelles le caractère véritable des textes législatifs se rapporte à la compétence de la province en matière de santé. Au contraire, ils corroborent la conclusion qu'ils visaient un objectif touchant le droit criminel.

(i) Le déroulement des faits

De toute évidence, ce qui a joué le rôle de catalyseur de l'action gouvernementale, ce sont la rumeur, puis l'annonce par le Dr Morgentaler de son intention d'ouvrir sa clinique. Le ministère public le concède. L'intimé représentait nettement, comme l'a conclu le juge du procès, un «mal» que les textes législatifs visaient à corriger. Le gouvernement a appris en janvier 1989 que le Dr Morgentaler avait l'intention d'ouvrir une clinique. Il a réagi en prenant, en mars, les règlements qui interdisaient de pratiquer un avortement ailleurs que dans un hôpital et qui excluaient l'assurance-maladie à leur égard. Le but direct et exclusif de cette action était d'empêcher l'ouverture de la clinique du Dr Morgentaler et cela, personne ne le conteste.

TAB 32

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA
ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

1948 CanLII 2 (SCC)

IN THE MATTER OF A REFERENCE AS TO THE
VALIDITY OF SECTION 5(A) OF THE DAIRY
INDUSTRY ACT, R.S.C. 1927, CHAPTER 45.

1948

*Oct. 5, 6, 7, 8

*Dec. 14

Constitutional law—Whether section 5(a) of Dairy Industry Act, R.S.C. 1927, c. 45 is ultra vires of Parliament—Constitutional validity—Criminal law—Trade and Commerce—Agriculture—Property and Civil Rights—Importation—B.N.A. Act, ss. 91, 92, 95.

Subsection a of Section 5 of the Dairy Industry Act provides that “no person shall manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.”

The Governor-in-Council referred to this Court under section 55 of the Supreme Court Act the following question: Is section 5(a) of the Dairy Industry Act, R.S.C. 1927, c. 45, *ultra vires* of the Parliament of Canada in whole or in part and if so in what particular or particulars and to what extent?

Held that the prohibition of importation of the goods mentioned in the section is *intra vires* of Parliament as legislation in relation to foreign trade. Locke J. finds the whole section to be *ultra vires* while expressing no opinion as to the power of Parliament to ban importation by appropriate legislation, the prohibition of importation being merely ancillary to the other prohibitions.

Held, The Chief Justice and Kerwin J. dissenting, that the prohibition of manufacture, offer, sale or possession for sale of the goods mentioned is *ultra vires* of Parliament. It is legislation in relation to property

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey and Locke JJ.

Although passed on June 2nd, 1886 it was retroactive to May 28th of that year. In the Revised Statutes of the same year the language was changed by substituting for "and all such substitutes" the words "or other similar substitutes". This latter form has been preserved to the present time with the addition in 1907 by chapter 11 of the words "and process butter or renovated butter".

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VALIDITY OF
SECTION 5(a)
OF THE DAIRY
INDUSTRY
ACT
Rand J.

Next there is chapter 42 of the statutes of 1886 passed on the same day, June 2nd:—

WHEREAS the use of certain substitutes for butter, heretofore manufactured and exposed for sale in Canada, is injurious to health; and it is expedient to prohibit the manufacture and sale thereof; Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. No oleomargarine, butterine or other substitute for butter, *manufactured from any animal substance other than milk, shall be manufactured in Canada*, or sold therein, and every person who contravenes the provisions of this Act in any manner whatsoever shall incur a penalty not exceeding four hundred dollars and not less than two hundred dollars, and in default of payment shall be liable to imprisonment for a term not exceeding twelve months and not less than three months.

In the same year the Act was incorporated in the Revised Statutes as chapter 100, and as is usual in the case of revisions, the preamble was omitted.

In 1903 the Butter Act was enacted as chapter 6 of the statutes of that year and an important change was introduced into the provision dealing with butter substitutes by the language of section 5:—

No person shall manufacture, *import into Canada*, or offer, sell or have in his possession for sale, any oleomargarine, butterine, or other substitute for butter, manufactured wholly or in part from *any fat other than that of milk or cream*.

This Act was in the revision of 1906 incorporated as Part VIII of the Inspection and Sale Act, chapter 85, R.S.C. 1906. In Schedule A, Vol. III, R.S.C. 1906, at page 2941, chapter 100 of the Revised Statutes is repealed.

Later, in 1914, Part VIII was repealed and the present provision enacted as section 5 of the Dairy Industry Act, chapter 7 of the statutes of that year. This later became chapter 45, R.S.C. 1927.

The question of the preamble was raised. Ordinarily a preamble indicates the purpose of the statute and it may be a guide to the meaning and scope of the language where that is doubtful or ambiguous. But when the question is

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the real character of the legislation for the purposes of jurisdiction between two legislatures under a federal constitution, different considerations arise. A legislation cannot conclude the question by a declaration in a preamble: at most it is a fact to be taken into account, the weight to be given to it depending on all the circumstances; and it is significant here that the only prohibitory enactment containing a preamble did not include margarine.

But whatever might have been the case of the 1886 legislation, the situation now is that not only has the preamble disappeared, but its recital of fact is admittedly no longer true of either margarine or oleomargarine. It is conceded that both of them—the latter containing animal fat other than milk added to the ingredients, chiefly vegetable oils, of the former—are substantially as nutritious, possess as much energy value and are as free from deleterious effects as butter itself; and that I take to have been the state of things in 1914. Between December 1st, 1917 and September 30th, 1923 approximately 52,000,000 lbs. of oleomargarine was either manufactured in or imported into Canada under the authorization of both order in council and statute. Margarine has become a staple in Great Britain and on the European continent, and in the United States its use is widespread. When in 1903 importation was banned, “animal substance” changed to “any fat”, and the prohibited substitutes thus enlarged to include those made from vegetable oils, the value of the preamble was greatly impaired; and the repeal of Part VIII together with the enactment of the Dairy Industry Act in the situation of 1914 removes any residue that might have survived. To ascertain then the true nature and substance of the legislation—which is the initial determination—I deal with it as free from any such indication of purpose.

The appearance of the provision in a statute dealing comprehensively with the dairy industry and the inclusion of prohibition of importation, the ordinary mode of protection of industry in its ultimate form, are, for this initial purpose, of considerable significance. On the other hand,

TAB 33

IN THE MATTER OF Section 27(1) of the
Judicature Act, R.S.A. 1980, chapter J-1

AND IN THE MATTER OF a Reference by
the Lieutenant Governor in Council to the
Court of Appeal of Alberta for hearing and
consideration of the questions set out in
Order in Council 461/96 respecting the
Firearms Act, S.C. 1995, chapter 39

The Attorney General for Alberta *Appellant*

v.

**The Attorney General of
Canada** *Respondent*

and

**The Attorney General for Ontario, the
Attorney General of Nova Scotia, the
Attorney General for New Brunswick, the
Attorney General of Manitoba, the Attorney
General for Saskatchewan, the Government
of the Northwest Territories, the Minister of
Justice for the Government of the Yukon
Territory, the Federation of Saskatchewan
Indian Nations, the Coalition of Responsible
Firearm Owners and Sportsmen (CORFOS),
the Law-Abiding Unregistered Firearms
Association (LUFA), the Shooting
Federation of Canada, the Association pour
la santé publique du Québec inc., the
Alberta Council of Women's Shelters,
CAVEAT, the Fondation des victimes du
6 décembre contre la violence, the Canadian
Association for Adolescent Health, the
Canadian Pediatric Society, the Coalition for
Gun Control, the Canadian Association of
Chiefs of Police, the Corporation of the City
of Toronto, the City of Montreal and the
City of Winnipeg** *Intervenors*

DANS L'AFFAIRE DU paragraphe 27(1) de
la *Judicature Act*, R.S.A. 1980, chapitre J-1

ET DANS L'AFFAIRE DE questions
déférées par le lieutenant gouverneur en
conseil à la Cour d'appel de l'Alberta dans
le décret 461/96 relativement à la *Loi sur les
armes à feu*, L.C. 1995, chapitre 39

Le procureur général de l'Alberta *Appellant*

c.

Le procureur général du Canada *Intimé*

et

**Le procureur général de l'Ontario, le
procureur général de la Nouvelle-Écosse, le
procureur général du Nouveau-Brunswick,
le procureur général du Manitoba, le
procureur général de la Saskatchewan, le
gouvernement des Territoires du Nord-
Ouest, le ministre de la Justice du
gouvernement du Territoire du Yukon, la
Federation of Saskatchewan Indian Nations,
la Coalition of Responsible Firearm Owners
and Sportsmen (CORFOS), la Law-Abiding
Unregistered Firearms Association (LUFA),
la Fédération de tir du Canada,
l'Association pour la santé publique du
Québec inc., l'Alberta Council of Women's
Shelters, CAVEAT, la Fondation des
victimes du 6 décembre contre la violence,
l'Association canadienne pour la santé des
adolescents, la Société canadienne de
pédiatrie, la Coalition for Gun Control,
l'Association canadienne des chefs de police,
la Corporation de la cité de Toronto, la
Ville de Montréal et la Ville de
Winnipeg** *Intervenants*

Dallas K. Miller, Q.C., for the intervener the Coalition of Responsible Firearm Owners and Sportsmen.

David R. Holman, for the intervener the Law-Abiding Unregistered Firearms Association.

Brian A. Crane, Q.C., and *Paul Shaw*, for the intervener the Shooting Federation of Canada.

Paul Larochelle, Q.C., and *Michèle Thivierge*, for the intervener the Association pour la santé publique du Québec inc.

Alexander D. Pringle, Q.C., and *June Ross*, for the intervener the Alberta Council of Women's Shelters.

Peter A. Downard, Paul F. Monahan and Rochelle S. Fox, for the interveners CAVEAT, the Fondation des victimes du 6 décembre contre la violence, the Canadian Association for Adolescent Health and the Canadian Pediatric Society.

Jill Copeland, for the interveners the Coalition for Gun Control, the Canadian Association of Chiefs of Police, the Corporation of the City of Toronto, the City of Montreal and the City of Winnipeg.

The following is the judgment delivered by

THE COURT —

I. Introduction

1

In 1995, Parliament amended the *Criminal Code*, R.S.C., 1985, c. C-46, by enacting the *Firearms Act*, S.C. 1995, c. 39, commonly referred to as the gun control law, to require the holders of all firearms to obtain licences and register their guns. In 1996, the Province of Alberta challenged Parliament's power to pass the gun control law by a reference to the Alberta Court of Appeal. The Court of Appeal by a 3:2 majority upheld Parliament's power to pass the law. The Province of Alberta now appeals that decision to this Court.

Dallas K. Miller, c.r., pour l'intervenante la Coalition of Responsible Firearm Owners and Sportsmen.

David R. Holman, pour l'intervenante la Law-Abiding Unregistered Firearms Association.

Brian A. Crane, c.r., et *Paul Shaw*, pour l'intervenante la Fédération de tir du Canada.

Paul Larochelle, c.r., et *Michèle Thivierge*, pour l'intervenante l'Association pour la santé publique du Québec inc.

Alexander D. Pringle, c.r., et *June Ross*, pour l'intervenant l'Alberta Council of Women's Shelters.

Peter A. Downard, Paul F. Monahan et Rochelle S. Fox, pour les intervenants CAVEAT, la Fondation des victimes du 6 décembre contre la violence, l'Association canadienne pour la santé des adolescents et la Société canadienne de pédiatrie.

Jill Copeland, pour les intervenantes la Coalition for Gun Control, l'Association canadienne des chefs de police, la Corporation de la cité de Toronto, la Ville de Montréal et la Ville de Winnipeg.

Version française du jugement rendu par

LA COUR —

I. Introduction

En 1995, le Parlement a modifié le *Code criminel*, L.R.C. (1985), ch. C-46, en adoptant la *Loi sur les armes à feu*, L.C. 1995, ch. 39, communément appelée la loi sur le contrôle des armes à feu, pour obliger tous les détenteurs d'armes à feu à obtenir un permis et à enregistrer leurs armes. En 1996, la province de l'Alberta, dans un renvoi à la Cour d'appel de l'Alberta, a contesté le pouvoir du Parlement d'adopter la loi sur le contrôle des armes à feu. Par une majorité de trois à deux, la Cour d'appel a confirmé la compétence du Parlement en la matière. La province de l'Alberta fait appel de cette décision devant notre Cour.

The issue before this Court is not whether gun control is good or bad, whether the law is fair or unfair to gun owners, or whether it will be effective or ineffective in reducing the harm caused by the misuse of firearms. The only issue is whether or not Parliament has the constitutional authority to enact the law.

The answer to this question lies in the Canadian Constitution. The Constitution assigns some matters to Parliament and others to the provincial legislatures: *Constitution Act, 1867*. The federal government asserts that the gun control law falls under its criminal law power, s. 91(27), and under its general power to legislate for the “Peace, Order and good Government” of Canada. Alberta, on the other hand, says the law falls under its power over property and civil rights, s. 92(13). All agree that to resolve this dispute, the Court must first determine what the gun control law is really about — its “pith and substance” — and then ask which head or heads of power it most naturally falls within.

We conclude that the gun control law comes within Parliament’s jurisdiction over criminal law. The law in “pith and substance” is directed to enhancing public safety by controlling access to firearms through prohibitions and penalties. This brings it under the federal criminal law power. While the law has regulatory aspects, they are secondary to its primary criminal law purpose. The intrusion of the law into the provincial jurisdiction over property and civil rights is not so excessive as to upset the balance of federalism.

II. Reference Questions

The formal questions put to the Alberta Court of Appeal by the Alberta government in 1996 are attached in Appendix A. Simply put, the issue before us is whether or not the licensing and registration provisions in the *Firearms Act*, as they

On ne demande pas à notre Cour de juger si le contrôle des armes à feu est bon ou mauvais en soi, si la loi est équitable ou inéquitable pour les détenteurs d’armes à feu ou si elle réussira à réduire les maux causés par l’usage abusif des armes à feu. La seule question est de savoir si le Parlement avait le pouvoir constitutionnel d’adopter la loi.

La réponse à cette question réside dans la Constitution canadienne. La Constitution attribue certaines matières au Parlement et d’autres aux législatures des provinces: *Loi constitutionnelle de 1867*. Le gouvernement fédéral affirme que la loi sur les armes à feu relève de sa compétence en matière de droit criminel, par. 91(27), et de sa compétence générale relativement à «la paix, l’ordre et le bon gouvernement» du Canada. Pour sa part, l’Alberta dit que cette loi relève de sa compétence en matière de propriété et de droits civils, par. 92(13). Les parties conviennent que pour trancher le litige, notre Cour doit d’abord déterminer en quoi consiste vraiment la loi sur le contrôle des armes à feu — son «caractère véritable» — et se demander ensuite à quel chef de compétence elle se rapporte le plus naturellement.

Nous concluons que la loi sur le contrôle des armes à feu relève de la compétence du Parlement en matière de droit criminel. De par son «caractère véritable», elle vise à améliorer la sécurité publique en régissant l’accès aux armes à feu, au moyen d’interdictions et de sanctions et, de ce fait, elle relève de la compétence fédérale en matière de droit criminel. Bien que la loi comporte des aspects de réglementation, ceux-ci sont accessoires à son objet premier, qui a trait au droit criminel. L’empiétement de la loi sur la compétence provinciale sur la propriété et les droits civils n’est pas important au point de rompre l’équilibre du fédéralisme.

II. Les questions du renvoi

Les questions déferées à la Cour d’appel de l’Alberta par le gouvernement de l’Alberta en 1996 sont énoncées à l’appendice A. En termes simples, la question est de savoir si le Parlement avait le pouvoir d’édicter à l’égard des armes à feu

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tion over criminal law or its peace, order and good government power. While she would have struck down the legislation entirely, she held that if the licensing scheme were deemed valid, the registration scheme could be severed from the licensing scheme.

V. Analysis

15 The issue before us is whether the licensing and registration provisions of the *Firearms Act* constitute a valid federal enactment pursuant to Parliament's jurisdiction over criminal law or its peace, order and good government power. In order to answer this question, we must engage in the division of powers analysis used so often by this Court, and most recently summarized in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; see also *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, and *R. v. Morgentaler*, [1993] 3 S.C.R. 463. There are two stages to this analysis. The first step is to determine the "pith and substance" or essential character of the law. The second step is to classify that essential character by reference to the heads of power under the *Constitution Act, 1867* in order to determine whether the law comes within the jurisdiction of the enacting government. If it does, then the law is valid.

A. Characterization: What Is the Pith and Substance of the Law?

16 The first task is to determine the "pith and substance" of the legislation. To use the wording of ss. 91 and 92, what is the "matter" of the law? What is its true meaning or essential character, its core? To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body, and the legal effect of the law.

17 A law's purpose is often stated in the legislation, but it may also be ascertained by reference to extrinsic material such as Hansard and government

des provinces en matière de propriété et de droits civils et qu'elle est invalide en tant qu'exercice de la compétence du Parlement relativement au droit criminel ou à la paix, l'ordre et le bon gouvernement. Bien que d'avis d'annuler l'ensemble de la loi, elle conclut que si le régime de permis était jugé valide, le régime d'enregistrement pourrait être dissocié du régime de permis.

V. Analyse

Nous devons décider si les dispositions de la *Loi sur les armes à feu* relatives aux permis et à l'enregistrement ont été valablement édictées par le Parlement en vertu de sa compétence en matière de droit criminel ou relativement à la paix, l'ordre et le bon gouvernement. Pour répondre à cette question, nous devons effectuer l'analyse du partage des pouvoirs qui a été utilisée si souvent par notre Cour et qui a été résumée très récemment dans *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21; voir aussi *Whitbread c. Walley*, [1990] 3 R.C.S. 1273, *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, et *R. c. Morgentaler*, [1993] 3 R.C.S. 463. Cette analyse comporte deux étapes. La première consiste à déterminer le «caractère véritable» ou le caractère essentiel de la loi et la seconde à classer ce caractère essentiel en égard aux chefs de compétence établis par la *Loi constitutionnelle de 1867*, afin de déterminer si la loi relève de la compétence du gouvernement qui l'a adoptée. Si c'est le cas, la loi est valide.

A. Caractérisation: Quel est le caractère véritable de la loi?

Il faut d'abord déterminer le «caractère véritable» de la loi. Pour reprendre les termes des art. 91 et 92, quelle est la «matière» de la loi? Quelle est sa véritable signification ou son caractère essentiel, sa quintessence? Le caractère véritable de la loi doit être déterminé sous deux aspects: le but visé par le législateur qui l'a adoptée et l'effet juridique de la loi.

L'objet d'une loi est souvent énoncé dans son texte, mais il peut aussi être établi à partir de documents extrinsèques, comme le Hansard et les

publications: see *Morgentaler, supra*, at pp. 483-84. While such extrinsic material was at one time inadmissible to facilitate the determination of Parliament's purpose, it is now well accepted that the legislative history, Parliamentary debates, and similar material may be quite properly considered as long as it is relevant and reliable and is not assigned undue weight: see *Global Securities, supra*, at para. 25; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 35; and *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at para. 14. Purpose may also be ascertained by considering the "mischiefs" of the legislation — the problem which Parliament sought to remedy: see *Morgentaler, supra*, at pp. 483-84.

Determining the legal effects of a law involves considering how the law will operate and how it will affect Canadians. The Attorney General of Alberta states that the law will not actually achieve its purpose. Where the legislative scheme is relevant to a criminal law purpose, he says, it will be ineffective (e.g., criminals will not register their guns); where it is effective it will not advance the fight against crime (e.g., burdening rural farmers with pointless red tape). These are concerns that were properly directed to and considered by Parliament. Within its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of powers analysis: *Morgentaler, supra*, at pp. 487-88, and *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373. Rather, the inquiry is directed to how the law sets out to achieve its purpose in order to better understand its "total meaning": W. R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), at pp. 239-40. In some cases, the effects of the law may suggest a purpose other than that which is stated in the law: see *Morgentaler, supra*, at pp. 482-83; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.) (*Alberta Bank Taxation Reference*); and *Texada Mines Ltd. v. Attorney-General of British Columbia*, [1960] S.C.R. 713; see generally P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), at pp. 15-14 to 15-16. In other words, a law may say

publications gouvernementales: *Morgentaler*, précité, aux pp. 483 et 484. Même si, à une certaine époque, les documents extrinsèques n'étaient pas admissibles aux fins de déterminer l'objet visé par le législateur, il est maintenant bien établi qu'on peut à bon droit examiner l'historique législatif, les débats parlementaires et autres documents semblables dans la mesure où ils sont pertinents et fiables et qu'on ne leur donne pas plus de poids qu'ils n'en méritent: *Global Securities*, précité, au par. 25; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, au par. 35; *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, au par. 14. L'objet peut aussi être établi par l'examen du «mal» visé par la loi — le problème auquel le législateur a voulu remédier: *Morgentaler*, précité, aux pp. 483 et 484.

Les effets juridiques d'une loi sont déterminés par l'examen de son application et de ses effets sur les Canadiens. Le procureur général de l'Alberta dit que la loi ne réussira pas à atteindre son but. Selon lui, pour ce qui a trait à un objet de droit criminel, le régime législatif sera inefficace (p. ex. les criminels n'enregistreront pas leurs armes); là où elle aura un effet, la loi ne contribuera pas à la lutte contre le crime (p. ex. en imposant aux agriculteurs de la paperasserie inutile). Ces préoccupations ont été adressées, comme il se doit, au Parlement qui les a examinées. Dans le cadre de ses compétences constitutionnelles, c'est au Parlement qu'il appartient de juger s'il est probable qu'une mesure atteindra le but poursuivi; l'efficacité n'est pas pertinente dans le cadre de l'analyse du partage des pouvoirs par notre Cour: *Morgentaler*, précité, aux pp. 487 et 488, et *Renvoi: Loi anti-inflation*, [1976] 2 R.C.S. 373. L'examen vise plutôt à déterminer comment la loi cherche à atteindre son but afin de mieux comprendre son [TRADUCTION] «entière portée»: W. R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), aux pp. 239 et 240. Dans certains cas, les effets de la loi peuvent indiquer un objet autre que celui qu'elle énonce: *Morgentaler*, précité, aux pp. 482 et 483; *Attorney-General for Alberta c. Attorney-General for Canada*, [1939] A.C. 117 (C.P.) (*Alberta Bank Taxation Reference*); et *Texada Mines Ltd. c. Attorney-General of British Columbia*, [1960] R.C.S. 713; et, de façon générale, P.

that it intends to do one thing and actually do something else. Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be “colourable”.

W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), aux pp. 15-14 à 15-16. En d’autres termes, une loi peut dire qu’elle vise une chose et, en réalité, faire autre chose. Lorsque les effets de la loi diffèrent de façon importante de l’objet déclaré, on parle parfois de «motif déguisé».

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Against this background, we turn to the purpose of the *Firearms Act*. Section 4 states that the purpose of the Act is “to provide . . . for the issuance of licences, registration certificates and authorizations under which persons may possess firearms” and “to authorize . . . the manufacture of” and “transfer of” ordinary firearms. This is the language of property regulation. However, this regulatory language is directly tied to a purpose cast in the language of the criminal law. The licensing, registration and authorization provisions delineate the means by which people can own and transfer ordinary firearms “in circumstances that would otherwise constitute [a criminal] offence”. Those who challenge the legislation point to the first part of the section and its regulatory focus. Those who seek to uphold the law point to the second part of the section and its criminal focus.

Sur cette toile de fond, nous abordons l’objet de la *Loi sur les armes à feu*. L’article 4 déclare que son objet est «de prévoir [. . .] la délivrance de permis, de certificats d’enregistrement et d’autorisations permettant la possession d’armes à feu» et «de permettre [. . .] la fabrication» et «la cession» d’armes à feu ordinaires. Ces mots tiennent du langage de la réglementation de la propriété. Ces mots sont toutefois directement liés à un objet formulé dans le langage du droit criminel. Les dispositions relatives aux permis, à l’enregistrement et aux autorisations circonscrivent les moyens par lesquels les personnes peuvent être propriétaires et faire cession d’armes à feu ordinaires «en des circonstances qui ne donnent pas lieu à une infraction» criminelle. Ceux qui contestent la loi invoquent la première partie de l’article et sa nature réglementaire. Ceux qui cherchent à la faire confirmer invoquent la deuxième partie de l’article et sa nature pénale.

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The statements of the Honourable Allan Rock, Minister of Justice at the time, in his second-reading speech in the House of Commons, reveal that the federal government’s purpose in proposing the law was to promote public safety. He stated: “The government suggests that the object of the regulation of firearms should be the preservation of the safe, civilized and peaceful nature of Canada” (*House of Commons Debates*, vol. 133, No. 154, 1st Sess., 35th Parl., February 16, 1995, at p. 9706 (emphasis added)). Mr. Rock went on to describe the contents of the bill in more detail (at p. 9707):

Les déclarations faites à la Chambre des communes par l’honorable Allan Rock, ministre de la Justice à l’époque, à la deuxième lecture, indiquent que l’objet visé par le gouvernement fédéral dans cette loi était de favoriser la sécurité publique. Il a déclaré: «Le gouvernement estime que la réglementation des armes à feu devrait viser principalement à faire que le Canada demeure un pays sûr, civilisé et paisible» (*Débats de la Chambre des communes*, vol. 133, n° 154, 1^{re} sess., 35^e lég., 16 février 1995, à la p. 9706 (nous soulignons)), puis il a décrit en détail le contenu de la loi (à la p. 9707):

First, tough measures to deal with the criminal misuse of firearms; second, specific penalties to punish those who would smuggle illegal firearms; and third, measures overall to provide a context in which the legiti-

[P]remièrement, des mesures sévères pour contrer l’usage criminel des armes à feu; deuxièmement, des peines précises pour punir ceux qui font la contrebande des armes à feu illégales; troisièmement, des mesures

cism of the law, is equally irrelevant to our constitutional analysis.

VI. Conclusion

We conclude that the impugned sections of the *Firearms Act* contain prohibitions and penalties in support of a valid criminal law purpose. The legislation is in relation to criminal law pursuant to s. 91(27) of the *Constitution Act, 1867* and hence *intra vires* Parliament. It is not regulatory legislation and it does not take the federal government so far into provincial territory that the balance of federalism is threatened or the jurisdictional powers of the provinces are unduly impaired.

Having determined that the legislation constitutes a valid exercise of Parliament's jurisdiction over criminal law, it is unnecessary to consider whether the legislation can also be justified as an exercise of its peace, order and good government power.

We would dismiss the appeal. The licensing and registration provisions in the *Firearms Act* do not constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to s. 92(13) of the *Constitution Act, 1867*. The Act is a valid exercise of Parliament's jurisdiction over criminal law pursuant to s. 91(27).

The answers to the reference questions are as follows:

Question 2:

(1) No.

(2) No.

Question 3:

(1) No.

(2) No.

dirigée contre la loi, est également sans pertinence dans notre analyse constitutionnelle.

VI. Conclusion

Nous concluons que les dispositions contestées de la *Loi sur les armes à feu* prévoient des interdictions et des sanctions à l'appui d'un objet valide de droit criminel. Cette loi se rapporte au droit criminel et, conformément au par. 91(27) de la *Loi constitutionnelle de 1867*, relève de la compétence du Parlement. Cette loi n'est pas de nature réglementaire et elle ne pousse pas le gouvernement fédéral si loin dans le domaine réservé aux provinces que l'équilibre du fédéralisme en est rompu ou qu'il y a empiétement indu sur les domaines de compétence des provinces.

Étant donné que nous avons conclu que la loi constituait un exercice valide de la compétence du Parlement en matière de droit criminel, il est inutile de déterminer si la loi peut également être justifiée en tant qu'exercice de sa compétence relativement à la paix, l'ordre et le bon gouvernement.

Nous sommes d'avis de rejeter le pourvoi. Les dispositions de la *Loi sur les armes à feu* relatives aux permis et à l'enregistrement ne constituent pas une atteinte à la compétence de la législature de l'Alberta en matière de propriété et de droits civils qui est conférée par le par. 92(13) de la *Loi constitutionnelle de 1867*. L'adoption de la Loi est un exercice valide de la compétence du Parlement en matière de droit criminel qui est conférée par le par. 91(27).

Les réponses aux questions du renvoi sont les suivantes:

Question 2:

(1) Non.

(2) Non.

Question 3:

(1) Non.

(2) Non.

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TAB 34

Canadian Western Bank, Bank of Montreal, Canadian Imperial Bank of Commerce, HSBC Bank Canada, National Bank of Canada, Royal Bank of Canada, Bank of Nova Scotia and Toronto-Dominion Bank *Appellants*

v.

Her Majesty The Queen in Right of Alberta *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General for Saskatchewan, Alberta Insurance Council, Financial Advisors Association of Canada, AIG Life Insurance Company of Canada, Canada Life Assurance Company, La Capitale Civil Service Insurer Inc., La Capitale Insurance and Financial Services Inc., CUMIS Life Insurance Company, Desjardins Financial Security Life Assurance Company, Empire Life Insurance Company, Equitable Life Insurance Company of Canada, Great-West Life Assurance Company, Industrial Alliance Insurance and Financial Services Inc., Industrial-Alliance Pacific Life Insurance Company, London Life Insurance Company, Manufacturers Life Insurance Company, Standard Life Assurance Company of Canada, Sun Life Assurance Company of Canada and Transamerica Life Canada *Interveners*

INDEXED AS: CANADIAN WESTERN BANK v. ALBERTA

Banque canadienne de l'Ouest, Banque de Montréal, Banque Canadienne Impériale de Commerce, Banque HSBC Canada, Banque Nationale du Canada, Banque Royale du Canada, Banque de Nouvelle-Écosse et Banque Toronto-Dominion *Appelantes*

c.

Sa Majesté la Reine du chef de l'Alberta *Intimée*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général du Nouveau-Brunswick, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, Alberta Insurance Council, Association des conseillers en finance du Canada, Compagnie d'Assurance-Vie AIG du Canada, Compagnie d'Assurance du Canada sur la Vie, La Capitale assureur de l'administration publique Inc., La Capitale assurances et gestion du patrimoine Inc., Compagnie d'Assurance-Vie CUMIS, Desjardins Sécurité financière, Compagnie d'Assurance-Vie, Empire, Compagnie d'Assurance-Vie, Équitable, Compagnie d'Assurance-Vie du Canada, Great-West, Compagnie d'Assurance-Vie, Industrielle Alliance, Assurance et services financiers Inc., Industrielle Alliance Pacifique, Compagnie d'Assurance sur la Vie, London Life Compagnie d'Assurance-Vie, Compagnie d'Assurance-Vie Manufacturers, Compagnie d'Assurance Standard Life du Canada, Sun Life du Canada, Compagnie d'Assurance-Vie et Compagnie d'Assurance-Vie Transamerica du Canada *Intervenants*

RÉPERTORIÉ : BANQUE CANADIENNE DE L'OUEST c. ALBERTA

This initial analysis consists of an inquiry into the true nature of the law in question for the purpose of identifying the “matter” to which it essentially relates. As Rand J. put it in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 333:

... the courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter *in relation to which* the legislature acting has been empowered to make laws. That principle inheres in the nature of federalism . . . [Emphasis in original.]

If the pith and substance of the impugned legislation can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. If, however, the legislation can more properly be said to relate to a matter that is outside the jurisdiction of that legislature, it will be held to be invalid owing to this violation of the division of powers.

To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body and the legal effect of the law (*Reference re Firearms Act*, at para. 16). To assess the purpose, the courts may consider both intrinsic evidence, such as the legislation’s preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary debates. In so doing, they must nevertheless seek to ascertain the *true* purpose of the legislation, as opposed to its mere stated or apparent purpose (*Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.), at p. 337). Equally, the courts may take into account the effects of the legislation. For example, in *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (“*Alberta Banks*”), the Privy Council held a provincial statute levying a tax on banks to be invalid on the basis that its effects on banks were so great that its true purpose could not be (as the province argued) the raising of money by levying a tax (in which case it would have been *intra vires*), but was rather the regulation of banking (which rendered it *ultra vires*, and thus invalid).

Cette première analyse consiste dans une recherche sur la nature véritable de la loi en question afin d’identifier la « matière » sur laquelle elle porte essentiellement. Comme l’a affirmé le juge Rand dans l’arrêt *Saumur c. City of Quebec*, [1953] 2 R.C.S. 299, p. 333 :

[TRADUCTION] . . . les tribunaux doivent pouvoir, d’après ses termes et les circonstances qui l’entourent, rattacher un texte législatif à une matière *relativement à laquelle* la législature qui l’adopte a reçu le pouvoir de faire des lois. Ce principe fait partie de la nature même du fédéralisme . . . [En italique dans l’original.]

Si le caractère véritable de la législation contestée peut se rattacher à une matière relevant de la compétence de la législature qui l’a adoptée, les tribunaux la déclareront *intra vires*. Cependant, lorsqu’il est plus juste d’affirmer qu’elle porte sur une matière qui échappe à la compétence de cette législature, la constatation de cette atteinte au partage des pouvoirs entraînera l’invalidation de la loi.

Le caractère véritable de la loi doit être déterminé sous deux aspects : le but visé par le législateur qui l’a adoptée et l’effet juridique de la loi (*Renvoi relatif à la Loi sur les armes à feu*, par. 16). Dans l’analyse du but visé, les tribunaux peuvent examiner tant la preuve intrinsèque, tels le préambule ou les dispositions de la législation énonçant ses objectifs généraux, que la preuve extrinsèque, tels le harsard ou les comptes rendus des débats parlementaires. Ce faisant, les tribunaux doivent toutefois rechercher l’objectif *réel* de la législation, plutôt que son but simplement déclaré ou apparent (*Attorney-General for Ontario c. Reciprocal Insurers*, [1924] A.C. 328 (C.P.), p. 337). De même, les tribunaux peuvent tenir compte des effets de la législation. Par exemple, dans l’arrêt *Attorney-General for Alberta c. Attorney-General for Canada*, [1939] A.C. 117 (« *Alberta Banks* »), le Conseil privé a invalidé une loi provinciale imposant une taxe aux banques pour le motif que les effets de cette loi sur les banques étaient si importants que son objet véritable ne pouvait pas être (comme le prétendait la province) le prélèvement de deniers par l’imposition d’une taxe (ce qui en aurait fait une loi *intra vires*), mais qu’il était la réglementation des opérations bancaires (ce qui la rendait *ultra vires* et donc l’invalidait).

TAB 35

The Attorney General of Quebec *Appellant*

v.

Irwin Toy Limited *Respondent*

and

Gilles Moreau in his capacity as President of the Office de la protection du consommateur
Intervener

and

The Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Saskatchewan, Pathonic Communications Inc., Réseau Pathonic Inc., and the Coalition contre le retour de la publicité destinée aux enfants
Intervenors

INDEXED AS: IRWIN TOY LTD. v. QUEBEC (ATTORNEY GENERAL)

File No.: 20074.

1987: November 19, 20; 1989: April 27.

Present: Dickson C.J. and Beetz, Estey*, McIntyre, Lamer, Wilson and Le Dain* JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Distribution of legislative powers — Commercial advertising — Provincial legislation prohibiting commercial advertising directed at persons under thirteen years of age — Whether provincial legislation ultra vires the provincial legislature — Colourable legislation — Impairment of federal undertakings — Conflict with federal legislation — Criminal law — Constitution Act, 1867, ss. 91, 92 — Consumer Protection Act, R.S.Q., c. P-40.1, ss. 248, 249 — Broadcasting Act, R.S.C. 1970, c. B-11, s. 3(c).

Constitutional law — Charter of Rights — Application — Exception where express declaration — Provincial legislation prohibiting commercial advertising directed at persons under thirteen years of age — Whether provincial legislation protected from the application of s. 2(b) of the Canadian Charter of Rights and Freedoms by a valid and subsisting override provision — Canadian Charter of Rights and Freedoms,

* Estey and Le Dain JJ. took no part in the judgment.

Le procureur général du Québec *Appellant*

c.

Irwin Toy Limited *Intimée*

^a

et

Gilles Moreau en sa qualité de président de l'Office de la protection du consommateur
Intervenant

^b

et

Le procureur général de l'Ontario, le procureur général du Nouveau-Brunswick, le procureur général de la Colombie-Britannique, le procureur général de la Saskatchewan, Pathonic Communications Inc., Réseau Pathonic Inc., et la Coalition contre le retour de la publicité destinée aux enfants
Intervenants

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RÉPERTORIÉ: IRWIN TOY LTD. c. QUÉBEC (PROCUREUR GÉNÉRAL)

N° du greffe: 20074.

^e

1987: 19, 20 novembre; 1989: 27 avril.

Présents: Le juge en chef Dickson et les juges Beetz, Estey*, McIntyre, Lamer, Wilson et Le Dain*.

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EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Partage des pouvoirs législatifs — Publicité commerciale — Loi provinciale interdisant la publicité commerciale destinée à des personnes de moins de treize ans — La loi provinciale est-elle ultra vires de la législature provinciale? — Législation déguisée — Entrave à une entreprise fédérale — Conflit avec la législation fédérale — Droit criminel — Loi constitutionnelle de 1867, art. 91, 92 — Loi sur la protection du consommateur, L.R.Q., chap. P-40.1, art. 248, 249 — Loi sur la radiodiffusion, S.R.C. 1970, chap. B-11, art. 3(c).

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Droit constitutionnel — Charte des droits — Application — Dérogation par déclaration expresse — Loi provinciale interdisant la publicité commerciale destinée à des personnes de moins de treize ans — La loi provinciale est-elle soustraite à l'application de l'art. 2(b) de la Charte canadienne des droits et libertés par une disposition dérogatoire valide et en vigueur? — Charte canadienne des droits et libertés, art. 33 — Loi

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* Les juges Estey et Le Dain n'ont pas pris part au jugement.

other hand, this fact could be taken into account as part of the context of the presentation of the advertisement. There is, in short, a contradiction in terms in the article and some redrafting appears required.

We conclude that s. 249 can be given a sensible construction. The narrow purpose of the last paragraph is to ensure that the three factors to be weighed by the judge, *viz.* the nature and intended purpose of the goods advertised, the manner of presenting the advertisement, and the time and place it is shown, are always weighed together. The last paragraph addresses only the third factor—time and place. It makes clear that children's product advertising, if presented in a manner aimed to attract children, is not permitted even if adults form the largest part of the public likely to see the advertisement. Of course if, in assessing "manner of presentation", the judge concludes that no children were likely to see the advertisement, it is also unlikely that the means chosen were designed to attract children. But the factors must all be weighed according to the balance of probabilities. No presumption is to be drawn by considering the third factor alone. Read this way, there is nothing inherently confusing or contradictory about ss. 248 and 249.

b. Judicial Discretion

The respondent contended that the test set out in ss. 248 and 249 leaves an inordinately wide discretion in the judge to determine whether a commercial advertisement was aimed at children. It cites the Introduction to the *Application Guide for Sections 248 and 249*, which comments on the prohibition against commercial advertising directed at children:

[T]he terms of the law can lend to different interpretations, thus allowing for some discretion in its application. This discretion is evident, for instance, in the determination of precisely what is meant by "intended for children". Therefore, the Office considers it important to make public the standards it has set to determine whether or not a given advertisement is permitted under the Act.

message publicitaire n'était pas destiné aux enfants. Par contre, ce fait pourrait être pris en considération à titre d'élément du contexte de la présentation du message publicitaire. Bref, il y a une contradiction dans les termes de l'article et sa rédaction mériterait d'être reprise.

Nous sommes d'avis qu'il est possible de donner une interprétation logique à l'art. 249. Le dernier paragraphe a pour objet restreint d'assurer que les trois facteurs dont le juge doit tenir compte, c.-à-d. la nature et la destination des biens annoncés, la manière de présenter le message publicitaire et le moment ou l'endroit où il apparaît, sont évalués ensemble. Le dernier paragraphe ne porte que sur le troisième facteur, le moment et l'endroit. Il dit clairement qu'une publicité pour un produit destiné aux enfants présentée de façon à attirer l'attention des enfants est interdite même si le public susceptible de la voir est composé en majeure partie d'adultes. Évidemment lorsque, après évaluation de «la manière de présenter» un message publicitaire, le juge conclut qu'aucun enfant n'est susceptible de le voir, il est également peu probable que les moyens choisis aient été conçus pour attirer l'attention des enfants. Mais il faut évaluer tous les facteurs selon la prépondérance des probabilités. On ne peut tirer aucune présomption de l'examen du troisième facteur seul. Interprétés de cette façon, les art. 248 et 249 n'ont rien d'intrinsèquement confus ou contradictoire.

b. Le pouvoir discrétionnaire des tribunaux

L'intimée prétend que le critère établi par les art. 248 et 249 confère au juge un pouvoir discrétionnaire excessivement large pour décider si un message publicitaire est destiné aux enfants. L'intimée cite l'introduction du *Guide d'application des articles 248 et 249* qui traite de l'interdiction de faire de la publicité commerciale destinée aux enfants:

Cependant, les termes mêmes de la loi peuvent prêter à diverses interprétations, créant ainsi une marge discrétionnaire dans son application. Par exemple, une telle discrétion existe dans la détermination de ce que l'on entend par «destinée à des enfants». L'Office croit donc important de publier les critères qu'il a établis pour déterminer si une publicité est permise ou non, eu égard à la loi.

The respondent suggested that this reference to "discretion" made by the very agency charged with administering the statute demonstrates that ss. 248 and 249 are imprecise.

Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

Sections 248 and 249 do provide an intelligible standard to be applied in determining whether an advertisement is subject to restriction. According to s. 248, the advertisement must have commercial content and it must be aimed at those under thirteen years of age. As explained above, s. 249 directs the judge to weigh three factors relating to the context in which the advertisement was presented. The courts are not simply given a discretion to ban whichever advertisements they please. In order to help advertisers comply with the ss. 248 and 249 standards, the Office de la protection du consommateur developed a more detailed series of guidelines which are not binding on the courts. One cannot infer from the existence of the guidelines that the courts have no intelligible standard to apply. One can only infer that the Office found it reasonable, as part of its mandate, to provide a voluntary pre-clearance mechanism allowing advertisers in most cases to substitute administrative decision-making for judicial decision-making.

C. The Relevance of the s. 1 and s. 9.1 Materials

The respondent contended that only evidence of legislative objective contemporary with the adop-

L'intimée a expliqué que la mention de l'existence d'une «marge discrétionnaire» dans un document émanant de l'organisme chargé de l'application de la loi démontre bien que les art. 248 et 249 sont imprécis.

En droit, la précision absolue est rare, voire inexistante. La question est de savoir si le législateur a formulé une norme intelligible sur laquelle le pouvoir judiciaire doit se fonder pour exécuter ses fonctions. L'interprétation de la manière d'appliquer une norme dans des cas particuliers comporte toujours un élément discrétionnaire parce que la norme ne peut jamais préciser tous les cas d'application. Par contre, s'il n'existe aucune norme intelligible et si le législateur a conféré le pouvoir discrétionnaire absolu de faire ce qui semble être le mieux dans une grande variété de cas, il n'y a pas de restriction prescrite «par une règle de droit».

Les articles 248 et 249 fournissent une norme intelligible à appliquer pour déterminer si un message publicitaire peut faire l'objet d'une restriction. Selon l'article 248, le message doit avoir un contenu commercial et viser les personnes de moins de treize ans. Comme on l'a déjà expliqué, l'art. 249 impose au juge d'évaluer trois facteurs relatifs au contexte dans lequel le message publicitaire a été présenté. Il ne confère pas aux tribunaux le pouvoir discrétionnaire d'interdire les messages publicitaires qu'ils veulent. Afin d'aider les annonceurs à se conformer aux critères des art. 248 et 249, l'Office de la protection du consommateur a donné une série de directives détaillées qui ne lient pas les tribunaux. On ne peut déduire de l'existence des directives que les tribunaux n'ont pas de norme intelligible à appliquer. On peut seulement en déduire que l'Office a jugé raisonnable, dans le cadre de son mandat, d'établir une procédure volontaire d'approbation préalable qui permet aux annonceurs dans la plupart des cas de soumettre leurs annonces à un processus décisionnel administratif plutôt que judiciaire.

C. La pertinence des documents relatifs à l'article premier et à l'art. 9.1

L'intimée prétend que seuls les éléments de preuve relatifs à l'objet visé par le législateur,

A corporation guilty of an offence contemplated in the preceding paragraph is liable to a minimum fine five times greater and to a maximum fine ten times greater than those provided for in the preceding paragraph.

Section 215 establishes that ss. 248 and 249 constitute "prohibited practices" within the meaning of the above section:

215. Any practice contemplated in sections 219 to 251 constitutes a prohibited practice for the purposes of this title.

282. Where a corporation is guilty of an offence against this act or any regulation, every director or representative of such corporation who had knowledge of the said offence is deemed to be a party to the offence and is liable to the penalty provided for in section 278 or 279 for a person other than a corporation, unless he establishes to the satisfaction of the court that he did not acquiesce in the commission of such offence.

Imprisonment is clearly one of the penalties envisioned for contravention of, *inter alia*, ss. 248 and 249 of the Act. A corporation is not, for obvious reasons, subject to imprisonment. By virtue of s. 282 of the Act, directors of corporations are deemed to be parties to offences committed by the corporation and are therefore liable to the penalties listed above. It is, therefore, the directors and representatives of corporations who risk, pursuant to the Act, a restriction of liberty of the kind envisioned in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486. In the present case, proceedings are brought only against the company and not against any individuals. In the context of physical restriction to liberty, it would be left to officers of a company whose conduct was impugned pursuant to s. 282 of the Act to raise a s. 7 argument in terms of vagueness or imputation of corporate liability to individuals. This circumstance does not arise in the present case.

In order to put forward a s. 7 argument in a case of this kind where the officers of the corporation are not named as parties to the proceedings, the corporation would have to urge that its own life, liberty or security of the person was being deprived in a manner not in accordance with the principles of fundamental justice. In our opinion, a corporation cannot avail itself of the protection offered by

Une corporation coupable d'une infraction visée à l'alinéa précédent est passible d'une amende minimale cinq fois plus élevée et d'une amende maximale dix fois plus élevée que celles qui sont prévues à l'alinéa précédent.

L'article 215 prévoit que les art. 248 et 249 constituent des «pratiques interdites» au sens de l'article précédent:

215. Constitue une pratique interdite aux fins du présent titre une pratique visée par les articles 219 à 251.

282. Lorsqu'une corporation commet une infraction à la présente loi ou à un règlement, un administrateur ou un représentant de cette corporation qui avait connaissance de l'infraction est réputé être partie à l'infraction et est passible de la peine prévue aux articles 278 ou 279 pour une personne autre qu'une corporation, à moins qu'il n'établisse à la satisfaction du tribunal qu'il n'a pas acquiescé à la commission de cette infraction.

La peine d'emprisonnement est clairement envisagée lorsqu'il y a violation, entre autres, des art. 248 et 249 de la Loi. Il va de soi qu'une société ne peut faire l'objet d'une peine d'emprisonnement. En vertu de l'art. 282 de la Loi, les administrateurs de sociétés sont réputés être parties aux infractions perpétrées par la société et sont donc passibles des peines énumérées ci-dessus. Ce sont donc les administrateurs et les représentants des sociétés qui risquent, selon la loi, de subir une restriction de liberté du genre de celle envisagée dans le *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486. En l'espèce, les poursuites concernent une compagnie et non des individus. Dans le contexte d'une restriction physique à la liberté, il appartiendrait aux dirigeants d'une société dont la conduite est contraire à l'art. 282 de la Loi de soulever en vertu de l'art. 7 des arguments fondés sur l'absence de précision ou sur l'attribution à des individus d'une responsabilité qui revient à la société. Ce n'est pas le cas en l'espèce.

Pour invoquer des arguments fondés sur l'art. 7 dans un cas comme celui-ci, où les dirigeants de la société ne sont pas identifiés comme des parties à l'instance, la société devrait faire valoir qu'on a porté atteinte à sa vie, à sa liberté ou à la sécurité de sa personne d'une manière qui n'est pas conforme aux principes de justice fondamentale. À notre avis, une société ne peut invoquer la protec-

s. 7 of the *Charter*. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". We have already noted that it is nonsensical to speak of a corporation being put in jail. To say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition. The only remaining argument is that corporations are protected against deprivations of some sort of "economic liberty".

There are several reasons why we are of the view that this argument can not succeed. It is useful to reproduce s. 7, which reads as follows:

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

What is immediately striking about this section is the inclusion of "security of the person" as opposed to "property". This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived "of life, liberty or property, without due process of law". The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property—contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the

tion qu'offre l'art. 7 de la *Charte*. Premièrement, nous aurions à établir de quelle manière une société peut être privée du droit «à la vie, à la liberté et à la sécurité de sa personne». Nous avons déjà souligné que c'est un non-sens de dire d'une société qu'elle est condamnée à l'emprisonnement. Affirmer qu'une procédure de faillite et de liquidation fait intervenir l'art. 7, reviendrait à fausser complètement le sens du droit à la vie. Le seul autre argument est de prétendre que les sociétés sont protégées contre la privation d'une sorte de «liberté économique».

Plusieurs raisons nous amènent à rejeter cet argument. Il est utile de citer encore l'art. 7:

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

Ce qui frappe immédiatement dans cet article c'est l'inclusion de l'expression «la sécurité de sa personne» par opposition à «propriété». Cela contraste avec la formulation classique libérale qui, par exemple, a été adoptée dans les Cinquième et Quatorzième amendements de la Constitution américaine, qui prévoient que nul ne sera privé [TRADUCTION] «de la vie, de la liberté et de sa propriété sans l'application régulière de la loi». À notre avis, l'exclusion intentionnelle de la propriété de l'art. 7 et son remplacement par la «sécurité de sa personne» a un double effet. Premièrement, cela permet d'en déduire globalement que les droits économiques, généralement désignés par le terme «propriété», ne relèvent pas de la garantie de l'art. 7. Cela ne signifie pas cependant qu'aucun droit comportant un élément économique ne peut être visé par l'expression «sécurité de sa personne». Les tribunaux d'instance inférieure ont conclu que la rubrique des «droits économiques» couvre un vaste éventail d'intérêts qui comprennent tant certains droits reconnus dans diverses conventions internationales—tels la sécurité sociale, l'égalité du salaire pour un travail égal, le droit à une alimentation, un habillement et un logement adéquats—que les droits traditionnels relatifs aux biens et aux contrats. Ce serait agir avec précipitation, à notre avis, que d'exclure tous ces droits alors que nous en

same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.

That is, read as a whole, it appears to us that this section 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. In this regard, the case of *Big M Drug Mart, supra*, is of no application. There are no penal proceedings pending in the case at hand, so the principle articulated in *Big M Drug Mart* is not involved.

IX—Disposition and Answers to Constitutional Questions

For these reasons the appeal is allowed with costs and the constitutional questions are answered as follows:

1. Is s. 364 of the *Consumer Protection Act*, R.S.Q., c. P-40.1, added by s. 1 of *An Act respecting the Constitution Act*, 1982, S.Q. 1982, c. 21, inconsistent with the provisions of s. 33 of the *Constitution Act*, 1982 and so *ultra vires* and of no force or effect to the extent of the inconsistency pursuant to s. 52(1) of the latter Act?

Answer: No, except in so far as section 364 is given retrospective effect by section 7 of *An Act respecting the Constitution Act*, 1982, S.Q. 1982, c. 21. However, because s. 364 expired on June 23, 1987, there is

sommes au début de l'interprétation de la *Charte*. À ce moment-ci, nous ne voulons pas nous prononcer sur la question de savoir si ces droits économiques, fondamentaux à la vie de la personne et à sa survie, doivent être traités comme s'ils étaient de la même nature que les droits économiques des sociétés commerciales. Ce faisant, nous concluons que l'inclusion de l'expression «sécurité de sa personne» à l'art. 7 a comme deuxième effet de n'accorder aucune protection constitutionnelle aux droits économiques d'une société.

En effet il nous semble que, pris globalement, cet article avait pour but d'accorder une protection à un niveau individuel seulement. Une lecture ordinaire, conforme au bon sens, de la phrase «Chacun a droit à la vie, à la liberté et à la sécurité de sa personne» fait ressortir l'élément humain visé; seul un être humain peut avoir ces droits. Le terme «chacun» doit donc être lu en fonction du reste de l'article et défini de façon à exclure les sociétés et autres entités qui ne peuvent jouir de la vie, de la liberté et de la sécurité de la personne, et de façon à ne comprendre que les êtres humains. À cet égard, l'arrêt *Big M Drug Mart*, précité, ne trouve aucune application. Il n'y a aucune poursuite pénale en cours en l'espèce de sorte que le principe formulé dans l'arrêt *Big M Drug Mart* n'entre pas en jeu.

IX—Dispositif et réponses aux questions constitutionnelles

Pour ces motifs, le pourvoi est accueilli avec dépens et les réponses aux questions constitutionnelles sont les suivantes:

1. L'article 364 de la *Loi sur la protection du consommateur*, L.R.Q., chap. P-40.1, ajouté par l'art. 1 de la *Loi concernant la Loi constitutionnelle de 1982*, L.Q. 1982, chap. 21, est-il incompatible avec les dispositions de l'art. 33 de la *Loi constitutionnelle de 1982* et partant *ultra vires* ou inopérant dans la mesure de cette incompatibilité aux termes du par. 52(1) de cette dernière loi?

Réponse: Non, sauf dans la mesure où l'art. 7 de la *Loi concernant la Loi constitutionnelle de 1982*, L.Q. 1982, chap. 21, lui accorde un effet rétroactif. Cependant, puisque l'effet de l'art. 364 a pris fin le

TAB 36

Nova Scotia Pharmaceutical Society,
Pharmacy Association of Nova Scotia,
Lawtons Drug Stores Limited, William H.
Richardson, Empire Drugstores Limited,
Woodlawn Pharmacy Limited, Nolan
Pharmacy Limited, Christopher D.A. Nolan,
Blackburn Holdings Limited, William G.
Wilson, Woodside Pharmacy Limited and
Frank Forbes *Appellants*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General for Ontario and the
Attorney General for Alberta *Interveners*

and

The Association québécoise des pharmaciens
propriétaires, Cumberland Drugs (Merivale)
Ltd., Kane's Super Drugmart Corp. Ltd.,
Les Entreprises Norpharm Inc., Escompte
Chez Lafortune Inc., Famili-Prix Inc., Le
Groupe Jean Coutu (P.J.C.) Inc., Groupe
Pharmaceutique Focus Inc., Les Magasins
Koffler de l'Est Inc., McMahon Essaim Inc.,
Super Escompte Brouillet Inc., B. Mayrand
Inc., Superpharm (Montréal) Ltée, Uniprix
Inc., Pierre Bossé, François-Jean Coutu,
Claude Gagnon, Guy Lanoue, Michel
Lesieur, Guy-Marie Papillon and Jean-Guy
Prud'Homme *Interveners*

INDEXED AS: R. v. NOVA SCOTIA PHARMACEUTICAL
SOCIETY

File No.: 22473.

1991: December 4; 1992: July 9.

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

ON APPEAL FROM THE NOVA SCOTIA SUPREME
COURT, APPEAL DIVISION

Nova Scotia Pharmaceutical Society,
Pharmacy Association of Nova Scotia,
Lawtons Drug Stores Limited, William H.
Richardson, Empire Drugstores Limited,
^a Woodlawn Pharmacy Limited, Nolan
Pharmacy Limited, Christopher D.A. Nolan,
Blackburn Holdings Limited, William G.
Wilson, Woodside Pharmacy Limited et
^b Frank Forbes *Appellants*

c.

^c Sa Majesté la Reine *Intimée*

et

^d Le procureur général de l'Ontario et le
procureur général de l'Alberta *Intervenants*

et

^e L'Association québécoise des pharmaciens
propriétaires, Cumberland Drugs (Merivale)
Ltd., Kane's Super Drugmart Corp. Ltd.,
Les Entreprises Norpharm Inc., Escompte
Chez Lafortune Inc., Famili-Prix Inc., Le
^f Groupe Jean Coutu (P.J.C.) Inc., Groupe
Pharmaceutique Focus Inc., Les Magasins
Koffler de l'Est Inc., McMahon Essaim Inc.,
Super Escompte Brouillet Inc., B. Mayrand
^g Inc., Superpharm (Montréal) Ltée, Uniprix
Inc., Pierre Bossé, François-Jean Coutu,
Claude Gagnon, Guy Lanoue, Michel
Lesieur, Guy-Marie Papillon et Jean-Guy
^h Prud'Homme *Intervenants*

RÉPERTORIÉ: R. c. NOVA SCOTIA PHARMACEUTICAL
SOCIETY

ⁱ N° du greffe: 22473.

1991: 4 décembre; 1992: 9 juillet.

Présents: Le juge en chef Lamer et les juges La Forest,
L'Heureux-Dubé, Sopinka, Gonthier, Cory et Iacobucci.

^j EN APPEL DE LA SECTION D'APPEL DE LA COUR
SUPRÊME DE LA NOUVELLE-ÉCOSSE

of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no "limit prescribed by law" and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a *Charter* right within reasonable limits. In this sense vagueness is an aspect of overbreadth.

In its recent decision in *R. v. Butler*, [1992] 1 S.C.R. 452, this Court followed its case law and found that the words "undue exploitation of sex" in s. 163(8) of the *Criminal Code*, R.S.C., 1985, c. C-46, constituted a limit prescribed by law within the meaning of s. 1 of the *Charter* and, as interpreted by the courts satisfied the minimum impairment branch of the s. 1 test.

The foregoing may be summarized by way of the following propositions:

1. Vagueness can be raised under s. 7 of the *Charter*, since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the *Charter in limine*, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on *Charter* rights be "prescribed by law". Furthermore, vagueness is also relevant to the "minimal impairment" stage of the *Oakes* test (*Morgentaler*, *Irwin Toy* and the *Prostitution Reference*).

2. The "doctrine of vagueness" is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement

voir discrétionnaire accordé au détenteur de ce pouvoir, soit de l'emploi d'un langage si obscur que les méthodes ordinaires ne permettent pas de lui donner une interprétation le moins exacte. Dans de telles circonstances, il n'existe pas de restriction prescrite par une règle de droit et point n'est alors besoin de procéder à l'analyse fondée sur l'article premier, car la condition préliminaire de son application n'est pas remplie. La seconde façon dont l'imprécision peut jouer un rôle constitutionnel est dans l'analyse de l'article premier. Une loi qui satisfait au critère préliminaire peut néanmoins, pour cause d'imprécision, ne pas constituer une restriction raisonnable. Il se peut en effet que la généralité d'une disposition ainsi que l'imprécision de ses termes fassent que l'atteinte portée à un droit garanti par la *Charte* ne soit pas maintenue dans des limites raisonnables. À cet égard, l'imprécision est un élément de la portée excessive.

Dans son arrêt récent *R. c. Butler*, [1992] 1 R.C.S. 452, notre Cour a suivi la jurisprudence et conclu que les mots «exploitation indue des choses sexuelles» au par. 163(8) du *Code criminel*, L.R.C. (1985), ch. C-46, constituaient une restriction prescrite par une règle de droit au sens de l'article premier de la *Charte* et, suivant l'interprétation des tribunaux, satisfaisaient au volet «atteinte minimale» du critère relatif à l'article premier.

On peut résumer cet exposé par les propositions suivantes:

1. On peut invoquer l'imprécision du chef de l'art. 7 de la *Charte* puisqu'un principe de justice fondamentale exige que les lois ne soient pas trop imprécises. On peut aussi l'invoquer dans le cadre de l'article premier de la *Charte in limine*, au motif qu'une disposition est imprécise au point qu'elle ne satisfait pas à l'exigence selon laquelle une restriction de droits garantis par la *Charte* doit être prescrite «par une règle de droit». De plus, l'imprécision est aussi pertinente sous le volet «atteinte minimale» du critère énoncé dans l'arrêt *Oakes* (arrêts *Morgentaler*, *Irwin Toy* et *Renvoi sur la prostitution*).

2. La «théorie de l'imprécision» repose sur la primauté du droit, en particulier sur les principes voulant que les citoyens soient raisonnablement prévenus et que le pouvoir discrétionnaire en matière d'application de la loi soit limité (*Ren-*

discretion (*Prostitution Reference and Committee for the Commonwealth of Canada*).

3. Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist (*Morgentaler, Irwin Toy, Prostitution Reference, Taylor and Osborne*).

4. Vagueness, when raised under s. 7 or under s. 1 *in limine*, involves similar considerations (*Prostitution Reference and Committee for the Commonwealth of Canada*). On the other hand, vagueness as it relates to the "minimal impairment" branch of s. 1 merges with the related concept of overbreadth (*Committee for the Commonwealth of Canada and Osborne*).

5. The Court will be reluctant to find a disposition so vague as not to qualify as "law" under s. 1 *in limine*, and will rather consider the scope of the disposition under the "minimal impairment" test (*Taylor and Osborne*).

In order to give a more complete picture of issues of vagueness under the *Charter*, I will examine in turn the proper place of the doctrine of vagueness in *Charter* analysis and its content.

2. The Proper Place of the Doctrine of Vagueness in *Charter* Adjudication

Vagueness is often mingled and confused with overbreadth, possibly because of the influence of American authorities. From a review of American law, it will appear that overbreadth is not an autonomous notion in Canadian law, and that, contrary to the position of U.S. constitutional law, vague-

voit sur la prostitution et l'arrêt *Comité pour la République du Canada*).

3. Les facteurs dont il faut tenir compte pour déterminer si une loi est trop imprécise comprennent: a) la nécessité de la souplesse et le rôle des tribunaux en matière d'interprétation; b) l'impossibilité de la précision absolue, une norme d'intelligibilité étant préférable; c) la possibilité qu'une disposition donnée soit susceptible de nombreuses interprétations qui peuvent même coexister (arrêts *Morgentaler, Irwin Toy, Renvoi sur la prostitution, Taylor et Osborne*).

4. L'imprécision, qu'elle soit soulevée par rapport à l'art. 7 ou par rapport à l'article premier *in limine*, fait entrer en jeu des considérations semblables (*Renvoi sur la prostitution* et l'arrêt *Comité pour la République du Canada*). En revanche, l'imprécision, en ce qui concerne le volet «atteinte minimale» du critère relatif à l'article premier, se confond avec la notion connexe de portée excessive (arrêts *Comité pour la République du Canada et Osborne*).

5. La Cour hésitera à décider qu'une disposition est imprécise au point de ne pas constituer une «règle de droit» au sens de l'article premier *in limine* et examinera plutôt la portée de la disposition sous l'éclairage du critère de l'«atteinte minimale» (arrêts *Taylor et Osborne*).

Afin de compléter cet exposé sur les questions touchant l'imprécision dans l'optique de la *Charte*, j'étudierai d'abord la place appropriée de la théorie de l'imprécision dans l'analyse fondée sur la *Charte* et ensuite le contenu de la théorie.

2. La place appropriée de la théorie de l'imprécision dans les litiges relatifs à la *Charte*

L'imprécision et la portée excessive sont souvent mêlées et confondues, peut-être à cause de l'influence de la doctrine et de la jurisprudence américaines. Il ressort de notre analyse du droit américain que la portée excessive n'est pas une notion autonome en droit canadien et que, contrai-

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Reference: *Commissioner of Competition v. Sears Canada Inc.*, 2005 Comp. Trib. 2
File no.: CT2002004
Registry document no.: 0158b

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

AND IN THE MATTER OF an inquiry pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* relating to certain marketing practices of Sears Canada Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.01 of the *Competition Act*.

B E T W E E N :

The Commissioner of Competition
(applicant)

and

Sears Canada Inc.
(respondent)

Dates of hearing: 20031020 to 20031024, 20031027 to 20031031, 20031103 to 20031107, 20031112 to 20031114, 20040116, 20040119 to 20040122, 20040202 to 20040203, 20040628 to 20040629, 20040819 to 20040820

Final written submissions filed: September 10, 2004; September 24, 2004 and October 1, 2004

Judicial Member: Dawson J. (presiding)

Date of Reasons: January 11, 2005

REASONS FOR ORDER

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[39] Turning to the application of these principles to the evidence which is before the Tribunal, I begin by considering whether the impugned legislation is a limit prescribed by law.

[40] Sears argues that the words used in subsection 74.01(3) of the Act are: i) excessively vague, uncertain and imprecise; ii) subject to unintelligible standards; and iii) subject to arbitrary application by the Commissioner. Particular reliance is placed on the fact that the Act provides no definition of the terms “substantial volume”, “reasonable period of time”, “substantial period of time” or “recently”, which are all used in the impugned legislation. While subsection 74.01(3) provides that the nature of the product and the relevant geographic market are factors to be considered in determining whether a person engages in reviewable conduct, Sears argues that the Act does not define these factors, nor does the Act provide any assistance or direction as to what weight should be given to each of these factors, nor is guidance offered about how these factors affect the determination of whether a person has complied with the volume and time tests. In the result, Sears submits that it is not possible for the Tribunal to determine Parliament’s intent by interpreting the words at issue using the ordinary tools of statutory interpretation.

[41] With respect to the Information Bulletin entitled “Ordinary Price Claims”, published by the Commissioner to outline her approach to the enforcement of the ordinary price claims provisions of the Act (“Guidelines”), Sears states that, as non-legal and non-binding administrative guidelines, they may be amended or replaced at will by the Commissioner. As such, they are not criteria prescribed by law which can justify any limitation on expression. Indeed, Sears says that the existence and purpose of the Guidelines support Sears’ contention that the impugned legislation is unconstitutionally vague and reflect the fact that subsection 74.01(3), standing alone, provides insufficient guidance.

[42] In short, Sears says that what is in issue is clarity; how much clarity should a statutory provision have and at what stage in the life of a statutory provision should clarity be evident?

[43] Two decisions of the Supreme Court of Canada provide significant assistance in dealing with Sears’ submissions.

[44] In *Irwin Toy, supra*, at page 983, Chief Justice Dickson, writing for the majority, observed that absolute precision in the law exists rarely, “if at all”. He said that the question to be asked is whether the legislation at issue provides an “intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies”. However, where there is “no intelligible standard” and a “plenary discretion” has been given to do what “seems best”, there is no limit prescribed by law.

[45] Subsequently, in *Nova Scotia Pharmaceutical Society, supra*, the Supreme Court reviewed its jurisprudence on this point and, at pages 626 and 627, Mr. Justice Gonthier, for the

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Court, set out the following propositions with respect to vagueness and its relevance to the Charter:

1. Vagueness can be raised under s. 7 of the *Charter*, since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the *Charter in limine*, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on *Charter* rights be “prescribed by law”. Furthermore, vagueness is also relevant to the “minimal impairment” stage of the *Oakes* test (*Morgentaler*, *Irwin Toy* and the *Prostitution Reference*).
2. The “doctrine of vagueness” is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion (*Prostitution Reference* and *Committee for the Commonwealth of Canada*).
3. Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist (*Morgentaler*, *Irwin Toy*, *Prostitution Reference*, *Taylor* and *Osborne*).
4. Vagueness, when raised under s. 7 or under s. 1 *in limine*, involves similar considerations (*Prostitution Reference* and *Committee for the Commonwealth of Canada*). On the other hand, vagueness as it relates to the “minimal impairment” branch of s. 1 merges with the related concept of over breadth (*Committee for the Commonwealth of Canada* and *Osborne*).
5. The Court will be reluctant to find a disposition so vague as not to qualify as “law” under s. 1 *in limine*, and will rather consider the scope of the disposition under the “minimal impairment” test (*Taylor* and *Osborne*).

[46] Justice Gonthier went on to confirm that the threshold for finding a law to be so vague that it does not qualify as a “law” is relatively high.

[47] With respect to the principles of fair notice to citizens and limitation of enforcement discretion referred to above at point 2, Justice Gonthier observed that fair notice comprises an understanding that certain conduct is the subject of legal restrictions (pages 633-635) and that limitation of enforcement discretion requires that a law must not be so devoid of precision that a conviction automatically follows from a decision to prosecute (pages 635-636).

[48] The Court concluded its comments about vagueness in the following terms at pages 638-640:

Legal rules only provide a framework, a guide as to how one may behave, but certainty is

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only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.

Indeed no higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective. The ECHR has repeatedly warned against a quest for certainty and adopted this “area of risk” approach in *Sunday Times*, *supra*, and especially the case of *Silver and others*, judgment of 25 March 1983, Series A No. 61, at pp. 33-34, and *Malone*, *supra*, at pp.32-33.

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term “legal debate” is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law. [underlining added]

[49] With that direction, I now consider whether subsection 74.01(3) of the Act gives sufficient guidance for legal debate, bearing in mind the caution of the Supreme Court that a relatively high standard must be applied in order to find legislation to be impermissibly vague, and the stated reluctance of the Supreme Court to find a provision so vague as not to qualify as a “law”. Rather, the Court will consider vagueness as it relates to minimal impairment and over breadth.

[50] As noted above, the main challenge to subsection 74.01(3) is based on the use of the undefined terms “substantial volume”, “reasonable period of time”, “substantial period of time” and “recently”. While these terms are not defined in the Act, and they defy precise measurement, they are terms of common usage with a commonly understood meaning. The word “substantial” has been held in another context under the Act to carry its ordinary meaning so as to mean something more than just *de minimus*. (See: *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Competition Tribunal); *aff’d* (1991) 38 C.P.R. (3d) 25 (F.C.A.)). As the Commissioner argues, there is no reason to conclude that the

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Tribunal is not equally capable of interpreting and applying the meaning of “substantial” in the context of subsection 74.01(3). The word “reasonable” is widely used in Canadian statutes and has an understood meaning at common law. Similarly, the word “recently” has, in the words of Mr. Justice Muldoon in *74712 Alberta Ltd. v. Canada (Minister of National Revenue)* (1994), 78 F.T.R. 259 at paragraph 12 “an inherently present tense connotation”. It is defined in the Oxford English Dictionary to mean “at a recent date; not long before or ago; lately, newly”. Thus, the terms about which Sears complains do carry commonly understood meanings.

[51] Further, the interpretation of subsection 74.01(3) is not constrained by a semantic inquiry into the meaning of each word used. In *Nova Scotia Pharmaceutical Society, supra*, the Supreme Court considered whether paragraph 32(1)(c) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (predecessor legislation to the Act) was a limit prescribed by law. That provision prohibited agreements to “prevent, or lessen, unduly, competition”. The unanimous Court noted, at pages 647-648, that the interpretation of the provision was conditioned by the purposes of the legislation, by the rest of the section and the mode of inquiry adopted by the courts which had considered this provision.

[52] In the present case, the purpose of the impugned legislation is to prohibit deceptive ordinary price representations. This is a purpose within the general purpose of the Act. That general purpose, as stated in section 1.1 of the Act, is “to maintain and encourage competition in Canada” in order, among other things, “to provide consumers with competitive prices and product choices”. Those policy objectives contribute to an understanding of whether, under the impugned legislation, a price qualifies as a legitimate OSP price.

[53] Subsection 74.01(3) also specifies two factors to be considered when applying the volume and time tests. Those factors are the nature of the product and the relevant geographic market. By providing factors which must be considered in applying the volume and time tests, the legislation provides further indication as to how the discretion it gives is to be exercised. Those two factors also provide needed flexibility. For example, the seasonal or perishable nature of a product may well require that a shorter time or smaller volume test be applied. Those factors ensure that the discretion contained in the impugned legislation is not unfettered with respect to application of the time and volume test.

[54] While Sears argues that neither the term “nature of the product” nor the term “relevant geographic market” are defined, and no guidance is given as to their application, it is my view that neither term could be defined too precisely because their meanings could vary depending upon the particular circumstances. I am confident, in the context of determining the reasonableness of an OSP representation, that the regard to be given to the nature of the product and the relevant geographic market contributes significantly to the adequacy of the basis for legal debate. It should be remembered that both the nature of a product and a geographic market are concepts which are commonly explored in the application of the Act.

[55] It follows, in my view, that the words used in the impugned legislation, when considered

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in the context of the purpose of the impugned legislation and the purpose of the Act, are sufficiently precise as to constitute a limit prescribed by law. The Act provides a framework and an intelligible standard for legal debate and judicial interpretation. It does this by setting out, to paraphrase the words of the Supreme Court in *Nova Scotia Pharmaceutical Society, supra*, boundaries of permissible and non-permissible conduct which allow for discussion of their actualization. The boundaries limit enforcement discretion and sufficiently delineate an area of risk so as to give notice to potentially affected citizens. While providing a standard for legal debate, the legislation also provides flexibility in order to deal with the variety of circumstances which may arise (eg. seasonal goods, perishable goods) and evolving market practices.

[56] Confirmatory evidence that the impugned legislation provides an intelligible standard is, in my view, found in the “Report of the Consultative Panel on Amendments to the *Competition Act*” (“Consultative Panel”) and in the legislation from other jurisdictions, put in evidence before the Tribunal.

[57] On June 28, 1995, the Minister of Industry announced the start of public consultations aimed at updating the *Competition Act*. As part of the consultation process, the Competition Bureau released a discussion paper which sought comments from interested parties on a number of potential amendments to the Act. Comment was specifically requested on misleading advertising and deceptive marketing practices, including the appropriate definition of an OSP for the purpose of assessing representations. A Consultative Panel, composed of eminent Canadian competition lawyers and academics, as well as representatives of Canadian consumer and retail associations, was established to review responses to the discussion paper. The recommendations of the Consultative Panel were set out in its report released on March 6, 1996 (“report”).

[58] The report acknowledged that regular or ordinary price claims are common in the marketplace and that they can be a powerful and legitimate marketing tool because many consumers are attracted to promotions that promise a saving from the ordinary or regular price of a product. The Consultative Panel noted that the then current legislation prohibited materially misleading representations, but that most of those who commented on the discussion paper felt that the volume test applied by the Competition Bureau and the Attorney General under the existing legislation did not adequately reflect the reality of the marketplace. The Consultative Panel summarized the result of the public consultations on this point as follows at page 25 of its report:

Some [commentators] asserted that the test should be based on the price at which a product is offered for sale for at least half of a relevant time period. It was asserted by both consumer and business commentators that consumers are most likely to interpret regular price claims as referring to the price at which the product is normally offered for sale. Such a test would be easy for retailers to meet since they can control the length of time at which they offer a product at a certain price.

However, those supporting a time test generally were concerned that the offered price be *bona fide*. They believe a retailer should be required to demonstrate that it made *bona fide* efforts to generate some sales at the represented regular price to avoid artificially inflated regular prices for a

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product.

Other commentators felt that the volume test was appropriate. Still others felt that both tests should be available, as alternatives.

[59] After discussion and consideration of several alternative proposals, the Consultative Panel concluded that revised legislative provisions “should explicitly identify two alternative tests. A price comparison that complied with either test would not raise a question. By clearly identifying the circumstances under which a challenge could take place, the revised provision would provide greater certainty”. In its report, the Consultative Panel went on to say at page 26:

Specifically, to comply with the law in the case of a representation of a former selling price, the represented price would have to reflect either the price of sellers generally in the relevant market at which a substantial volume of recent sales of the product took place, *or* the price of sellers generally in the relevant market at which the product was recently offered for sale in good faith for a substantial period of time prior to the sale.

Where the comparison price is clearly specified to be the price of the advertiser, these tests would apply with reference to the price of that person alone, rather than in relation to the price of sellers generally in the relevant market.

[...]

The Panel discussed the desirability of defining for greater certainty several terms contained in the revised provision. Such terms included “substantial volume”, “good faith”, “like products”, “substantial time”, “nature of the product” and “relevant market”. Some Panel members cautioned against defining these terms too precisely, since their meanings could vary depending on the circumstances of each case. The consensus was that existing and future jurisprudence could provide sufficient guidance regarding the meaning of some of these terms. [underlining added]

[60] The following model provision was recommended by the Consultative Panel at page 28 of its report:

(ii) a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied which is clearly specified to be the price of the person by whom or on whose behalf the representation is made is not misleading if the person making the representation establishes that it is the price at which that person:

(A) recently sold a substantial volume of the product, or

(B) recently offered the product for sale in good faith for a substantial period of time prior to the sale. [underlining added]

The model provided that, in making a determination under this test, regard should be had to the nature of the product and the relevant market.

[61] In the view of the expert Consultative Panel, salient terms, including the terms about which Sears now complains, could not be defined too precisely because their meaning could vary depending on the circumstances of each case. Clearly, the Consultative Panel was of the view

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that the use of terms such as “recently”, “substantial volume”, and “substantial period of time” provided an intelligible standard for the exercise of discretion. It was the consensus of the Consultative Panel that existing and future jurisprudence could provide sufficient guidance regarding the meaning of the terms used. I take this to be recognition of: i) the need for flexibility and the interpretive role of the courts; and, ii) the impossibility of achieving absolute certainty. These are the factors to be considered in determining whether a law is too vague (*Nova Scotia Pharmaceutical Society, supra* at pages 626-627).

[62] With respect to comparable legislation from other jurisdictions, Sears called Mr. Stephen Mahinka, as an expert witness. Mr. Mahinka is a lawyer who is a partner in the law firm of Morgan, Lewis & Bockius LLP. There he manages the Antitrust Practice Group of the Washington, D.C. office. Mr. Mahinka has 28 years of experience advising clients with respect to pricing, marketing, advertising and consumer protection matters involving the U.S. Federal Trade Commission. He has advised clients regarding compliance with price comparison requirements under U.S. and state laws. He has defended clients whose pricing and advertising activities have been under investigation and he has acted as counsel in litigation asserting violations of state comparative pricing requirements. As well, he has published in the order of 60 articles concerning U.S. antitrust law and consumer protection issues.

[63] Over the Commissioner’s objection, the Tribunal ruled that Mr. Mahinka was qualified to opine upon comparative price advertising, consumer protection and antitrust law at the state level. The Tribunal also concluded that he was qualified to opine on U.S. federal comparative price advertising, consumer protection and antitrust law. The Commissioner conceded Mr. Mahinka’s expertise within the federal sphere.

[64] Mr. Mahinka testified as to his review of U.S. federal and state laws relating to the advertising of comparison prices. Included in his testimony was evidence that a number of U.S. jurisdictions have enacted legislation that contains broad general terms. For example, Florida’s Deceptive and Unfair Trade Practices Law generally prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. Mr. Mahinka testified that regulations implementing these provisions were “repealed on the basis that it was neither possible nor necessary to codify every conceivable deceptive and unfair trade practice prohibited by the statute”.

[65] New York’s General Business Law makes false advertising in the conduct of any business unlawful. “False advertising” is defined as advertising that is misleading in a material respect.

[66] Under Virginia law, a former price may not be advertised unless: (1) it is the price at or above which a “substantial number of sales” were made in the “recent regular course of business”; (2) the former price was the price at which such goods or services or “substantially similar” goods or services were openly and actively offered for sale for a “reasonably substantial period of time” in the “recent regular course of business” honestly, in good faith and not for the

TAB 38

Attorney General of Canada and Minister of Health for Canada *Appellants/Respondents on cross-appeal*

v.

PHS Community Services Society, Dean Edward Wilson, Shelly Tomic and Attorney General of British Columbia *Respondents*

and

Vancouver Area Network of Drug Users (VANDU) *Respondent/Appellant on cross-appeal*

and

Attorney General of Quebec, Dr. Peter AIDS Foundation, Vancouver Coastal Health Authority, Canadian Civil Liberties Association, Canadian HIV/AIDS Legal Network, International Harm Reduction Association, CACTUS Montréal, Canadian Nurses Association, Registered Nurses' Association of Ontario, Association of Registered Nurses of British Columbia, Canadian Public Health Association, Canadian Medical Association, British Columbia Civil Liberties Association, British Columbia Nurses' Union and REAL Women of Canada *Intervenors*

INDEXED AS: CANADA (ATTORNEY GENERAL) v. PHS COMMUNITY SERVICES SOCIETY

2011 SCC 44

File No.: 33556.

2011: May 12; 2011: September 30.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Procureur général du Canada et ministre de la Santé du Canada *Appellants/Intimés au pourvoi incident*

c.

PHS Community Services Society, Dean Edward Wilson, Shelly Tomic et Procureur général de la Colombie-Britannique *Intimés*

et

Vancouver Area Network of Drug Users (VANDU) *Intimé/Appelant au pourvoi incident*

et

Procureur général du Québec, Dr. Peter AIDS Foundation, Vancouver Coastal Health Authority, Association canadienne des libertés civiles, Réseau juridique canadien VIH/sida, International Harm Reduction Association, CACTUS Montréal, Association des infirmières et infirmiers du Canada, Association des infirmières et infirmiers autorisés de l'Ontario, Association of Registered Nurses of British Columbia, Association canadienne de santé publique, Association médicale canadienne, Association des libertés civiles de la Colombie-Britannique, British Columbia Nurses' Union et REAL Women of Canada *Intervenants*

RÉPERTORIÉ : CANADA (PROCUREUR GÉNÉRAL) c. PHS COMMUNITY SERVICES SOCIETY

2011 CSC 44

N° du greffe : 33556.

2011 : 12 mai; 2011 : 30 septembre.

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

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

[108] The claimants argue that the prohibition on possession of illegal drugs in s. 4(1) of the *CDSA* is not in accordance with the principles of fundamental justice because it is arbitrary, disproportionate in its effects, and overbroad. They say it is arbitrary because, when applied to Insite, it is not only inconsistent with the goals of the *CDSA*, but undermines them. They submit that it is disproportionate in its effects, as it causes significant harm to the clients of Insite and those like them, while providing no commensurate benefit. And they assert that it is overbroad because its application to Insite is unnecessary to meet the state's objectives.

[109] The difficulty with this submission is that it considers s. 4(1) in isolation, rather than in the context of other provisions of the *CDSA*, notably s. 56. If the Act consisted solely of blanket prohibitions with no provision for exemptions for necessary medical or scientific use of drugs, the assertions that it is arbitrary, overbroad and disproportionate in its effects might gain some traction. However, the Act contains not only a prohibition on possession of illegal drugs, but a provision, s. 56, that empowers the Minister to grant exemptions from the prohibition to health service providers like Insite. The constitutional validity of s. 4(1) of the Act cannot be determined without considering the provisions in the Act designed to relieve against unconstitutional or unjust applications of that prohibition.

[110] The scheme of the *CDSA* reveals that it has two purposes: the protection of public health and the maintenance of public safety. The public safety purpose of the Act is achieved by the prohibition on possession and trafficking in listed substances. The public health purpose of the statute is achieved not only by the prohibitions in ss. 4(1) and 5(1), which seek to avert the use of dangerous substances, but also by the provision of regulations guiding exemptions for and the use of listed substances for

[108] Les demandeurs soutiennent que l'interdiction de possession de drogues illégales établie par le par. 4(1) de la *Loi* ne respecte pas les principes de justice fondamentale en raison de son caractère arbitraire, de ses effets disproportionnés et de sa portée excessive. Selon eux, cette interdiction serait arbitraire parce que, lorsqu'elle est appliquée à Insite, non seulement elle n'est pas compatible avec les objets de la *Loi*, mais elle nuit à leur réalisation. Les demandeurs prétendent que ses effets sont disproportionnés, car elle cause un tort considérable aux clients d'Insite et aux personnes qui se trouvent dans la même situation, sans procurer d'avantage équivalent. Ils prétendent de plus que sa portée est excessive parce qu'il n'est pas nécessaire de l'appliquer à Insite pour atteindre les objectifs de l'État.

[109] La faiblesse de cet argument tient à ce qu'il isole le par. 4(1) des autres dispositions de la *Loi*, notamment de l'art. 56. Si la *Loi* ne consistait qu'en interdictions générales et ne comprenait aucune disposition prévoyant des exemptions relativement à l'utilisation de drogues à des fins médicales ou scientifiques, les affirmations voulant qu'elle soit arbitraire, sa portée excessive et ses effets disproportionnés pourraient avoir plus de poids. Or, la *Loi* ne comprend pas seulement une interdiction de possession de drogues illégales, mais également une disposition, l'art. 56, qui habilite le ministre à accorder des exemptions pour soustraire des fournisseurs de soins de santé comme Insite à l'interdiction de possession de drogues. On ne peut apprécier la validité constitutionnelle du par. 4(1) sans tenir compte des dispositions de la *Loi* conçues pour remédier aux applications inconstitutionnelles ou inéquitables de cette interdiction.

[110] Le régime de la *Loi* révèle qu'elle a deux objets : la protection de la santé publique et le maintien de la sécurité publique. Son objet de maintien de la sécurité publique est réalisé par l'interdiction de posséder les substances énumérées et d'en faire le trafic. Son objet de protection de la santé publique est réalisé non seulement par les interdictions prévues aux par. 4(1) et 5(1), qui visent à prévenir l'utilisation de substances dangereuses, mais également par le pouvoir de réglementation prévu à

medical and scientific purposes in ss. 55 and 56 of the Act.

[111] Section 55(1) provides that “[t]he Governor in Council may make regulations for carrying out the purposes and provisions of this Act, including the regulation of the medical, scientific and industrial applications and distribution of controlled substances”. There follows a lengthy non-exhaustive list of matters in respect of which regulations may be made, including regulations exempting a person or class of person from the application of the Act: s. 55(1)(z).

[112] Section 56 gives the Minister of Health a broad discretion to grant exemptions from the application of the Act “if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest”.

[113] The availability of exemptions acts as a safety valve that prevents the *CDSA* from applying where such application would be arbitrary, over-broad or grossly disproportionate in its effects.

[114] I conclude that while s. 4(1) of the *CDSA* engages the s. 7 *Charter* rights of the individual claimants and others like them, it does not violate s. 7. This is because the *CDSA* confers on the Minister the power to grant exemptions from s. 4(1) on the basis, *inter alia*, of health. Indeed, if one were to set out to draft a law that combats drug abuse while respecting *Charter* rights, one might well adopt just this type of scheme — a prohibition combined with the power to grant exemptions. If there is a *Charter* problem, it lies not in the statute but in the Minister’s exercise of the power the statute gives him to grant appropriate exemptions.

[115] The claimants’ s. 7 challenge to the *CDSA* accordingly fails.

l’art. 55 et par les exemptions prévues à l’art. 56 concernant l’utilisation des substances énumérées à des fins médicales et scientifiques.

[111] Le paragraphe 55(1) prévoit que « [l]e gouverneur en conseil peut, par règlement, prendre les mesures nécessaires à l’application de la présente loi, y compris en matière [...] d’applications médicales, scientifiques et industrielles et de distribution des substances désignées ». Vient ensuite une longue liste non exhaustive de sujets à l’égard desquels des règlements peuvent être pris, notamment des règlements soustrayant une personne ou une catégorie de personnes à l’application de la *Loi* : al. 55(1)z).

[112] L’article 56 confère au ministre de la Santé un vaste pouvoir discrétionnaire d’accorder des exemptions de l’application de la *Loi* « [s]’il estime que des raisons médicales, scientifiques ou d’intérêt public le justifient ».

[113] La possibilité d’accorder des exemptions sert de soupape empêchant l’application de la *Loi* dans les cas où son application serait arbitraire, ses effets exagérément disproportionnés ou sa portée excessive.

[114] Je conclus que, bien que le par. 4(1) de la *Loi* mette en jeu les droits garantis par l’art. 7 de la *Charte* aux demandeurs et aux autres personnes qui se trouvent dans la même situation, il ne contrevient pas à l’art. 7. Il en est ainsi parce que la *Loi* confère au ministre le pouvoir d’accorder des exemptions de l’application du par. 4(1), notamment pour des motifs de santé. En fait, si on décidait de rédiger une loi qui combat la toxicomanie tout en respectant les droits garantis par la *Charte*, on pourrait fort bien adopter précisément ce type de régime — une interdiction conjuguée au pouvoir d’accorder des exemptions. S’il y a un problème lié à la *Charte*, il ne réside pas dans la loi, mais dans l’exercice par le ministre de son pouvoir légal d’accorder les exemptions appropriées.

[115] Les allégations d’invalidité de la *Loi* fondées sur l’art. 7 doivent donc être rejetées.

C. *Has the Minister's Decision Violated the Claimants' Section 7 Rights?*

[116] The main issue, as the appeal was argued, was the constitutionality of the *CDSA* itself. I have concluded that, properly interpreted, the statute is valid. This leaves the question of the Minister's decision to refuse an exemption. A preliminary issue arises whether the Court should consider this issue. In the special circumstances of this case, I conclude that it should. The claimants pleaded in the alternative that, if the *CDSA* were valid, the Minister's decision violated their *Charter* rights. The issue was raised at the hearing and the parties afforded an opportunity to address it. It is therefore properly before us and the Attorney General of Canada cannot complain that it would be unfair to deal with it. Most importantly, justice requires us to consider this issue. The claimants have established that their s. 7 rights are at stake. They should not be denied a remedy and sent back for another trial on this point simply because it is the Minister's decision and not the statute that causes the breach when the matter has been pleaded and no unfairness arises.

[117] The discretion vested in the Minister of Health is not absolute: as with all exercises of discretion, the Minister's decisions must conform to the *Charter*: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3. If the Minister's decision results in an application of the *CDSA* that limits the s. 7 rights of individuals in a manner that is not in accordance with the *Charter*, then the Minister's discretion has been exercised unconstitutionally.

[118] I note that this case is different from *Parker*, where the Ontario Court of Appeal held that the general prohibition on possession of marihuana was not saved by the availability of an exemption for possession for medical purposes under s. 56. No decision of the Minister was at stake in *Parker*,

C. *La décision du ministre a-t-elle porté atteinte aux droits des demandeurs garantis par l'art. 7?*

[116] La principale question soulevée dans le pourvoi, tel qu'il a été plaidé, est celle de la validité constitutionnelle de la *Loi* même. J'ai conclu que la *Loi*, interprétée correctement, est valide. Reste donc la question de la décision du ministre de refuser une exemption. La Cour doit décider, à titre préliminaire, si elle devrait examiner cette question. Dans les circonstances particulières de l'espèce, je conclus qu'elle devrait le faire. Les demandeurs ont plaidé, à titre subsidiaire, au cas où la *Loi* serait valide, que la décision du ministre a porté atteinte à leurs droits protégés par la *Charte*. Cette question a été soulevée lors de l'audition et les parties ont eu l'occasion de présenter leur point de vue à cet égard. La Cour est donc dûment saisie de cette question et le procureur général du Canada ne peut prétendre qu'il serait injuste qu'elle la tranche. Mais surtout, la justice commande que la Cour l'examine. Les demandeurs ont établi que leurs droits garantis par l'art. 7 sont en jeu. Ils ne peuvent être privés d'un recours et contraints à la tenue d'un nouveau procès sur ce point, simplement parce que c'est la décision du ministre et non la *Loi* même qui a porté atteinte à leurs droits, alors que la question a été plaidée et que l'équité n'est pas compromise.

[117] La discrétion laissée au ministre de la Santé n'est pas absolue : comme c'est toujours le cas de l'exercice d'un pouvoir discrétionnaire, les décisions du ministre doivent respecter la *Charte* : *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3. Si la décision du ministre fait en sorte que l'application de la *Loi* restreint les droits garantis par l'art. 7 d'une manière qui contrevient à la *Charte*, l'exercice du pouvoir discrétionnaire du ministre est inconstitutionnel.

[118] Je souligne que la présente affaire diffère de l'affaire *Parker*, dans laquelle la Cour d'appel de l'Ontario a conclu que l'interdiction générale de possession de marihuana n'était pas validée par la possibilité, prévue à l'art. 56, d'accorder une exemption relative à la possession pour raisons

and the Court's conclusion rested on findings of the trial judge that, at that time, "the availability of the exemption was illusory" (para. 174).

médicales. Dans *Parker*, aucune décision du ministre n'était en cause et la conclusion de la cour reposait sur des constatations du juge de première instance selon lesquelles [TRADUCTION] « la possibilité d'accorder une exemption était illusoire » (par. 174).

(1) Has the Minister Made a Decision?

[119] The Attorney General of Canada argues that the Minister has not violated s. 7 because the Minister has not yet made a decision whether to grant a s. 56 exemption to Insite. He also submits that the decision of the British Columbia Courts that ss. 4(1) and 5(1) of the *CDSA* are unconstitutional prevents the Minister from exercising his powers to grant an exemption under s. 56. Although the declaration of unconstitutionality has been suspended and a temporary constitutional exemption granted to Insite by judicial order, the Minister says it would be improper for him to exercise his s. 56 discretion until the constitutionality of the *CDSA* has been finally resolved by this Court.

[120] In my view, the record establishes that the Minister *has* made a decision on the request for an exemption for Insite, and that that decision was to refuse the exemption.

[121] The essential facts are as follows. The first exemption for Insite, which lasted three years, was effective as of September 12, 2003. The Minister granted a temporary extension on September 11, 2006, to expire December 31, 2007. On October 2, 2007, the exemption was extended for another six months to June 30, 2008. In his letters to the VCHA granting the exemption, the Minister stated that the extensions were to be for the purpose of allowing time for additional research on the impact of Insite on prevention, treatment and crime. In the course of the summary trial, on May 2, 2008, the VCHA sent an application to Health Canada formally requesting an extension of the exemption for another three years. The application was supported by the provincial Minister of Health. Health Canada responded on December 19, 2008, after

(1) Le ministre a-t-il rendu une décision?

[119] Le procureur général du Canada prétend que le ministre n'a pas violé l'art. 7, puisqu'il n'a pas encore décidé s'il accordera une exemption à Insite en vertu de l'art. 56. Il ajoute que la décision des tribunaux de la Colombie-Britannique selon laquelle les par. 4(1) et 5(1) de la *Loi* sont inconstitutionnels empêche le ministre d'exercer son pouvoir d'accorder une exemption en vertu de l'art. 56. Bien que cette déclaration d'inconstitutionnalité ait été suspendue et qu'une exemption constitutionnelle temporaire ait été accordée à Insite par une ordonnance judiciaire, le ministre affirme qu'il ne conviendrait pas qu'il exerce le pouvoir discrétionnaire qui lui est conféré par l'art. 56 tant que la Cour n'aura pas rendu de décision définitive sur la constitutionnalité de la *Loi*.

[120] Selon moi, le dossier établit que le ministre *a* rendu une décision concernant la demande d'exemption à l'égard d'Insite et qu'il a décidé de refuser l'exemption.

[121] Les faits essentiels sont les suivants. La première exemption accordée relativement à Insite est entrée en vigueur le 12 septembre 2003, pour une durée de trois ans. Le 11 septembre 2006, le ministre l'a prolongée temporairement jusqu'au 31 décembre 2007. Le 2 octobre 2007, il a accordé une nouvelle prolongation de six mois, reportant l'expiration de l'exemption au 30 juin 2008. Dans les lettres envoyées à la VCHA pour lui accorder l'exemption, le ministre a déclaré que les prolongations visaient à permettre la réalisation de recherches additionnelles quant à l'incidence d'Insite sur la prévention, le traitement et la criminalité. Au cours du procès sommaire, le 2 mai 2008, la VCHA a envoyé à Santé Canada une demande formelle de prolongation de trois ans. Cette demande était appuyée par le

TAB 39

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The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness (*Appellants*)

Le ministre de la Citoyenneté et de l'Immigration et le ministre de la Sécurité publique et de la Protection civile (*appelants*)

v.

c.

The Canadian Council For Refugees, Amnesty International, The Canadian Council of Churches, ABC, DE [By Her Litigation Guardian ABC], and FG [By Her Litigation Guardian ABC], Mohammad Majd Maher Homs, Hala Maher Homs, Karam Maher Homs and Reda Yassin Al Nahass and Nedira Jemal Mustefa (*Respondents*)

Le Conseil canadien pour les réfugiés, Amnistie internationale, le Conseil canadien des Églises, ABC, DE [représentée par son tuteur à l'instance, ABC], et FG [représentée par son tuteur à l'instance, ABC], Mohammad Majd Maher Homs, Hala Maher Homs, Karam Maher Homs et Reda Yassin Al Nahass et Nedira Jemal Mustefa (*intimés*)

INDEXED AS: CANADA (CITIZENSHIP AND IMMIGRATION) v. CANADIAN COUNCIL FOR REFUGEES

RÉPERTORIÉ : CANADA (CITOYENNETÉ ET IMMIGRATION) c. CONSEIL CANADIEN POUR LES RÉFUGIÉS

Federal Court of Appeal, Noël C.J., Stratas and Laskin JJ.A.—By videoconference, February 23, 24; Ottawa, April 15, 2021.

Cour d'appel fédérale, juge en chef Noël, juges Stratas et Laskin, J.C.A.—Par vidéoconférence, 23 et 24 février; Ottawa, 15 avril 2021.

Citizenship and Immigration — Status in Canada — Convention Refugees and Persons in Need of Protection — Appeal, cross-appeal from Federal Court judgment allowing applications for judicial review — Appeal, cross-appeal concerning constitutional validity of certain legislative provisions that prevent certain refugee claimants from seeking refugee protection in Canada — Since 2004, United States designated pursuant to Immigration and Refugee Protection Regulations, s. 159.3, which followed agreement in 2002 between United States, Canada called Safe Third Country Agreement — Since that time, many refugee claimants arriving from United States ruled ineligible for refugee protection in Canada, including individual respondents — They, advocacy organizations for refugees, brought three judicial reviews in Federal Court; alleged that designation of United States under Regulations, s. 159.3 ultra vires but Federal Court rejected allegation — Respondents also alleged that designation of U.S. as safe third country under Regulations, s. 159.3, resulting ineligibility of refugee claimants in Canada under Immigration and Refugee Protection Act, s. 101(1)(e) infringed rights guaranteed by Canadian Charter of Rights and Freedoms, ss. 7, 15 — Federal Court agreed that both provisions infringed Charter, s. 7; were not justified under Charter, s. 1 — Federal Court declared provisions of no force or effect under Constitution Act, 1982, s. 52 — Given this conclusion, Federal Court found it unnecessary to deal with s. 15 issues — Main issue: whether cross-appeal should be summarily

Citoyenneté et Immigration — Statut au Canada — Réfugiés au sens de la Convention et personnes à protéger — Appel et appel incident à l'encontre d'un jugement rendu par la Cour fédérale, qui a accueilli des demandes de contrôle judiciaire — Appel et appel incident portant sur la validité constitutionnelle de dispositions légales qui empêchent certaines personnes de demander l'asile au Canada — Depuis 2004, les États-Unis sont un pays désigné conformément à l'art. 159.3 du Règlement sur l'immigration et la protection des réfugiés; cette désignation découle d'un accord intervenu en 2002 entre les États-Unis et le Canada, appelé l'Entente sur les tiers pays sûrs — Depuis, de nombreuses demandes d'asile présentées par des personnes arrivant des États-Unis ont été jugées irrecevables au Canada, dont celles des intimés qui sont des particuliers — Avec des organisations de défense des droits des réfugiés, ils ont présenté trois demandes de contrôle judiciaire devant la Cour fédérale; ils ont soutenu que la désignation des États-Unis sous le régime de l'art. 159.3 du Règlement outrepassait le pouvoir conféré par la loi (ultra vires), mais la Cour fédérale a rejeté cette prétention — Les intimés ont affirmé également que la désignation des États-Unis à titre de tiers pays sûr sous le régime de l'art. 159.3 du Règlement et l'irrecevabilité des demandes d'asile au Canada prévue à l'art. 101(1)e de la Loi sur l'immigration et la protection des réfugiés en découlant restreignaient les droits garantis par les art. 7 et 15 de la Charte canadienne des droits et libertés — La Cour fédérale a reconnu que ces

than the subsection 102(3) reviews and related administrative conduct and their effect.

[55] The Claimants' applications do not fit with the nature of the legislative scheme. To reiterate, paragraph 101(1)(e) of the Act and section 159.3 of the Regulations do not sit alone and in isolation. They are part of an interrelated legislative scheme. And after designation, the real cause of any continued designation or decision to revoke it is the subsection 102(3) reviews and related administrative conduct.

(2) *The nature of the Charter and the basic requirements for a challenge under it*

[56] The Charter sets out rights and freedoms and guarantees them subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. But nowhere does the Charter invite courts to depart from their role as courts. Nor does it invite judges—career lawyers who happen to hold a judicial commission—to follow whatever procedures they wish. Rather, the Charter is a document of law, surrounded, suffused and sustained by law. In fact, tens of thousands of cases have been decided under it, a veritable mountain of guidance.

[57] From this mountain, certain immutable principles bind us all. One of the most basic is that Charter claimants must show that some state action—for example, legislation or administrative conduct by state officials—has caused an infringement of rights or freedoms. Inherent in this are two requirements: the Charter claimants must identify the state action responsible for the infringement, i.e., demonstrate a causal link between the state action and the infringement, and place enough evidence before the Court to prove causation and infringement. See, e.g., *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at pages 447 and 490, (1985), 18 D.L.R. (4th) 481; *Symes v. Canada*, [1993] 4 S.C.R. 695 at pages 764–765, (1993), 110 D.L.R. (4th) 470; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paragraph 60; *Canada*

application du paragraphe 102(3) et les actes administratifs connexes et leurs effets.

[55] Les demandes ne cadrent pas avec la nature du régime légal. Répétons-le, l'alinéa 101(1)e) de la Loi et l'article 159.3 du Règlement n'existent pas en vase clos. Ils appartiennent à un régime légal doté de composantes interreliées. Une fois qu'un pays est désigné, la véritable cause du maintien de la désignation ou de la révocation de cette dernière se trouve dans les examens prévus au paragraphe 102(3) et les actes administratifs connexes.

2) *La nature de la Charte et les exigences minimales auxquelles est subordonné tout recours fondé sur elle*

[56] La Charte énonce les droits et libertés qui sont garantis. 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. Or, aucune disposition de la Charte n'invite les tribunaux à se distancier de leur rôle judiciaire. Aucune n'invite les juges — d'anciens avocats d'expérience à qui on a conféré une charge judiciaire — à suivre la procédure de leur choix. Au contraire, la Charte est un document de droit, circonscrit par le droit et fondé sur le droit. Des dizaines de milliers de décisions ont été rendues sur le fondement de la Charte, une véritable montagne de jurisprudence.

[57] De cette montagne découlent certains principes immuables et incontournables. Suivant un de ces principes fondamentaux, il incombe aux demandeurs qui invoquent la Charte de démontrer qu'un acte de l'État — par exemple une loi ou une mesure administrative prise par un fonctionnaire — a enfreint un droit ou une liberté. Ce principe comporte deux critères essentiels : les demandeurs doivent indiquer l'acte de l'État qui a causé la violation, c'est-à-dire qu'ils doivent démontrer un lien de causalité entre l'acte de l'État et la violation, et produire une preuve suffisante pour démontrer le lien de causalité et la violation. Voir, p. ex., *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, aux pages 447 et 490, 1985 CanLII 74; *Symes c. Canada*, [1993] 4 R.C.S. 695, aux pages 764 à 765, 1993 CanLII 55; *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2

(*Attorney General*) v. *Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paragraphs 73–78; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, at paragraphs 126 and 131–134; *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398, at paragraphs 251–254 and cases cited therein. Common to these requirements is causation. Causation is key.

[58] From this, two practical rules have emerged in the jurisprudence:

- (a) Legislative provisions in an interrelated legislative scheme cannot be taken in isolation and selectively challenged: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 [*PHS Community Services*]. The provisions, taken in isolation, may not have caused the Charter infringement. Other related provisions may be responsible or may prevent or cure any possible defects. This sort of artificial and narrow challenge often results in the creation of an unduly artificial and narrow evidentiary record.
- (b) Where administrative action or administrative inaction under legislation is the cause of a rights infringement, it, not the legislation, must be challenged: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120. Challenging the legislation and ignoring the administrative action or administrative inaction will not satisfy the requirement of causation between the state action and the rights infringement. This can also lead to the development of an unduly artificial and narrow evidentiary record.

[59] In considering a Charter challenge, another basic principle must be kept front of mind: courts are courts and have to act like courts. Thus, courts can deal only with the challenge the Charter challengers have advanced and courts can work only with the evidence the parties have offered concerning that challenge. Courts cannot go beyond the challenge and address a different

R.C.S. 307, au paragraphe 60; *Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101, au paragraphes 73 à 78; *Kazemi (Succession) c. République islamique d'Iran*, 2014 CSC 62, [2014] 3 R.C.S. 176, aux paragraphes 126 et 131 à 134; *R. c. Kokopenace*, 2015 CSC 28, [2015] 2 R.C.S. 398, aux paragraphes 251 à 254 et la jurisprudence qui y est mentionnée. Le point commun de ces critères est le lien de causalité. Le lien de causalité est crucial.

[58] Il en ressort deux règles pratiques énoncées dans la jurisprudence :

- a) Les dispositions qui appartiennent à un régime légal aux composantes interreliées ne sauraient être examinées et contestées isolément (*Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134 [*PHS Community Services*]). Il se peut que les dispositions, examinées isolément, n'aient pas causé la violation de la Charte. D'autres dispositions connexes peuvent en être la cause ou servir à prévenir toute lacune ou à y remédier. Ce genre de recours artificiel et étroit se traduit souvent par un dossier de preuve indûment artificiel et étroit.
- b) Dans les cas où la violation des droits résulte d'un acte — ou d'une omission — administratif pris en application d'une loi, c'est sur ce dernier, et non sur la loi, que le recours doit porter (*Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, 2000 CSC 69, [2000] 2 R.C.S. 1120). En attaquant la loi, et non l'acte ou l'omission administratif, on ne démontre pas l'existence d'un lien de causalité entre l'acte de l'État et la violation du droit. On risque également de monter un dossier de preuve indûment artificiel et étroit.

[59] Dans un recours fondé sur la Charte, il importe de garder à l'esprit un autre principe fondamental : les tribunaux sont des tribunaux et se doivent d'agir comme tels. Ainsi, le juge peut instruire uniquement le recours fondé sur la Charte intenté par les demandeurs, et ce uniquement sur le fondement du dossier de preuve constitué par les parties. Il ne lui est pas loisible de transcender l'objet du

TAB 40

**SUPREME COURT OF CANADA**

CITATION: Canadian Council for Refugees v. Canada (Citizenship and Immigration), 2023 SCC 17

APPEAL HEARD: October 6, 2022

JUDGMENT RENDERED: June 16, 2023

DOCKET: 39749

BETWEEN:

Canadian Council for Refugees, Amnesty International, Canadian Council of Churches, ABC, DE by her litigation guardian ABC, FG by her litigation guardian ABC, Mohammad Majd Maher Homs, Hala Maher Homs, Karam Maher Homs, Reda Yassin Al Nahass and Nedira Jemal Mustefa
Appellants

and

Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness
Respondents

- and -

Association québécoise des avocats et avocates en droit de l'immigration, Canadian Civil Liberties Association, Canadian Association of Refugee Lawyers, National Council of Canadian Muslims, Canadian Muslim Lawyers Association, Canadian Lawyers for International Human Rights, Canadian Centre for Victims of Torture, Queen's Prison Law Clinic, Rainbow Refugee Society, British Columbia Civil Liberties Association, Advocates for the Rule of Law, David Asper Centre for Constitutional Rights, West Coast Legal Education and Action Fund Association, Women's Legal Education and Action Fund Inc., HIV & AIDS Legal Clinic Ontario and Rainbow Railroad
Intervenors

“be the only or the dominant cause of the prejudice suffered by the claimant” (para. 76). As a result, the mere fact that other forms of state action may also have a causal connection to the harms alleged does not mean that a challenge to legislation — such as s. 159.3 of the *IRPR* — is improperly constituted.

[61] The Court of Appeal dismissed the *Charter* challenges for failing to adhere to two propositions it drew from this Court’s causation jurisprudence. First, challengers should not attack provisions in artificial isolation. Second, when administrative conduct under legislation is responsible for unconstitutional effects, that action or inaction must be challenged, not the legislation. While these two propositions do speak to important considerations, in my respectful view they do not justify the conclusion that the appellants’ challenge is improperly constituted.

(1) The Relevance of Preventative and Curative Measures to the Section 7 Challenge

[62] Provisions in a complex, interrelated legislative scheme should not be viewed in isolation. Generally, the constitutionality of these provisions can only be evaluated by considering the entire scheme. However, this did not preclude the appellants from targeting s. 159.3 of the *IRPR*.

[63] When a *Charter* challenge targets a provision in an interrelated legislative scheme, the potential impact of related provisions, including those that may serve to “prevent or cure any possible defects”, must be reviewed (C.A. reasons, at para. 58(a))

(emphasis added)). The success or failure of a *Charter* claim may turn on arguments or evidence related to preventative or curative provisions. But this should rarely preclude consideration of whether life, liberty or security of the person under s. 7 are “engaged”.

[64] Legislation often implicates interests that s. 7 protects. At times, this will result from broad provisions that would — taken on their own — have constitutionally relevant effects on life, liberty or security of the person. However, legislatures can include related provisions within a scheme that temper those effects. When these measures are part of an integrated legislative whole, they must be accounted for when assessing the constitutionality of rules of general application.

[65] In *PHS*, for example, this Court considered the linkages between a general rule and provisions related to it. At issue was, among other things, a general statutory prohibition on possession of controlled substances except as authorized under the regulations. The statute gave the Minister the power “to issue exemptions for medical or scientific reasons, or for any purpose the Minister deems to be in the public interest” from the application of any provision of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (“*CDSA*”) (*PHS*, at para. 39).

[66] The Court found that exemptions acted “as a safety valve that prevents the [statute] from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects” (*PHS*, at para. 113). In other words, when the Minister’s discretion was exercised, these provisions cured the constitutional defects that would have arisen had the general prohibition been left to apply to those who ought not to

TAB 41



Compliance and Enforcement Decision CRTC 2017-367

PDF version

Ottawa, 19 October 2017

File number: PDR 9094-201400302-001

3510395 Canada Inc., operating as Compu.Finder – Constitutional challenge to Canada’s Anti-Spam Legislation

The Commission dismisses the challenge regarding the constitutionality of Canada’s Anti-Spam Legislation (CASL) raised by 3510395 Canada Inc., operating as Compu.Finder (CompuFinder), in the context of a review of a notice of violation issued against the company under CASL.

In particular, the Commission determines that

- it has the jurisdiction to answer the constitutional issues raised by CompuFinder, and there is a sufficient factual foundation to address these issues;*
- CASL is intra vires the federal Parliament’s legislative powers to enact;*
- the statutory regime prohibiting the sending of commercial electronic messages without consent, subject to certain exceptions and exemptions, violates section 2(b) of the Canadian Charter of Rights and Freedoms (the Charter), but the infringement is justified under section 1;*
- the impugned provisions of CASL do not, in themselves, result in the application of section 11 of the Charter to a person who has been issued and served with a notice of violation under CASL; and*
- no violation of section 7 or 8 of the Charter has been established.*

Accordingly, CompuFinder’s constitutional challenge of CASL has not succeeded.

The Commission’s determinations in the notice of violation review proceeding regarding whether CompuFinder has committed the violations set out in the notice of violation, and with respect to the penalty set out therein, are contained in Compliance and Enforcement Decision 2017-368, also issued today.

Introduction

1. On 5 March 2015, a notice of violation was issued against 3510395 Canada Inc., operating as Compu.Finder (CompuFinder) pursuant to section 22 of *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and*

Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 2010, c. 23 (Canada's Anti-Spam Legislation [CASL] or the Act) by a person designated for that purpose under section 14 of the Act.¹

2. The notice of violation alleged that CompuFinder had committed violations of the Act by, for instance, sending commercial electronic messages (CEMs) without the consent of the recipients, and that contained an unsubscribe mechanism that did not function. The notice of violation set out an administrative monetary penalty (AMP) of \$1,100,000.
3. CompuFinder made representations to the Commission on 15 May 2015 pursuant to section 24 of CASL, seeking a review of the notice of violation. In these representations, CompuFinder raised a constitutional challenge to CASL on various grounds. Among other things, CompuFinder argued that CASL was not validly enacted as it is not *intra vires* the federal Parliament's (Parliament) legislative powers under the *Constitution Act, 1867*. It further argued that CASL contravenes the *Canadian Charter of Rights and Freedoms* (the Charter) by, among other things, infringing CompuFinder's freedom of expression and by allowing the Commission to impose penal sanctions without the necessary procedural safeguards.
4. In response to the constitutional questions raised by CompuFinder, additional process was established to allow CompuFinder to make further representations on the constitutional issues. CompuFinder filed these representations on 29 July 2015.
5. In accordance with section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, CompuFinder was required to serve notice of its constitutional challenge on the Attorney General of Canada and the attorneys general of each province. In response to this notice, the Attorney General of Canada (the Attorney General) chose to make representations to the Commission on the constitutional challenge. These representations were filed with the Commission on 4 February 2016.
6. CompuFinder filed reply comments to the Attorney General's representations on 4 March 2016.
7. The record of this proceeding with respect to the constitutional issues is extensive and includes the following:
 - the notice of violation issued and served upon CompuFinder on 5 March 2015 and the accompanying investigation report served on the same date;

¹ Section 14 of the Act provides that the Commission may designate persons to exercise various investigative powers and enforcement functions set out in sections 15 through 46. For example, persons may be designated to issue preservation demands and notices to produce, to apply for and execute warrants, and to enter into undertakings or issue notices of violation with respect to alleged violations of the Act.

- the representations filed by CompuFinder on 15 May and 29 July 2015 and the final reply filed on 4 March 2016, including 34 exhibits, 37 authorities, and 3 expert reports; and
 - the response to CompuFinder’s challenge filed by the Attorney General on 4 February 2016, including 78 exhibits, 33 authorities, and 3 expert reports.
8. In this decision, the Commission makes determinations on the issues raised by CompuFinder’s constitutional questions in the context of the notice of violation review proceeding. As explained in greater detail below, the Commission determines that CASL is not unconstitutional on any of the grounds raised by CompuFinder.
9. Had CompuFinder’s constitutional challenge been successful, it would not have been necessary to resolve the issues with respect to whether CompuFinder committed the violations alleged in the notice of violation, as this would have involved the application to CompuFinder of a law that the Commission had found to be unconstitutional. In the circumstances, however, the Commission’s determinations with respect to the alleged violations and the AMP set out in the notice of violation are set out in *3510395 Canada Inc., operating as Compu.Finder – Violations of Canada’s Anti-Spam Legislation*, Compliance and Enforcement Decision CRTC 2017-368 (Compliance and Enforcement Decision 2017-368), also issued today.
10. Further, CompuFinder challenged the amount of the AMP set out in the notice of violation, in part on constitutional grounds. That aspect of its constitutional challenge is also dealt with in Compliance and Enforcement Decision 2017-368.

Constitutional challenge

11. CompuFinder argued that the following provisions of CASL, and related regulations, are unconstitutional (the impugned provisions):
- subsection 1(1) – the definition of “commercial activity”;
 - subsection 1(2) – the meaning of “commercial electronic message” (CEM);
 - subsection 1(3) – clarification of other electronic messages that will be considered CEMs;
 - section 3 – the purpose of the Act;
 - subsections 6(1), 6(5), and 6(6), as well as section 12 – provisions related to unsolicited CEM prohibitions;
 - subsections 10(1), 10(9), 10(10), and 10(13) – provisions related to express consent and implied consent, including the definitions of “existing business relationship” and “existing non-business relationship”;
 - section 17 – notices to produce;
 - sections 20, 22, and 25 – provisions related to notices of violation and AMPs;
 - section 30 – clarification that a violation of CASL is not an offence;

- sections 31 and 32 – extension of liability provisions;
 - the *Electronic Commerce Protection Regulations (CRTC)*, SOR/2012-36 (the CRTC regulations); and
 - the *Electronic Commerce Protection Regulations*, SOR/2013-221 (the Governor in Council regulations).
12. In its final reply, CompuFinder requested that the Commission find that the impugned provisions violate the Charter or are *ultra vires* Parliament's legislative powers under the *Constitution Act, 1867* (or both), and are therefore unconstitutional. According to CompuFinder, it would then follow that the Commission would have to treat those provisions as having no force or effect, that CompuFinder could not be liable for any violation alleged by the notice of violation, and that the AMP set out in the notice of violation could not be imposed.

Issues

13. Based on its review of the record of the proceeding, the Commission considers that the following issues are relevant to the determination of the constitutional challenge:
- Can the Commission determine the constitutionality of the impugned provisions at issue in this proceeding?
 - Is CASL *intra vires* Parliament's legislative powers?
 - Does CASL violate the freedom of expression guaranteed to CompuFinder by section 2(b) of the Charter? If so, is any such violation justified under section 1?
 - Does CASL violate any of the rights of CompuFinder protected by section 11 of the Charter?
 - Does CASL violate the section 7 Charter protection against self-incrimination or the section 8 Charter right against unreasonable search and seizure?

Can the Commission determine the constitutionality of the impugned provisions at issue in this proceeding?

14. Before it can deal with the substance of CompuFinder's constitutional challenge, the Commission must determine whether it would be appropriate to do so in the circumstances. This involves first determining whether it has the jurisdiction to resolve constitutional issues and then determining whether there is a sufficient factual foundation on the record of the proceeding upon which to address those issues.

185. In light of the above, the Attorney General has established that the salutary effects of the impugned provisions outweigh their deleterious effects.

Conclusion

186. In summary, the Commission has determined that the impugned provisions of CASL violate the freedom of expression guaranteed to CompuFinder by section 2(b) of the Charter. However, the Commission determines that the Attorney General has demonstrated, on a balance of probabilities, that the infringement is justified under section 1 of the Charter.

Does CASL violate any of CompuFinder's rights protected by section 11 of the Charter?

187. Section 11 of the Charter guarantees any person charged with an offence with certain legal rights relating to proceedings in criminal and penal matters, including the right against self-incrimination and the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.⁸⁶

188. In *Guindon*,⁸⁷ the Supreme Court confirmed the two-part test for determining whether a statutory infraction will be considered an offence (and therefore whether section 11 of the Charter will apply): whether the proceeding leading to the imposition of a penalty is by its very nature a criminal proceeding and whether the sanction results in a true penal consequence. The “criminal in nature” test focuses on the process while the “true penal consequence” test focuses on its potential impact on the person subject to the proceeding.⁸⁸

189. The analysis set out below deals only with the impugned provisions themselves, and whether they would result in persons who have been served with notices of violation being “charged with an offence” in the relevant sense. The analysis of whether the

⁸⁶ Section 11 states the following: Any person charged with an offence has the right (a) to be informed without unreasonable delay of the specific offence; (b) to be tried within a reasonable time; (c) not to be compelled to be a witness in proceedings against that person in respect of the offence; (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; (e) not to be denied reasonable bail without just cause; (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment; (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations; (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

⁸⁷ *Guindon v. Canada*, 2015 SCC 41.

⁸⁸ *Ibid.* at paras. 44 and 50.

particular AMP imposed on CompuFinder results in it being charged with an offence is set out in Compliance and Enforcement Decision 2017-368.

Positions of parties

190. CompuFinder alleged that CASL violates section 11 of the Charter because it allows for the imposition of true penal consequences without providing any of the constitutional protections guaranteed to those persons charged with an offence. CompuFinder argued that it was denied, for instance, the right to a fair hearing before an independent and impartial arbiter and the right to be presumed innocent until proven guilty.
191. CompuFinder argued that AMPs that may be imposed under CASL are of a potentially extraordinary magnitude, even to the point of being ruinous. The true purpose of such potential AMPs can only be to punish, and go far beyond what would be necessary for a regulatory purpose or for deterrence.
192. CompuFinder stated that the administrative regime under CASL affords less procedural protection than other regimes such as the one under the *Competition Act*, in which AMPs are recoverable only in a court of competent jurisdiction, or under the *Investment Canada Act*, where AMPs may be imposed only by order of a superior court. Further, the factors prescribed by the Act to be considered in determining the quantum of an AMP are not based on purely economic or mathematical considerations and appear to serve penal sentencing goals.
193. The Attorney General submitted that the legislative history and the nature of CASL's provisions reinforce the non-criminal nature of the statute. The process provided for does not involve the laying of a charge, an arrest, or a summons to appear before a court of criminal jurisdiction. A finding of responsibility does not lead to a criminal record. Nor does the statute use any of the words the Supreme Court has identified as being traditionally associated with a criminal process, such as "guilt," "acquittal," "indictment," "summary conviction," "prosecution," and "accused."
194. The Attorney General also submitted that the maximum penalty amounts set out in CASL are high to encourage compliance with CASL, to serve as an effective deterrent, and to ensure that AMPs do not simply become a cost of doing business. The mandatory factors that must be taken into account in determining the amount of the penalty give the Commission room to ensure that the penalty reflects the severity of the conduct.

Commission's analysis and determinations

The criminal in nature test

195. The question of whether proceedings are criminal in nature is concerned not with the nature of the act that gave rise to the proceedings but the nature of the proceedings

themselves.⁸⁹ The Supreme Court identified the following criteria as providing insight into the nature of the proceeding: the objectives of the legislation, the objectives of the sanction, and the process leading to the imposition of the sanction.⁹⁰

196. The first criterion concerns whether the objective of the proceedings, examined in their full legislative context, have a regulatory or a penal purpose. As has already been noted, the objective of CASL is set out in section 3 of the Act and states that CASL seeks to regulate specific conduct that could detract from the well-being of the e-economy.
197. The explanatory note to Order in Council P.C. 2013-1323 that fixed 1 July 2014 as the date upon which many of the impugned provisions would come into force noted that the objective of CASL was to deter spam and other damaging and deceptive electronic threats such as identity theft, phishing, and spyware from occurring in Canada and to help drive spammers out of Canada.⁹¹
198. Further, the Act's legislative history also indicates that the government favoured an administrative and regulatory solution as opposed to a criminal approach:

This bill combats spam and related online threats in two ways. It provides regulatory powers to administer monetary penalties and it gives individuals and businesses the right to sue spammers. Bill C-27 makes use of the federal trade and commerce power rather than the law enforcement authorities in the *Criminal Code*. A civil administrative regime such as that in the ECPA [i.e. the *Electronic Commerce Protection Act*] is consistent with the approach taken internationally.⁹²

199. Based on the above, the full legislative context is one that establishes an administrative regime to regulate a limited sphere of activity: namely, certain activities that take place within, and could damage, Canada's e-economy, and proceedings under this scheme have a regulatory, rather than a penal, purpose.

⁸⁹ *Ibid.* at para. 45.

⁹⁰ *Ibid.* at para. 52.

⁹¹ *Order Fixing Certain Dates as the Days on which Certain Provisions of the Act Come into Force*, SI/2013-127, (2013) C. Gaz. II 3087. The note is not part of the Order.

⁹² *House of Commons Debates*, 40th Parl., 2d Sess., No. 105 (2 November 2009) at 1535 (Hon. Mike Lake, Parliamentary Secretary to the Minister of Industry). This is an excerpt from a speech introducing Bill C-27 for third reading. The short title of that bill was the *Electronic Commerce Protection Act*. It died on the order paper when Parliament was prorogued on 30 December 2009. The bill was reintroduced, substantially unchanged, as Bill C-28 on 25 May 2010 and eventually became CASL, though the originally proposed short title was abandoned.

200. The inclusion of a private right of action⁹³ within the legislative context of CASL, which includes the possibility for a court to order compensation in an amount equal to the loss or damage suffered or expenses incurred, is also indicative, in the Commission's view, of a regulatory purpose as opposed to a criminal one.
201. As for the objectives of the sanction, the Supreme Court has found that, in the case of an AMP regime where this criterion must also be considered under the true penal consequence test, it may be unnecessarily repetitive to consider the criterion under the criminal in nature test as well.⁹⁴ Accordingly, consideration of this criterion appears in the next subsection of this decision.
202. With respect to the criterion to consider the process leading to the imposition of a sanction, the heart of the analysis is concerned with the extent to which it bears the traditional hallmarks of a criminal proceeding.⁹⁵
203. Under CASL, the process leading to the imposition of a sanction is overseen by the Commission, a regulatory body, rather than by the criminal justice system. The Act does not make reference to words traditionally associated with a criminal process. Rather, the use of words such as "balance of probabilities," "due diligence," "penalty," "undertaking," or "representations" are indicative of the regulatory purpose of the Act.
204. In addition, the process leading to the penalty does not resemble a criminal proceeding in key respects. It does not involve the laying of a charge, an arrest, or a summons to appear before a court of criminal jurisdiction. A finding of responsibility does not result in a criminal record.
205. In all cases, when a notice of violation is issued, it is issued by a person who has been designated for that purpose pursuant to section 14 of the Act. The Commission itself is not involved in the process that leads to the issuance of a notice of violation but it may be called to decide review applications pursuant to section 25 of the Act.
206. The processes under CASL must be considered as designed to enhance public confidence in Canadian online commerce and, ultimately, to be administrative or regulatory in nature. This conclusion is further reinforced by section 30 of the Act, which states that a violation is not an offence and, accordingly, that section 126 of the *Criminal Code* does not apply.⁹⁶

⁹³ This scheme is set out in sections 47 to 51 and section 55 of CASL, though it is not in force as of the date of publication of this decision.

⁹⁴ *Guindon*, *supra* note 87, at para. 52.

⁹⁵ *Ibid.* at para. 63.

⁹⁶ Section 126 of the *Criminal Code* provides that every person who, without lawful excuse, wilfully contravenes an Act of Parliament is guilty of an indictable offence and liable to a term of imprisonment not exceeding two years (unless another punishment is expressly provided by law).

207. Based on the above, the impugned provisions of CASL do not prescribe proceedings that are criminal in nature.

The true penal consequence test

208. In *Wigglesworth*,⁹⁷ the Supreme Court stated that a true penal consequence is imprisonment in all cases or a fine in those cases where, by its magnitude, the fine would appear to be imposed for the purpose of redressing the wrong done to society at large rather than simply to secure compliance within a limited sphere of activity.

209. There is some authority for the proposition that, in determining whether an AMP represents a true penal consequence, the actual amount imposed is to be considered, rather than penalties that are theoretically possible.⁹⁸ However, in the more recent *Guindon* case, the Supreme Court considered both the statutory scheme and the particular penalty imposed in order to assess whether an AMP constituted a true penal consequence.⁹⁹

210. Therefore, in the analysis that follows, the Commission considers whether CASL itself allows for the imposition of true penal consequences. If CASL does allow it, and the statute did not also prescribe processes that protect the rights set out in section 11 of the Charter, CASL would be considered unconstitutional.¹⁰⁰

211. The Supreme Court has provided several factors to be considered in determining whether an AMP is a true penal consequence, such as the magnitude of the fine, to whom the fine is paid, whether its magnitude is determined by regulatory considerations (rather than principles of criminal sentencing), and whether stigma is associated with the penalty.¹⁰¹ Also relevant, as noted above, is the purpose of the penalty.

212. Subsection 20(4) of CASL provides for maximum AMPs of \$1 million in the case of an individual and \$10 million in the case of any other person, which includes corporations. These are large potential amounts; however, the size of an AMP on its own is only part of the analysis. There is no magic number above which an AMP, in the abstract, becomes penal.

213. The Supreme Court has said that an arbitrary upper limit on AMPs could undermine their goal: to deter actions that do not comply with the administrative regime.¹⁰² It has also cited with approval a decision of the Ontario Superior Court in which that

⁹⁷ *R. v. Wigglesworth*, [1987] 2 S.C.R. 541.

⁹⁸ *Rowan v. Ontario Securities Commission*, 2012 ONCA 208 at para. 46.

⁹⁹ *Guindon*, *supra* note 87, at paras. 82-84.

¹⁰⁰ As noted, the analysis of the specific AMP at issue in this case is set out in Compliance and Enforcement Decision 2017-368.

¹⁰¹ *Guindon*, *supra* note 87, at paras. 76-77.

¹⁰² *Ibid.* at para. 79.

court found that the provision in the *Competition Act* for AMPs of up to \$10 million for deceptive marketing practices did not engage section 11 of the Charter.¹⁰³

214. While CASL provides for a higher maximum penalty per violation than some other AMP regimes (including the Unsolicited Telecommunications Rules and Voter Contact Registry regime, which the Commission also enforces),¹⁰⁴ the potential for higher penalties simply provides the Commission with further means to deal with more egregious conduct when it arises. The maximum is just that: an upper limit that need not be reached except in cases where circumstances warrant.

215. Further, CompuFinder correctly noted that there is not a purely mathematical or economic method of determining the quantum of an AMP. However, this does not mean that the quantum of an AMP is therefore determined by sentencing factors. Subsection 20(3) of CASL prescribes that the determination of the amount of the penalty must be based on the following factors:

- (a) the purpose of the penalty;
- (b) the nature and scope of the violation;
- (c) the person's previous history with respect to any previous violation under the Act, or any previous contravention of section 74.011 of the *Competition Act* or any previous contravention of section 5 of PIPEDA;
- (d) the person's history with respect to any previous undertaking entered into under subsection 21(1) of the Act, and any previous consent agreement signed under subsection 74.12(1) of the *Competition Act* relating to conduct reviewable under section 74.011 of that Act;
- (e) any financial benefit that the person obtained from the commission of the violation;
- (f) the person's ability to pay the penalty;
- (g) whether the person has voluntarily paid compensation to a person affected by the violation;
- (h) the factors established by the regulations; and
- (i) any other relevant factor.

216. The *Criminal Code* governs criminal sentencing in Canada. Part XXIII contains the sentencing provisions, including, at section 718, the purpose and principles of criminal sentencing. The stated purpose is to protect society and to contribute, along

¹⁰³ *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5315, cited in *Guindon*, *supra* note 87, at para. 80.

¹⁰⁴ However, under those regimes, unlike under CASL, a violation continued on more than one day constitutes a separate violation in respect of each day during which it is continued (see section 72.03 of the *Telecommunications Act*).

with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions. The objectives are as follows:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

217. There is little overlap between the factors set out in CASL and the objectives of criminal sentencing prescribed by the *Criminal Code*. The CASL factors are much more narrowly focused on the regulatory regime established by CASL and related Acts such as PIPEDA and the *Competition Act* than are the criminal sentencing objectives, which are aimed broadly at redressing harms to society.

218. Large AMPs may be seen to have a deterrent purpose, though this alone would not necessarily make them penal.¹⁰⁵ Even if deterrence were to be considered another relevant factor to take into consideration under section 20 of CASL, as long as this deterrence was understood to serve the promotion of compliance within a limited regulatory sphere, it would not indicate a penal intention.¹⁰⁶

219. Further, subsection 20(2) of CASL explicitly states that the purpose of the penalty is to promote compliance with the Act and not to punish. As the Commission has stated in previously published informational materials regarding its enforcement approach under CASL, the specific approach taken in a given case will be dictated by the specific circumstances of that case.¹⁰⁷ Any AMP imposed must depend on the factors set out in the Act, which is ultimately informed by the explicitly prescribed non-penal purpose of the AMP.

220. Regarding the remaining relevant inquiries of the true penal consequence analysis, an AMP under CASL is paid into the Consolidated Revenue Fund, which can be indicative that an AMP represents a true penal consequence, but is not dispositive.¹⁰⁸

¹⁰⁵ Rowan, *supra* note 98, at paras. 51 and 53.

¹⁰⁶ The Supreme Court has held that general deterrence is a valid consideration to take into account in imposing an administrative penalty in the public interest: *Cartaway Resources Corp. (Re)*, 2004 SCC 26. See also *Guindon*, *supra* note 87, at para. 83.

¹⁰⁷ See FAQs, *supra* note 41.

¹⁰⁸ *Guindon*, *supra* note 87, at para. 88.

221. Finally, CompuFinder has not argued, and there is no evidence, that an AMP that may be imposed under CASL would result in stigma comparable to that attached to a criminal conviction.¹⁰⁹

222. Given the above, CASL does not prescribe true penal consequences. While it does allow for large AMPs, it does not require them. It prescribes a set of considerations that must be taken into account in determining a quantum. These considerations may overlap to a limited degree with criminal sentencing factors, but are restricted to regulatory considerations related to the sphere of activity within the Canadian digital economy that CASL and related statutes govern. AMPs are paid into the Consolidated Revenue Fund, but the mere imposition of an AMP does not result in criminal stigma.

Conclusion

223. Based on the above, the impugned provisions of CASL, to the extent that they can be considered in the abstract, are not unconstitutional by reason of violating section 11 of the Charter. These provisions do not prescribe proceedings that are criminal in nature. Moreover, the mere possibility of large AMPs being imposed under CASL does not lead to the conclusion that the statute itself imposes penal sanctions. Accordingly, section 11 of the Charter is not engaged.

Does CASL violate the section 7 Charter protection against self-incrimination or the section 8 Charter right against unreasonable search and seizure?

Positions of parties

224. CompuFinder made some cursory arguments to the effect that CASL unjustifiably infringes on the right against self-incrimination under section 7 and the right against unreasonable search and seizure under section 8 of the Charter. These arguments were not pursued in its reply comments.

225. The Attorney General submitted that CASL is an administrative regime; therefore, Charter protections against self-incrimination do not apply. Further, as a result of the administrative nature of the regulatory scheme, section 8 of the Charter does not impose the requirement for judicial pre-authorization for searches that would be applicable in the criminal context.

Commission's analysis and determinations

226. CompuFinder's arguments on these issues are generally based on the premise that proceedings under CASL are penal or criminal rather than regulatory in nature. In addition to the rights enumerated in section 11, the Charter also affords individuals subject to penal proceedings certain rights under sections 7 and 8.

¹⁰⁹ *Ibid.* at para. 84.

227. Accordingly, the issue here also depends on whether the proceedings to which CompuFinder has been subject are properly characterized as administrative or penal.

228. For the reasons set out above, the Commission has determined that proceedings under CASL are administrative in nature. The predominant purpose of these proceedings is not the determination of penal liability – i.e. whether an offence has been committed – and it does not involve the pursuit of a criminal investigation. Therefore, Charter protections that are relevant in the criminal context do not apply.

229. Consequently, CompuFinder has not demonstrated a violation of section 7 or 8 of the Charter.

Conclusion

230. CompuFinder requested that the Commission find that the impugned provisions are unconstitutional and treat them as having no force or effect. This would mean that CompuFinder could not be held liable for any violation alleged by the notice of violation and that no AMP could be imposed.

231. However, the Commission has determined that CompuFinder's constitutional challenge has not succeeded.

232. Specifically, the Commission has determined that

- CASL is *intra vires* the legislative powers of Parliament, under the general trade and commerce head of power of subsection 91(2) of the *Constitution Act, 1867*;
- the impugned provisions of CASL violate the freedom of expression guaranteed to CompuFinder by section 2(b) of the Charter, but this violation is justified under section 1;
- the impugned provisions of CASL do not, in themselves, result in the application of section 11 of the Charter to a person who has been issued and served with a notice of violation under CASL; and
- the purpose of proceedings under CASL is not the determination of penal liability, so no violation of section 7 or 8 of the Charter has been established.

233. Accordingly, the Commission dismisses the constitutional challenge raised by CompuFinder and **denies** its requested relief.

Secretary General

TAB 42

2020 FCA 103
A-382-17

2020 CAF 103
A-382-17

3510395 Canada Inc. (Appellant)

3510395 Canada Inc. (appellante)

v.

c.

The Attorney General of Canada (Respondent)

Le procureur général du Canada (intimé)

A-383-17

A-383-17

3510395 Canada Inc. (Appellant)

3510395 Canada Inc. (appellante)

v.

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The Attorney General of Canada (Respondent)

Le procureur général du Canada (intimé)

INDEXED AS: 3510395 CANADA INC. v. CANADA (ATTORNEY GENERAL)

RÉPERTOIRE : 3510395 CANADA INC. c. CANADA (PROCUREUR GÉNÉRAL)

Federal Court of Appeal, Nadon, Webb and Woods JJ.A.—
Toronto, April 29, 2019; Ottawa, June 5, 2020.

Cour d'appel fédérale, les juges Nadon, Webb et Woods,
J.C.A.—Toronto, 29 avril 2019; Ottawa, 5 juin 2020.

Telecommunications — Appeal from Canadian Radio-Television and Telecommunications Commission (CRTC) decision finding that appellant violating Canada's anti-spam legislation¹ (CASL or the Act), imposing administrative monetary penalty (AMP) — Act regulating, inter alia, sending of commercial electronic messages (CEMs) — E-mail marketing primary means of business development for appellant — Appellant sending promotional CEMs to various recipients — Later issued notice of violation (NOV) pursuant to Act, s. 22 for violating Act, ss. 6(1)(a) (not obtaining recipients' consent prior to sending CEMs), 6(2)(c) (some CEMs not containing functioning "unsubscribe" link) — CRTC finding Act intra vires Parliament — Determining that impugned provisions' violation of Canadian Charter of Rights and Freedoms (Charter), s. 2(b) justified under Charter, s. 1 — Further holding that impugned provisions not creating offence for purposes of Charter, s. 11 — Finding that Act not violating Charter, ss. 7, 8 — CRTC holding, inter alia, that appellant failing to establish that "business-to-business" exemption applying to any CEMs under consideration — Of view

Télécommunications — Appel interjeté à l'égard d'une décision dans laquelle le Conseil de la radiodiffusion et des télécommunications canadiennes (le CRTC) a conclu que l'appellante violait la loi canadienne sur la lutte contre les pourriels¹ (la Loi ou la LCAP) et lui a infligé une sanction administrative pécuniaire (SAP) — La Loi prévoit la réglementation notamment de l'envoi de messages électroniques commerciaux (MEC) — Le marketing par courriel était le principal mode de prospection commerciale de l'appellante — L'appellante a transmis des MEC pour promouvoir ses services à divers destinataires — Elle s'est vu signifier par la suite un procès-verbal de violation (PVV) en vertu de l'art. 22 de la Loi au motif qu'elle n'avait pas obtenu le consentement des destinataires avant de leur transmettre les MEC (art. 6(1)a de la Loi), et que certains des MEC ne comportaient pas de mécanisme d'exclusion sous la forme d'un lien fonctionnel (art. 6(2)c de la Loi) — Le CRTC a conclu que la Loi relevait de la compétence du Parlement — Il a conclu que la violation de l'art. 2b) de la Charte canadienne des droits et libertés (Charte) par les dispositions contestées

¹ An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 2010, c.23 (CASL).

¹ Loi visant à promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne par la réglementation de certaines pratiques qui découragent l'exercice des activités commerciales par voie électronique et modifiant la Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes, la Loi sur la concurrence, la Loi sur la protection des renseignements personnels et les documents électroniques et la Loi sur les télécommunications, L.C. 2010, ch. 23 (LCAP).

that appellant not providing sufficient evidence of relationships with organizations CEMs sent to — Issues: whether Act ultra vires Parliament; whether Act's violation of Charter, s. 2(b) justified under Charter, s. 1; whether Act violating Charter, ss. 7, 8, 11; whether CRTC erring in its interpretation, application of business-to-business exemption, of Act's implied consent requirements regarding conspicuous publication — Five indicia of valid general trade, commerce legislation set out in General Motors of Canada Ltd. v. City National Leasing considered to determine vires of CASL — CASL's CEM scheme constituting valid exercise of Parliament's power over general trade, commerce affecting Canada as a whole pursuant to second branch of Constitution Act, 1867, s. 91(2) — With respect to Charter, s. 2(b), while impugned provisions infringing freedom of expression, infringement justified under Charter, s. 1 — Act's benefits outweighing its detrimental effects on freedom of expression — Appellant having no standing to bring claim under Charter, s. 7 as appellant corporation not defending against criminal charge — Charter, s. 8 finding application but no unreasonable seizure arising herein — Act's administrative monetary penalty (AMP) not violating Charter, s. 11(d) — AMP proceedings having regulatory purpose, not criminal in nature — CRTC not erring in its interpretation, application of business-to-business exemption — "Contractual relationship" not determinative of whether Act's business-to-business exemption applicable — Contractual relationships comprehending limited number of transactions affecting few employees not constituting relationships for purposes of business-to-business exemption — Evidentiary requirements for establishing relationship for purposes of business-to-business exemption more demanding than for existing business relationship — Appellant failed to demonstrate relationships with the recipient organizations — Finally, CRTC not erring in interpreting, applying Act's implied consent requirements regarding conspicuous publication, unsubscribe mechanisms — Appeals dismissed.

était justifiée au regard de l'article premier de la Charte — Le CRTC s'est dit d'avis également que les dispositions contestées ne créaient pas d'infraction au sens de l'art. 11 de la Charte — Il a conclu que la Loi n'enfreint pas les art. 7 et 8 — Le CRTC a conclu notamment que l'appelante n'avait pas démontré que l'exception pour les communications interentreprises s'appliquait aux MEC visés — De l'avis du CRTC, l'appelante n'avait pas produit assez d'éléments démontrant l'existence de rapports avec les organisations auxquelles elle avait envoyé les MEC — Il s'agissait de savoir : si la Loi relève de la compétence du Parlement; si la violation de l'art. 2b) de la Charte est justifiée au regard de l'article premier de la Charte; si la Loi enfreint les articles 7, 8 et 11 de la Charte; si le CRTC a mal interprété et appliqué l'exception pour les communications interentreprises et les exigences de la Loi relatives au consentement tacite lorsqu'il y a publication bien en vue — Pour décider si la LCAP était constitutionnelle, il a fallu recourir aux cinq indices énoncés dans l'arrêt General Motors of Canada Ltd. c. City National Leasing, servant à déterminer si une loi relève du pouvoir général en matière de trafic et de commerce — Les dispositions de la LCAP sur les MEC représentent un exercice valide du pouvoir général en matière de trafic et de commerce du Parlement qui touche le Canada dans son ensemble et est visé par le second volet de l'art. 91(2) de la Loi constitutionnelle de 1867 — En ce qui concerne l'art. 2b) de la Charte, les dispositions contestées restreignent la liberté d'expression, mais cette atteinte est justifiée au regard de l'article premier de la Charte — Les avantages de la Loi l'emportent sur ses effets préjudiciables sur la liberté d'expression — Étant donné qu'elle est une société et qu'elle ne se défendait pas contre des accusations de nature criminelle, l'appelante n'avait pas qualité pour invoquer la protection de l'art. 7 de la Charte — L'art. 8 de la Charte s'appliquait en l'espèce, mais il n'y a pas eu saisie abusive — Le régime de sanctions administratives pécuniaires (SAP) de la Loi n'enfreint pas l'art. 11d) de la Charte — L'objet des procédures menant aux SAP prévues par la Loi est de nature administrative et n'est pas de nature criminelle — Le CRTC n'a pas commis d'erreur dans son interprétation et son application de l'exception pour les communications interentreprises — L'existence d'une « relation contractuelle » ne tranchait pas la question de savoir si l'exception pour les communications interentreprises prévue par la Loi s'appliquait — Les relations contractuelles comptant un petit nombre de transactions touchant un petit nombre d'employés ne constituent pas un rapport pour l'application de l'exception pour les communications interentreprises — La preuve à faire pour démontrer l'existence de rapports pour l'application de l'exception pour les communications interentreprises est plus rigoureuse que la preuve à faire pour démontrer l'existence de relations d'affaires en cours — L'appelante n'a pas démontré qu'elle entretenait des rapports avec les organisations destinataires — Enfin, le CRTC n'a pas commis d'erreur dans son interprétation et son application des exigences de la Loi relatives au consentement tacite lorsqu'il y a publication bien en vue et aux mécanismes d'exclusion — Appels rejetés.

Constitutional Law — Distribution of Powers — Canadian Radio-Television and Telecommunications Commission (CRTC) dismissing appellant's constitutional challenge to Canada's anti-spam legislation² (CASL or the Act) — Act regulating, inter alia, sending of commercial electronic messages (CEMs) — Appellant sending promotional CEMs to various recipients in violation of Act, ss. 6(1)(a), 6(2)(c) — CRTC finding Act intra vires Parliament — Considering five indicia of valid general trade, commerce legislation set out in General Motors of Canada Ltd. v. City National Leasing (General Motors) — Concluding Act's pith, substance falling within Parliament's power over general trade, commerce pursuant to Constitution Act, 1867, s. 91(2) — Whether Act ultra vires Parliament — Act's CEM scheme valid exercise of Parliament's power over general trade, commerce — Impugned provisions constituting distinct regulatory scheme relating to unsolicited CEMs — Parliament's intending to create scheme to regulate CEMs in order to prevent, inter alia, impairment of e-economy, costs to businesses and consumers — Act not intruding on provincial jurisdiction by interfering with contractual terms — Impugned CEM scheme meeting first two indicia of General Motors test — Impugned legislation concerned with trade as whole, thus satisfying third General Motors indicium — Provinces, jointly or severally, constitutionally incapable of enacting CEM scheme — Scheme's successful operation jeopardized by failing to include all provinces — CASL's CEM scheme constituting valid exercise of Parliament's power over general trade, commerce affecting Canada as a whole pursuant to second branch of Constitution Act, 1867, s. 91(2)

Constitutional Law — Charter of Rights — Fundamental Freedoms — Canadian Radio-Television and Telecommunications Commission (CRTC) dismissing appellant's constitutional challenge to Canada's anti-spam legislation³ (CASL or the Act) — Act regulating, inter alia, sending of commercial electronic messages (CEMs) — Appellant sending promotional CEMs to various recipients in violation of Act, ss. 6(1)(a), 6(2)(c) — CRTC determining that Act's impugned provisions violating Charter, s. 2(b) — Concluding this violation justified under Charter, s. 1 — Whether Act's violation of s. 2(b) justified under s. 1 — CEMs

Droit constitutionnel — Partage des pouvoirs — Le Conseil de la radiodiffusion et des télécommunications canadiennes (le CRTC) a rejeté la contestation constitutionnelle intentée par l'appelante contre la loi canadienne sur la lutte contre les pourriels² (la Loi ou la LCAP) — La Loi prévoit la réglementation notamment de l'envoi de messages électroniques commerciaux (MEC) — L'appelante a transmis des MEC pour promouvoir ses services à divers destinataires en contravention des art. 6(1)a) et 6(2)c) de la Loi — Le CRTC a conclu que la Loi relevait de la compétence du Parlement — Il a examiné les cinq critères de validité permettant de vérifier qu'une loi relève de la compétence générale de réglementation du trafic et du commerce énoncés dans l'arrêt General Motors of Canada Ltd. c. City National Leasing (General Motors) — Il a déterminé que le caractère véritable de la Loi tombe sous le coup de l'art. 91(2) de la Loi constitutionnelle de 1867, qui attribue au Parlement le pouvoir général en matière de trafic et de commerce — Il s'agissait de savoir si la Loi relève de la compétence du Parlement — Les dispositions de la Loi sur les MEC représentent un exercice valide du pouvoir général en matière de trafic et de commerce du Parlement — Les dispositions contestées créent un régime administratif distinct visant les MEC non sollicités — Le législateur entendait créer un régime réglementant l'envoi de MEC pour empêcher notamment que de telles pratiques nuisent à la cyberéconomie et entraînent des coûts pour les entreprises et les consommateurs — La Loi n'empiète pas sur un domaine de compétence provinciale en modifiant les modalités de contrats — Les dispositions sur les MEC contestées satisfont aux deux premiers indices de validité de l'arrêt General Motors — La loi contestée intéresse le commerce dans son ensemble et satisfait donc au troisième indice du critère de l'arrêt General Motors — La Constitution n'habilite pas les provinces, conjointement ou séparément, à adopter les dispositions sur les MEC — L'absence d'une ou de plusieurs provinces du régime compromettrait l'application de ce dernier — Les dispositions de la LCAP sur les MEC représentent un exercice valide du pouvoir général en matière de trafic et de commerce du Parlement qui touche le Canada dans son ensemble et est visé par le second volet de l'art. 91(2) de la Loi constitutionnelle de 1867.

Droit constitutionnel — Charte des droits — Libertés fondamentales — Le Conseil de la radiodiffusion et des télécommunications canadiennes (le CRTC) a rejeté la contestation constitutionnelle intentée par l'appelante contre la loi canadienne sur la lutte contre les pourriels³ (la Loi ou la LCAP) — Loi prévoit la réglementation notamment de l'envoi de messages électroniques commerciaux (MEC) — L'appelante a transmis des MEC pour promouvoir ses services à divers destinataires en contravention des art. 6(1)a) et 6(2)c) de la Loi — Le CRTC a conclu que les dispositions contestées de la Loi

² Ibid.

³ Ibid.

² Ibid.

³ Ibid.

protected under s. 2(b) — Impugned provisions infringing freedom of expression — However, violation justified under Charter, s. 1 — Act meeting threshold for passing “prescribed by law” stage of s. 1 analysis — Impugned provisions not vague — Act’s legislative objective not too broad — Act passing rational connection stage of s. 1 inquiry — Act establishing partial, rather than absolute, prohibition on CEMs — Establishing complex legislative scheme to achieve its objectives — CRTC correctly rejecting less impairing alternatives proposed by appellant — Act’s benefits outweighing its detrimental effects on freedom of expression — Act presenting obstacle to non-commercial forms of speech only where such speech having commercial purpose — Harm to other forms of speech de minimis — Commercial expression lying some distance from core of s. 2(b), warranting reduced level of protection.

Constitutional Law — Charter of Rights — Criminal Process — Canadian Radio-Television and Telecommunications Commission (CRTC) dismissing appellant’s constitutional challenge to Canada’s anti-spam legislation⁴ (CASL or the Act) — Act’s administrative monetary penalty (AMP) not violating Charter, s. 11(d) — AMP proceedings having regulatory purpose, not criminal in nature — Relevant provisions of Act not using words associated with criminal process — AMP regime promoting compliance with Act’s regulatory scheme.

Constitutional Law — Charter of Rights — Life, Liberty and Security — Canadian Radio-Television and Telecommunications Commission (CRTC) dismissing appellant’s constitutional challenge to Canada’s anti-spam legislation⁵ (CASL or the Act) — Whether Act violating Charter, s. 7 — Appellant, as corporation, having no standing to bring claim under s. 7 because not defending against criminal charge.

Constitutional Law — Charter of Rights — Unreasonable Search or Seizure — Canadian Radio-Television and

enfreignent l’art. 2b) de la Charte — Il a conclu que cette atteinte est justifiée au regard de l’article premier de la Charte — Il s’agissait de savoir si la violation par la Loi de l’art. 2b) est justifiée au regard de l’article premier — Les MEC constituent une activité protégée par l’art. 2b) — Les dispositions contestées portent atteinte à la liberté d’expression — Toutefois, cette atteinte est justifiée au regard de l’article premier de la Charte — La Loi satisfait au critère applicable à l’étape de l’analyse fondée sur l’article premier visant à déterminer si la restriction a été apportée « par une règle de droit » — Les dispositions contestées ne sont pas imprécises — La portée de l’objectif législatif de la Loi n’est pas trop générale — La Loi satisfait au critère du lien rationnel de l’analyse fondée sur l’article premier — La Loi crée une interdiction partielle, et non pas absolue, des MEC — Elle établit un régime légal complexe pour atteindre ses objectifs — Le CRTC a eu raison de ne pas retenir les solutions de rechange moins attentatoires proposées par l’appelante — Les avantages de la Loi l’emportent sur ses effets préjudiciables sur la liberté d’expression — La Loi ne constitue un obstacle aux formes non commerciales de discours que lorsque ces discours ont un but commercial — L’atteinte portée aux autres formes de discours est négligeable — L’expression commerciale se trouve à une certaine distance des valeurs fondamentales protégées par l’art. 2b) et commande un niveau de protection moindre.

Droit constitutionnel — Charte des droits — Procédures criminelles et pénales — Le Conseil de la radiodiffusion et des télécommunications canadiennes (le CRTC) a rejeté la contestation constitutionnelle intentée par l’appelante contre la loi canadienne sur la lutte contre les pourriels⁴ (la Loi ou la LCAP) — Le régime de sanctions administratives pécuniaires (SAP) de la Loi n’enfreint pas l’art. 11d) de la Charte — L’objet des procédures menant aux SAP est de nature administrative et n’est pas de nature criminelle — Les dispositions pertinentes de la Loi n’utilisent pas les termes traditionnellement associés aux procédures en matière criminelle — Le but du régime de SAP est d’assurer le respect des exigences réglementaires de la Loi.

Droit constitutionnel — Charte des droits — Vie, liberté et sécurité — Le Conseil de la radiodiffusion et des télécommunications canadiennes (le CRTC) a rejeté la contestation constitutionnelle intentée par l’appelante contre la loi canadienne sur la lutte contre les pourriels⁵ (la Loi ou la LCAP) — Il s’agissait de savoir si la Loi enfreint l’art. 7 de la Charte — Étant donné qu’elle est une société et qu’elle ne se défendait pas contre des accusations de nature criminelle, l’appelante n’avait pas qualité pour invoquer la protection de l’art. 7.

Droit constitutionnel — Charte des droits — Fouilles, perquisitions ou saisies abusives — Le Conseil de la radiodiffusion

⁴ Ibid.

⁵ Ibid.

⁴ Ibid.

⁵ Ibid.

Telecommunications Commission (CRTC) dismissing appellant's constitutional challenge to Canada's anti-spam legislation⁶ (CASL or the Act) — Whether Act violating Charter, s. 8 — S. 8 finding application in present circumstances — However, no unreasonable seizure arising — Appropriate standard for reasonable seizure under Act, s. 17 articulated in Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission) — Notice to produce issued to appellant meeting this modest standard.

These were appeals from two related compliance and enforcement decisions of the Canadian Radio-Television and Telecommunications Commission (CRTC). In the first decision, the CRTC dismissed the appellant's constitutional challenge to Canada's anti-spam legislation⁷ (CASL or the Act). In the second decision, the CRTC found that the appellant had committed four violations of the Act and imposed a \$200,000 administrative monetary penalty (AMP).

The Act provides for the regulation of certain forms of commercial conduct relating to electronic commerce (e-commerce), most notably the sending of commercial electronic messages (CEMs). The appellant was a small business offering courses in areas such as team management. E-mail marketing was the appellant's primary means of business development. The appellant conducted three advertising campaigns in 2014 during which it sent promotional CEMs to various recipients in Quebec. The appellant was later issued a notice of violation (NOV) pursuant to section 22 of the Act because the appellant had not obtained the recipients' consent prior to sending the CEMs (paragraph 6(1)(a) of the Act) and some of the CEMs did not contain a functioning "unsubscribe" link (paragraph 6(2)(c) of the Act). In representations to the CRTC, the appellant denied that it had violated the Act. It asserted that the Act was unconstitutional. The CRTC found that the Act is *intra vires* Parliament after a two-step division of powers analysis. The CRTC considered the five *indicia* of valid general trade and commerce legislation set out in the Supreme Court decision of *General Motors of Canada Ltd. v. City National Leasing (General Motors)*. The CRTC ultimately concluded that the Act's pith and substance falls within Parliament's power over general trade and commerce pursuant to subsection 91(2) of the *Constitution Act, 1867*. The CRTC determined that the Act's impugned provisions violate paragraph 2(b) of the *Canadian Charter of Rights and Freedoms* (Charter) because they prohibit the sending of unsolicited CEMs that convey meaning. After conducting a section 1 analysis

et des télécommunications canadiennes (le CRTC) a rejeté la contestation constitutionnelle intentée par l'appelante contre la loi canadienne sur la lutte contre les pourriels⁶ (la Loi ou la LCAP) — Il s'agissait de savoir si la Loi enfreint l'art. 8 de la Charte — L'art. 8 s'appliquait en l'espèce — Toutefois, il n'y a pas eu saisie abusive — La norme à appliquer pour juger du caractère raisonnable de la saisie effectuée en vertu de l'art. 17 de la Loi a été énoncée dans l'arrêt Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, commission sur les pratiques restrictives du commerce) — L'avis de communication signifié à l'appelante satisfaisait à cette norme peu élevée.

Il s'agissait d'appels interjetés à l'égard de deux décisions de conformité et enquêtes connexes du Conseil de la radiodiffusion et des télécommunications canadiennes (le CRTC). Dans la première décision, le CRTC a rejeté la contestation constitutionnelle intentée par l'appelante contre la loi canadienne sur la lutte contre les pourriels⁷ (la Loi ou la LCAP). Dans la seconde décision, le CRTC était d'avis que l'appelante avait commis quatre violations de la Loi et lui a infligé une sanction administrative pécuniaire (SAP) de 200 000 \$.

La Loi prévoit la réglementation de certaines formes d'activités commerciales relatives au commerce électronique, tout particulièrement, l'envoi de messages électroniques commerciaux (MEC). L'appelante était une petite entreprise qui offrait des cours sur des sujets comme la gestion d'équipe. Le marketing par courriel était son principal mode de prospection commerciale. L'appelante a mené trois campagnes publicitaires en 2014 et, dans le cadre de celles-ci, elle a transmis des MEC pour promouvoir ses services à divers destinataires au Québec. L'appelante s'est vu signifier par la suite un procès-verbal de violation (PVV) en vertu de l'article 22 de la Loi au motif qu'elle n'avait pas obtenu le consentement des destinataires avant de leur transmettre les MEC (alinéa 6(1)a) de la Loi), et que certains des MEC ne comportaient pas de mécanisme d'exclusion sous la forme d'un lien fonctionnel (alinéa 6(2)c) de la Loi). Dans ses observations au CRTC, l'appelante a nié avoir enfreint la Loi. Selon elle, la Loi était inconstitutionnelle. Le CRTC a conclu que la Loi relevait de la compétence du Parlement à l'issue d'une analyse en deux volets du partage des compétences. Le CRTC a examiné les cinq critères de validité permettant de vérifier qu'une loi relève de la compétence générale de réglementation du trafic et du commerce énoncés dans l'arrêt *General Motors of Canada Ltd. c. City National Leasing (General Motors)*. Le CRTC a déterminé que le caractère véritable de la Loi tombe sous le coup du paragraphe 91(2) de la *Loi constitutionnelle de 1867*, qui attribue au Parlement le pouvoir général en matière de trafic et de commerce. Le CRTC a conclu

⁶ *Ibid.*

⁷ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

according to the test set out in *R. v. Oakes*, the CRTC concluded that the Act's violation of freedom of expression is justified under section 1. The CRTC further held that the impugned provisions of CASL do not create an offence for the purposes of section 11 of the Charter. As a result, the CRTC found that the rights provided by sections 7 and 8 of the Charter to individuals subject to penal proceedings also did not apply. The CRTC therefore held that the Act does not violate sections 7 and 8. As to the second decision, the CRTC held, *inter alia*, that the appellant failed to establish that the "business-to-business" exemption, as set out in subparagraph 3(a)(ii) of the *Electronic Commerce Protection Regulations* SOR/2013-221, applied to any CEMs under consideration. In the CRTC's view, the appellant failed to provide sufficient evidence of relationships with any of the organizations to which the appellant had sent CEMs.

The appellant argued, *inter alia*, that the CRTC's pith and substance analysis was flawed because it considered CASL as a whole rather than focusing on the specific provisions at issue; that the Act's violation of paragraph 2(b) of the Charter is not saved under section 1; and that the Act violates the right against self-incrimination in sections 11 and 7 of the Charter as well as the right against unreasonable search and seizure in section 8. The appellant claimed that the CRTC adopted a restrictive approach to the business-to-business exemption as to render it almost ineffectual.

The issues regarding the constitutional challenge were whether the Act is *ultra vires* Parliament; whether the Act's violation of paragraph 2(b) of the Charter is justified under section 1; and whether the Act violates sections 7, 8 and 11 of the Charter. The main issue regarding the NOV decision was whether the CRTC erred in its interpretation and application of the business-to-business exemption.

Held, the appeals should be dismissed.

The Act's CEM scheme is a valid exercise of Parliament's power over general trade and commerce affecting Canada as a whole pursuant to the second branch of subsection 91(2) of the Constitution Act. To determine whether the impugned legislation properly fell within Parliament's legislative competence, a division of powers analysis was required. A line of jurisprudence culminating in *General Motors* established five *indicia* of validity for matters falling under the second branch of subsection 91(2). The Supreme Court's method of integrating the *General Motors* test into the division of powers analysis was employed herein, i.e. conducting a pith and substance analysis

que les dispositions contestées de la Loi enfreignent l'alinéa 2b) de la *Charte canadienne des droits et libertés* parce qu'elles interdisent l'envoi de MEC non sollicités qui transmettent un message. Après avoir procédé à l'analyse fondée sur l'article premier décrite dans le critère énoncé à l'arrêt *R. c. Oakes*, le CRTC a conclu que l'atteinte portée à la liberté d'expression est justifiée au regard de l'article premier. Le CRTC s'est dit d'avis également que, comme les dispositions contestées de la LCAP ne créent pas d'infraction au sens de l'article 11 de la Charte, les droits garantis aux articles 7 et 8 de ce même texte aux personnes inculpées ne s'appliquent pas non plus. Le CRTC a donc conclu que la Loi n'enfreint pas les articles 7 et 8. En ce qui concerne la seconde décision, le CRTC a conclu notamment que l'appelante n'avait pas démontré que l'exception pour les communications interentreprises énoncée à l'alinéa 3a)(ii) du *Règlement sur la protection du commerce électronique*, DORS/2013-221 s'appliquait aux MEC visés. De l'avis du CRTC, l'appelante n'avait pas produit assez d'éléments démontrant l'existence de rapports avec les organisations auxquelles elle avait envoyé les MEC.

L'appelante a fait valoir entre autres choses que l'analyse du caractère véritable à laquelle le CRTC a procédé était lacunaire, car ce dernier a examiné la LCAP dans son ensemble, plutôt que les dispositions en litige; que l'atteinte portée par la Loi à l'alinéa 2b) de la Charte n'est pas justifiée au regard de l'article premier; et que la Loi porte atteinte au droit de ne pas témoigner contre soi-même garanti par les articles 7 et 11 de la Charte ainsi qu'au droit d'être protégé contre les fouilles, perquisitions et saisies abusives garanti à l'article 8. Selon l'appelante, le CRTC a interprété l'exception pour les communications interentreprises de manière si étroite que celle-ci en est devenue presque inefficace.

En ce qui concerne la contestation constitutionnelle, il s'agissait de savoir si la Loi relève de la compétence du Parlement; si la violation de l'alinéa 2b) de la Charte est justifiée au regard de l'article premier; et si la Loi enfreint les articles 7, 8 et 11 de la Charte. En ce qui concerne la décision sur le PVV, il s'agissait de savoir principalement si le CRTC a mal interprété et appliqué l'exception pour les communications interentreprises.

Arrêt : les appels doivent être rejetés.

Les dispositions de la Loi sur les MEC représentent un exercice valide du pouvoir général en matière de trafic et de commerce du Parlement qui touche le Canada dans son ensemble et est visé par le second volet du paragraphe 91(2) de la Loi constitutionnelle. Pour décider si la loi contestée relevait bel et bien de la compétence législative du Parlement, il fallait procéder à une analyse fondée sur le partage des compétences. Un courant jurisprudentiel s'étant soldé par l'arrêt *General Motors* a établi cinq indices servant à déterminer la validité d'une mesure prise en vertu du deuxième volet du paragraphe 91(2). La méthode de la Cour suprême permettant d'intégrer le critère établi

of the relevant legislation and then employing the *General Motors* test at the classification stage. The Act contains three separate regulatory schemes, each centered on one of the distinct forms of prohibited conduct enumerated in sections 6, 7 and 8 of the Act, respectively. On this reading, the impugned provisions constitute a distinct regulatory scheme relating to unsolicited CEMs, separate and apart from the Act's schemes targeting the alteration of transmission data and unauthorized installation of computer programs. There is no purpose clause for the Act's CEM scheme in particular. However, section 3 of the Act states that the Act's purpose is "to promote the efficiency and adaptability of the Canadian economy by regulating commercial conduct that discourages reliance on electronic means of carrying out commercial activities". It is because certain commercial activities can give rise to undesirable consequences that impact the economy that Parliament undertook to regulate those activities through the Act. Parliament's intention in legislating the impugned provisions was to create a scheme regulating the sending of CEMs in order to prevent impairment of the e-economy and costs to businesses and consumers, as well as to protect confidential information and Canadians' confidence in e-commerce. The impugned scheme regulates only a narrow aspect of the targeted type of messaging. It does not seek to regulate any other aspect of commercial messaging nor does it regulate the contracts of any particular business or trade. The scheme's effects apply to the exceedingly wide array of businesses and trades that participate in e-commerce. These effects do not include the regulation of contracts nor the frustration of contractual rights. Accordingly, the Act does not intrude on provincial jurisdiction by interfering with contractual terms. The main thrust of the impugned scheme is to regulate the public's ability to send unsolicited CEMs in order to guard against the threats that such messages can pose to Canada's e-economy. The impugned CEM scheme meets the first two *indicia* of the *General Motors* test regarding the existence of a regulatory scheme under the oversight of a regulatory agency. E-commerce has become a pillar of Canada's national economy, one that transcends industries, sectors and categories of market participants as well as provincial borders. Unsolicited emails can carry a number of electronic threats, such as phishing attacks, malware, identity theft, and online scams. Once it is accepted that e-commerce permeates Canada's economy and is not confined to any specific industry or sector, it must follow that the impugned legislation is concerned with trade as a whole and thus satisfies the third *General Motors* *indicium*. The Act's CEM scheme also satisfies the fourth *indicium*, as the provinces, jointly or severally, would be constitutionally incapable of enacting it. Finally, the failure to include one or more provinces in the legislative scheme would jeopardize its successful operation in other parts of the country. If one province were to have more lenient laws respecting unsolicited CEMs, spammers using cloud computing or other methods could easily arrange to disseminate their CEMs from servers located in that province. This would fundamentally handicap any interprovincial

dans l'arrêt *General Motors* à l'analyse du partage des compétences a été adoptée en l'espèce, et l'on a donc procédé à une analyse du caractère véritable de la loi visée pour appliquer ensuite le critère établi dans l'arrêt *General Motors* à l'étape de la classification. La Loi comporte trois régimes administratifs distincts, qui visent chacun une des catégories d'activités interdites établies aux articles 6, 7 et 8 de la Loi. Selon une telle interprétation, les dispositions contestées créent un régime administratif distinct visant les MEC non sollicités, qui est distinct de ceux visant la modification des données de transmission et l'installation non autorisée de programmes d'ordinateur. La Loi ne comporte aucune disposition distincte énonçant l'objet des dispositions sur les MEC. Toutefois, aux termes de l'article 3, la Loi a pour objet « de promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne par la réglementation des pratiques commerciales qui découragent l'exercice des activités commerciales par voie électronique ». Comme certaines activités commerciales sont susceptibles d'emporter de telles conséquences fâcheuses qui nuisent à l'économie, le législateur a décidé de réglementer ces pratiques en adoptant la Loi. Le législateur entendait, en adoptant les dispositions contestées, créer un régime réglementant l'envoi de MEC pour empêcher que de telles pratiques nuisent à la cyberéconomie et entraînent des coûts pour les entreprises et les consommateurs, ainsi que pour protéger les renseignements confidentiels et préserver la confiance des Canadiens dans le commerce électronique. Les dispositions contestées réglementent seulement un aspect étroit de la catégorie de messages visés. Elles ne visent pas à réglementer d'autres aspects des messages commerciaux, ni ne réglementent les contrats d'un secteur ou d'un commerce en particulier. Ces dispositions ont des effets sur les secteurs et commerces extrêmement variés qui participent au commerce électronique. Ces effets n'incluent pas la réglementation des contrats ni la frustration des droits issus de contrats. Par conséquent, la Loi n'empiète pas sur un domaine de compétence provinciale en modifiant les modalités de contrats. Le caractère véritable des dispositions contestées consiste à réglementer l'envoi par le public de MEC non sollicités en vue d'atténuer les risques pour la cyberéconomie canadienne susceptibles de découler de tels messages. Les dispositions sur les MEC contestées satisfont aux deux premiers indices de validité de l'arrêt *General Motors*, à savoir l'appartenance à un système général de réglementation faisant l'objet d'une surveillance constante par un organisme de réglementation. Le commerce électronique est devenu un pilier de l'économie nationale, qui transcende les secteurs et les catégories de participants au marché économique ainsi que les frontières provinciales. Les courriels non sollicités sont susceptibles de véhiculer des menaces en ligne, telles que les attaques d'hameçonnage, les logiciels malveillants, les vols d'identité et les escroqueries en ligne. Une fois qu'on accepte que le commerce électronique a infiltré l'économie canadienne dans son ensemble, et non un seul secteur, il doit s'ensuivre que la loi contestée intéresse le commerce dans son ensemble. Il est donc satisfait au troisième indice du critère de l'arrêt *General*

scheme aimed at guarding Canada's e-economy from the online threats associated with unsolicited CEMs. In the context of Parliament's power over general trade and commerce, the five *General Motors* indicia of validity are tailored to assess validity under this particular head of power. The CRTC did not err in eschewing the national concern test.

CEMs fall within the scope of activity protected under paragraph 2(b) of the Charter. The impugned provisions restrict that activity and therefore infringe freedom of expression guaranteed by paragraph 2(b). However, this violation is justified under section 1 of the Charter. Section 1 requires that a limit on a Charter right or freedom be "prescribed by law". It must next be determined whether the objective of the impugned measures is pressing and substantial, or, in other words, sufficiently important to warrant limiting a Charter right. The Act more than meets the threshold for passing the "prescribed by law" stage of the section 1 analysis. The Act is sufficiently precise to delineate an area or zone of risk, which is all that can be realistically expected and all that is constitutionally required of legislation. The impugned provisions are intelligible, offer a grasp to the judiciary, and provide an adequate basis for legal debate and therefore do not bear the characteristics of vague legislation. The objective of the prohibition on CEMs not meeting the Act's consent and content requirements or otherwise falling under an exception is not simply to ban CEMs. Rather, the Act's legislative objective is to stymie certain negative effects to which unsolicited CEMs give rise. This is not too broad an objective. The objective of promoting the efficiency and adaptability of the Canadian economy by regulating CEMs is sufficiently important to warrant limiting a constitutionally protected right or freedom.

The three prongs of the proportionality analysis require a rational connection between the restricting measures and the measures' objective; that the impugned measures impair the right or freedom as little as possible; and overall proportionality between the benefits of the impugned measures and the

Motors. Les dispositions de la Loi sur les MEC satisfont également au quatrième critère, puisque la Constitution n'habiliterait pas les provinces, conjointement ou séparément, à l'adopter. Enfin, l'absence d'une ou de plusieurs provinces du régime légal compromettrait l'application de ce dernier dans d'autres parties du pays. Si une province adoptait des lois plus laxistes qu'une autre sur les MEC non sollicités, les expéditeurs de pourriels pourraient facilement, par le truchement de l'infonuagique ou d'autres méthodes, transmettre leurs MEC à partir de serveurs situés dans cette province. Tout régime interprovincial voué à la protection de la cyberéconomie canadienne contre les menaces que présentent les MEC non sollicités serait alors fondamentalement entravé. En ce qui a trait à la compétence générale du Parlement sur le trafic et le commerce, les cinq indices de validité énoncés dans l'arrêt *General Motors* sont établis pour déterminer si une loi relève de ce chef de compétence. Le CRTC n'a pas fait erreur en faisant fi de l'analyse de l'intérêt national.

Les MEC constituent une activité protégée par l'alinéa 2b) de la Charte. Les dispositions contestées restreignent cette activité et portent par conséquent atteinte à la liberté d'expression garantie par l'alinéa 2b). Toutefois, cette atteinte est justifiée au regard de l'article premier de la Charte. L'article premier exige que la restriction du droit ou de la liberté garantis par la Charte soit apportée « par une règle de droit ». Ensuite, il faut déterminer si les mesures contestées ont un objectif urgent et réel ou, en d'autres mots, un objectif suffisamment important pour justifier la restriction d'un droit garanti par la Charte. La Loi satisfait amplement au critère applicable à l'étape de l'analyse fondée sur l'article premier visant à déterminer si la restriction a été apportée « par une règle de droit ». La Loi est suffisamment précise pour délimiter une aire ou une zone de risque. Réalistement, on ne peut s'attendre à rien de plus d'une loi et, constitutionnellement, on n'exige rien de plus d'une loi. Les dispositions contestées sont intelligibles, donnent une prise au pouvoir judiciaire et constituent un fondement pour un débat judiciaire. Par conséquent, elles ne comportent pas les caractéristiques de l'imprécision. Les dispositions de la Loi interdisant les MEC ne satisfaisant pas aux exigences légales en matière de consentement ou de contenu ou faisant l'objet d'une exception n'ont pas pour but d'interdire purement et simplement les MEC. L'objectif législatif de la Loi est plutôt d'atténuer certains effets néfastes causés par les MEC non sollicités. Il ne s'agit pas d'un objectif de portée trop générale. L'objectif de promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne par la réglementation des MEC est suffisamment important pour justifier la restriction d'un droit ou d'une liberté garantis par la Constitution.

Les trois volets de l'analyse de la proportionnalité à effectuer sont les suivants : il doit y avoir un lien rationnel entre les mesures restrictives et l'objectif des mesures; les mesures contestées doivent porter le moins possible atteinte au droit ou à la liberté en question; et il doit y avoir dans l'ensemble proportionnalité

deleterious effects to which they give rise. The Act's complex legislative scheme sufficiently tailors means to objectives to pass the rational connection stage of the section 1 inquiry. At this stage of the section 1 analysis, the government must establish a rational connection between the law's objective and the means chosen to achieve it. While it is correct to state that an overinclusive prohibition is not rationally connected to its legislative objective to the extent of its overinclusiveness, the nuanced legislative scheme created by the Act can be distinguished from the categorical, rigid approach taken by the impugned legislation in other cases. The Act does not create an absolute prohibition on electronic messages that aim to encourage participation in commercial activity. The Act, and subsection 6(1) in particular, establish a partial, rather than absolute, prohibition on CEMs. There are a number of exceptions and exclusions to this partial prohibition. The Act thus establishes a complex legislative scheme that evinces a considerable degree of tailoring to achieve its objectives. A proper appreciation of the Act's objectives makes clear that it may validly restrict messages that may seem innocuous relative to "the most damaging and deceptive forms of spam" without being arbitrary or unfair. It is reasonable to conclude that the Act's prohibition captures conduct that can reasonably be said to offend a purpose of the Act and accommodates conduct that does not so offend.

The next stage of the section 1 analysis assesses whether "the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective." A law may fail this stage where "the government fails to explain why a significantly less intrusive and equally effective measure was not chosen". The appellant misapprehended that the existence of less impairing alternatives cannot cause the impugned measures to fail the minimal impairment stage if those alternatives do not also provide sufficient protection to the government's goals. The CRTC was correct to reject the appellant's alternatives. While alternatives need not satisfy the legislature's objectives to the exact same extent as the impugned measures, the opt-out model—where messages must include an unsubscribe mechanism allowing recipients to opt-out of receiving further messages—fails to provide sufficient protection to more than one, if not all, of the Act's objectives set out in section 3. The fundamental issue with the opt-out model is that it permits spammers to continue sending spam. The opt-out model could be safely discarded as a viable alternative to the Act for the purposes of the minimal impairment analysis. A second alternative to the Act raised by the appellant and considered by the CRTC was Australia's *Spam Act 2003* (Cth). The differential in expression captured by CASL relative to the Australian act is narrow enough to find that both the open and closed approaches to defining CEM fall within the range of reasonable alternatives. This prevents CASL from foundering at the minimal

entre les avantages apportés par les mesures contestées et les effets préjudiciables qui en découlent. Le régime légal complexe qu'instaure la Loi est suffisamment adapté à ses objectifs pour satisfaire au critère du lien rationnel de l'analyse fondée sur l'article premier. À cette étape de l'analyse fondée sur l'article premier, le gouvernement doit établir un lien rationnel entre l'objectif de la loi et les moyens choisis pour le réaliser. S'il est juste de dire que, si une interdiction est trop vaste, la partie excédante n'est pas rationnellement liée à l'objectif, on peut établir une distinction entre le régime légal nuancé créé par la Loi et la méthode catégorique et rigide adoptée dans les lois contestées dans d'autres affaires. La Loi n'interdit pas de manière absolue les messages électroniques visant à encourager la participation à une activité commerciale. La Loi, et en particulier le paragraphe 6(1), crée une interdiction partielle, et non pas absolue, des MEC. Il existe plusieurs exceptions et exclusions à cette interdiction partielle. La Loi établit donc un régime légal complexe qui manifeste un degré considérable d'adaptation à ses objectifs. La juste appréciation des objectifs de la Loi montre clairement que la Loi peut restreindre de façon valide des messages qui peuvent sembler inoffensifs en comparaison avec « les pourriels sous leurs formes les plus dangereuses et trompeuses » sans que la restriction soit arbitraire ou injuste. Il est raisonnable de conclure que l'interdiction imposée par la Loi vise des pratiques dont on peut raisonnablement dire qu'elles sont contraires aux objectifs de la Loi et autorise des pratiques dont on ne peut pas raisonnablement dire la même chose.

L'étape suivante de l'analyse fondée sur l'article premier consiste à déterminer si « les mesures en cause restreignent le droit à la liberté d'expression aussi peu que cela est raisonnablement possible aux fins de la réalisation de l'objectif législatif ». La loi peut être jugée invalide à cette étape dans le cas où « le gouvernement omet d'expliquer pourquoi il n'a pas choisi une mesure beaucoup moins attentatoire et tout aussi efficace ». L'appelante a semblé oublier que l'existence de solutions de rechange moins attentatoires ne peut rendre les dispositions contestées invalides à l'étape de l'atteinte minimale si ces solutions de rechange ne protègent pas suffisamment l'objectif du gouvernement. Le CRTC a eu raison de ne pas retenir les solutions de rechange proposées par l'appelante. Bien que les solutions de rechange n'aient pas à remplir les objectifs du législateur exactement dans la même mesure que les dispositions contestées, le modèle du régime à option de retrait—suivant lequel les messages doivent comporter un mécanisme d'exclusion qui permet au destinataire de choisir de ne pas recevoir d'autres messages—ne protège pas suffisamment l'un des objectifs, voire tous les objectifs, de la Loi énoncés à l'article 3. Le problème fondamental du régime à option de retrait est qu'il permet aux expéditeurs de pourriels de continuer à envoyer des pourriels. On peut conclure sans risque de se tromper que le modèle à option de retrait ne constitue pas une solution de rechange valable au régime prévu par la Loi dans le cadre de l'analyse sur l'atteinte minimale. Une deuxième solution de

impairment stage. It was clear that additional suggestions made by the appellant would not provide sufficient protection to render them viable alternatives for the purposes of the minimal impairment test. Finally, none of the recommendations made by the Parliamentary Standing Committee on Industry, Science and Technology in its report on the Act could be classified as an “alternative” for the purposes of the minimal impairment stage, nor did they suggest that the Act is not minimally impairing.

The Act’s benefits outweigh its detrimental effects on freedom of expression. The constitutionally protected expression implicated by the Act is not banned, but regulated. With respect to non-commercial forms of speech such as political and religious speech, outreach to disadvantaged communities, and charitable and public benefit endeavors, the Act presents an obstacle only where such speech has a commercial purpose. The harm to these other forms of speech is therefore *de minimis* since the Act does not impede their expression in non-commercial forms. The Act’s impact on commercial expression is mitigated by numerous exceptions and a prescribed method of compliance. Commercial expression lies some distance from the core of section 2(b) of the Charter and warrants a commensurately reduced level of protection. Restrictions on commercial expression are more easily justifiable than limits on some other types of expression, like political expression, that lie closer to the core of the guarantee in paragraph 2(b).

The Act’s AMP regime does not violate paragraph 11(d) of the Charter. The Act’s AMP proceedings are part of a regulatory framework for the protection of the public and are “generally not the sort of proceedings that engage [section] 11”. Examined in their full legislative context, the AMP proceedings have a regulatory purpose and are not criminal in nature. The process associated with the Act’s AMP regime does not bear any of the hallmarks of a criminal proceeding, nor do the relevant provisions of the Act use any of the words traditionally associated with the criminal process. The purpose of the Act’s AMP regime is to promote compliance with the Act’s regulatory scheme. The magnitude of fines levied under the Act do not

rechange à la Loi proposée par l’appelante et examinée par le CRTC était la loi adoptée par l’Australie, intitulée *Spam Act 2003* (Cth). La différence entre les formes d’expression visées par la LCAP et celles visées par la loi australienne est suffisamment étroite pour que l’on puisse conclure que le modèle ouvert et le modèle fermé de la définition des MEC font l’un et l’autre partie de la gamme des solutions de rechange raisonnables. Il s’ensuit que la LCAP ne peut être jugée invalide à l’étape de l’atteinte minimale. Il était manifeste que les autres solutions de rechange que l’appelante a proposées ne protégeraient pas suffisamment les objectifs législatifs pour qu’elles soient valides aux fins de l’analyse sur l’atteinte minimale. Enfin, aucune des recommandations formulées par le Comité permanent de l’industrie, des sciences et de la technologie de la Chambre des communes dans son rapport sur la LCAP ne pourrait constituer une « solution de rechange » pouvant servir à l’étape de l’analyse sur l’atteinte minimale, pas plus que ces recommandations ne donnent à penser que les restrictions apportées par la Loi ne sont pas minimalement attentatoires.

Les avantages de la Loi l’emportent sur ses effets préjudiciables sur la liberté d’expression. La forme d’expression protégée constitutionnellement assujettie à la Loi n’est pas interdite, mais réglementée. En ce qui concerne les formes non commerciales de discours, comme le discours politique et religieux, l’action directe dans les communautés défavorisées, et les œuvres caritatives et dédiées au bien public, la Loi ne constitue un obstacle que lorsque ces discours ont un but commercial. L’atteinte portée à ces autres formes de discours est par conséquent négligeable puisque la Loi n’entrave pas les formes d’expression non commerciales. Les répercussions de la Loi sur l’expression commerciale sont atténuées par de nombreuses exceptions et un mécanisme de conformité réglementaire. L’expression commerciale se trouve à une certaine distance des valeurs fondamentales protégées par l’alinéa 2b) de la Charte et commande un niveau de protection proportionnellement moindre. Les restrictions à l’expression commerciale se justifient plus facilement que les restrictions à d’autres formes d’expression, comme l’expression politique, qui sont plus au cœur des valeurs protégées par l’alinéa 2b).

Le régime de SAP de la Loi n’enfreint pas l’alinéa 11(d) de la Charte. Les procédures menant aux SAP prévues par la Loi font partie d’un cadre administratif assurant la protection du public et ne sont « généralement pas de celles qui emportent l’application de l’art. 11 ». L’objet des procédures menant aux SAP prévues par la Loi, considérée dans leur contexte législatif global, est de nature administrative et n’est pas de nature criminelle. Le processus lié au régime de SAP établi par la Loi ne comporte aucune des caractéristiques propres aux procédures en matière criminelle, pas plus que les dispositions pertinentes de la Loi n’utilisent de termes traditionnellement associés aux procédures en matière criminelle. Le but du régime de SAP établi par la Loi

necessarily signal that the sanction's purpose is to denounce or punish morally or socially reprehensible conduct.

The appellant, as a corporation, had no standing to bring a claim under section 7 of the Charter. The appellant corporation was not defending against a criminal charge. Section 8 of the Charter, unlike section 7, did find application in the present circumstances. However, no unreasonable seizure arose on the facts of this case. Section 17 of the Act only grants authority for compelling production of documents rather than physical searches of premises—the former being a far less intrusive power than the latter. The standard articulated by the Supreme Court in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* is the appropriate standard for a reasonable seizure under section 17 of the Act. The notice to produce issued to the appellant met this modest standard.

The CRTC did not err in its interpretation and application of the business-to-business exemption. Whether or not a “contractual relationship” arose between the appellant and an organization that paid for a course on behalf of one of its employees was not determinative of whether this created a relationship for the purposes of the Act's business-to-business exemption. There was nothing wrong with the CRTC's determination that contractual relationships comprehending a very limited number of transactions affecting very few employees do not constitute relationships for the purposes of the business-to-business exemption. Merely because “existing business relationship” is a defined term and “relationship” is not, does not mean that the latter must have a broader scope, or, in other words, must be easier to make out, than the former. In assessing the threshold for establishing each type of relationship, consideration must be given to the relative effects, in the context of the Act's objectives, attendant upon a finding that each type of relationship exists. The evidentiary requirements for establishing a relationship for the purposes of the business-to-business exemption should be more demanding than for an existing business relationship. It is too narrow an interpretation of the word “activities” in the text of the exemption to suggest that a recipient organization's “activities” with which a CEM must be concerned should not extend beyond the organization's core business operations. Organizations engage in many activities that are not directly related to their core business operations and maintain relationships with other organizations to facilitate those supplementary activities. There is nothing in the text, context or purpose of the exemption that justifies reading-in qualifiers to circumscribe the vast universe of an organization's potential business activities into a shortlist of “activities” to which CEMs from partner organizations must relate in order for

est d'assurer le respect des exigences réglementaires de la Loi. Les amendes imposées en vertu de la Loi, bien qu'importantes, ne signifient pas nécessairement que la sanction a pour but de dénoncer ou de punir un comportement moralement ou socialement répréhensible.

Étant donné qu'elle est une société, l'appelante n'avait pas qualité pour invoquer la protection de l'article 7 de la Charte. L'appelante ne se défendait pas contre des accusations de nature criminelle. L'article 8 de la Charte, contrairement à l'article 7, s'appliquait en l'espèce. Cependant, les faits de la présente affaire ne montraient pas qu'il y a eu saisie abusive. L'article 17 de la Loi confère uniquement le pouvoir d'ordonner la communication de documents et non celui de perquisitionner des lieux — le premier pouvoir étant beaucoup moins intrusif que le second. La norme énoncée par la Cour suprême dans l'arrêt *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, commission sur les pratiques restrictives du commerce)* est la norme à appliquer pour juger du caractère raisonnable de la saisie effectuée en vertu de l'article 17 de la Loi. L'avis de communication signifié à l'appelante satisfaisait à cette norme peu élevée.

Le CRTC n'a pas commis d'erreur dans son interprétation et son application de l'exception pour les communications interentreprises. Que l'achat par une organisation d'un cours pour un de ses employés auprès de l'appelante crée ou non une « relation contractuelle » ne tranchait pas la question de savoir si cet achat a créé un rapport pour l'application de l'exception pour les communications interentreprises prévue par la Loi. Il n'y avait rien d'erroné dans la conclusion du CRTC selon laquelle les relations contractuelles comptant un très petit nombre de transactions touchant un très petit nombre d'employés ne constituent pas un rapport pour l'application de l'exception pour les communications interentreprises. Le seul fait que le terme « relations d'affaires en cours » est défini alors que le terme « rapports » ne l'est pas ne fait pas en sorte que ce dernier doit nécessairement avoir une portée plus large ou, en d'autres mots, être plus facile à prouver. Lorsqu'on évalue le seuil servant à déterminer l'existence de relations d'un type ou l'autre, il faut prendre en considération les effets relatifs, dans le contexte des objectifs de la Loi, qu'entraînerait une conclusion confirmant l'existence de l'un ou l'autre type de relation. La preuve à faire pour démontrer l'existence de rapports pour l'application de l'exception pour les communications interentreprises devrait être plus rigoureuse que la preuve à faire pour démontrer l'existence de relations d'affaires en cours. Affirmer que les « activités » de l'organisation destinataire faisant l'objet du MEC doivent se limiter à l'entreprise fondamentale revient à interpréter trop étroitement le terme « activités » dans le libellé de l'exception. Les organisations exercent de nombreuses activités qui ne sont pas directement liées à leur entreprise fondamentale et entretiennent des rapports avec d'autres organisations afin de faciliter l'exercice de ces activités supplémentaires. Il

the business-to-business exemption to apply. Where an organization pays for employee training courses—whether or not it is legally obligated to do so—the activities of that organization can include the purchase of employee training courses. A second organization that provides training courses, and has a relationship with the first organization based on providing it with such courses, could thus send the first organization CEMs under the auspices of the business-to-business exemption.

In the present case, the CEMs would have satisfied the relevance requirement if the appellant had been able to show that the recipient organizations purchased similar courses in the past or planned to do so in future. However, the appellant failed to demonstrate relationships with the recipient organizations.

Finally, the CRTC did not err in its interpretation and application of the Act's implied consent requirements regarding conspicuous publication, and in the Act's requirements regarding unsubscribe mechanisms.

STATUTES AND REGULATIONS CITED

Act to promote workforce skills development and recognition, CQLR c. D-8.3.
An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 2010, c. 23, ss. 1(1),(2),(3), 3, 6, 7, 8, 9, 10(1),(9),(10),(13), 11(1), 12(1),(2), 13, 14, 15, 17, 19, 20(1),(2),(3),(4),(5), 22, 24, 25, 27, 29(1), 30, 31, 32, 34(1).
Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 69.6(2).
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], ss. 1, 2(b), 7, 8, 11.
Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 17, 31.1.
Competition Act, R.S.C., 1985, c. C-34.
Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the

n'y a rien dans le texte, le contexte ou l'objet de l'exception qui justifierait qu'on l'interprète en y ajoutant des qualificatifs qui ramèneraient la vaste gamme de ce qui peut constituer une activité d'affaires exercée par une organisation à une courte liste d'« activités » que les MEC d'organisations partenaires doivent concerner pour que s'applique l'exemption pour les communications interentreprises. Lorsqu'une organisation achète des cours de perfectionnement professionnel — qu'elle soit légalement tenue de le faire ou non —, les activités de cette organisation peuvent comprendre l'achat de cours de perfectionnement professionnel. Une seconde organisation qui offre de tels cours et qui entretient avec la première organisation des rapports fondés sur le fait qu'elle lui offre ces cours pourrait donc envoyer des MEC à cette première organisation au titre de l'exception pour les communications interentreprises.

En ce qui concerne les faits en l'espèce, les MEC auraient satisfait à l'exigence de la pertinence si l'appelante avait été en mesure de prouver que les organisations destinataires avaient acheté des cours de ce genre par le passé ou prévoyaient de le faire à l'avenir. Cependant, l'appelante n'a pas démontré qu'elle entretenait des rapports avec les organisations destinataires.

Enfin, le CRTC n'a pas commis d'erreur dans son interprétation et son application des exigences de la Loi relatives au consentement tacite lorsqu'il y a une publication bien en vue et des exigences de la Loi concernant les mécanismes d'exclusion.

LOIS ET RÈGLEMENTS CITÉS

Charte canadienne des droits et libertés, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.) [L.R.C. (1985), appendice II, n° 44], 1, 2b), 7, 8, 11.
Code criminel, L.R.C. (1985), ch. C-46, art. 126, 718.
Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. 103.
Health and Social Services Delivery Improvement Act, S.B.C. 2002, ch. 2.
Loi constitutionnelle de 1867, 30 & 31 Vict., ch. 3 (R.-U.) (mod. par la *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.), annexe de la *Loi constitutionnelle de 1982*, n° 1) [L.R.C. (1985), appendice II, n° 5], art. 91(2).
Loi de l'impôt sur le revenu, L.R.C. (1985) (5^e suppl.), ch. 1, art. 248(1).
Loi favorisant le développement et la reconnaissance des compétences de la main-d'œuvre, RLRQ, ch. D-8.3.
Loi relative aux enquêtes sur les coalitions, S.R.C. 1970, ch. C-23, art. 17, 31.1.
Loi sur la concurrence, L.R.C. (1985), ch. C-34.
Loi sur la faillite et l'insolvabilité, L.R.C. (1985), ch. B-3, art. 69.6(2).

Constitution Act, 1982, Item 1) [R.S.C., 1985, Appendix II, No. 5], s. 91(2).
Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. 103.
Criminal Code, R.S.C. 1985, c. C-46, ss. 126, 718.
Electronic Commerce Protection Regulations, SOR/2013-221, ss. 1, 2, 3, 4, 5, 6, 7, 8.
Electronic Commerce Protection Regulations (CRTC), SOR/2012-36, ss. 1, 2, 3, 4, 5, 6.
Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2.
Income Tax Act, R.S.C., 1985 (5th Supp.), c. 1, s. 248(1).
Personal Information Protection Act, S.A. 2003, c. P-6.5.
Proposed Canadian Securities Act, Order in Council P.C. 2010-667.
Regulation respecting the determination of total payroll, CQLR, c. D-8.3, r. 4, s. 1.
Spam Act 2003 (Cth), s. 6, Sch. 2, s. 2(b).

CASES CITED

APPLIED:

General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641, (1989), 58 D.L.R. (4th) 255; *R. v. Oakes*, [1986] 1 S.C.R. 103, (1986), 26 D.L.R. (4th) 200; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, (1989), 58 D.L.R. (4th) 577; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, (1995), 127 D.L.R. (4th) 1; *R. v. Keegstra*, [1990] 3 S.C.R. 697, (1990), 114 A.R. 81, [1991] 2 W.W.R. 1; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 (as to how to integrate the *General Motors* test into the division of powers analysis); *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, (1998), 159 D.L.R. (4th) 385; *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31, [2009] 2 S.C.R. 295 (as to whether a limitation is “prescribed by law”); *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, (1991), 82 D.L.R. (4th) 321; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, (1992), 93 D.L.R. (4th) 36; *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Rocket v. Royal College of Dental Surgeons (Ontario)*,

Loi visant à promouvoir l’efficacité et la capacité d’adaptation de l’économie canadienne par la réglementation de certaines pratiques qui découragent l’exercice des activités commerciales par voie électronique et modifiant la Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes, la Loi sur la concurrence, la Loi sur la protection des renseignements personnels et les documents électroniques et la Loi sur les télécommunications, L.C. 2010, ch. 23, art. 1(1),(2),(3), 3, 6, 7, 8, 9, 10(1),(9),(10),(13), 11(1), 12(1),(2), 13, 14, 15, 17, 19, 20(1),(2),(3),(4),(5), 22, 24, 25, 27, 29(1), 30, 31, 32, 34(1).
Personal Information Protection Act, S.A. 2003, ch. P-6.5.
Proposition concernant une loi canadienne intitulée Loi sur les valeurs mobilières, décret C.P. 2010-667.
Règlement sur la détermination de la masse salariale, RLRQ, ch. D-8.3, r. 4, art. 1.
Règlement sur la protection du commerce électronique, DORS/2013-221, art. 1, 2, 3, 4, 5, 6, 7, 8.
Règlement sur la protection du commerce électronique (CRTC), DORS/2012-36, art. 1, 2, 3, 4, 5, 6.
Spam Act 2003 (Cth), art. 6, ann. 2, art. 2(b).

JURISPRUDENCE CITÉE

DÉCISIONS APPLIQUÉES :

General Motors of Canada Ltd. c. City National Leasing, [1989] 1 R.C.S. 641, 1989 CanLII 133; *R. c. Oakes*, [1986] 1 R.C.S. 103, 1986 CanLII 46; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, 1989 CanLII 87; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, 1995 CanLII 64; *R. c. Keegstra*, [1990] 3 R.C.S. 697, 1990 CanLII 24; *Guindon c. Canada*, 2015 CSC 41, [2015] 3 R.C.S. 3; *Canada (Ministre de la Citoyenneté et de l’Immigration) c. Vavilov*, 2019 CSC 65, [2019] A.C.S. n° 65; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *Renvoi relatif à la Loi sur les valeurs mobilières*, 2011 CSC 66, [2011] 3 R.C.S. 837 (sur la question de savoir comment intégrer le critère de *General Motors* à l’analyse sur le partage des compétences); *Thomson Newspapers Co. c. Canada (Procureur général)*, [1998] 1 R.C.S. 877, 1998 CanLII; *Greater Vancouver Transportation Authority c. Fédération canadienne des étudiantes et étudiants*, 2009 CSC 31, [2009] 2 R.C.S. 295 (sur la question de savoir si une restriction est imposée par une « règle de droit »); *Osborne c. Canada (Conseil du Trésor)*, [1991] 2 R.C.S. 69, 1991 CanLII 60; *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, 1992 CanLII 72; *Health Services & Support-Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 39; *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567; *Rocket c. Collège royal des chirurgiens dentistes d’Ontario*, [1990] 2

[1990] 2 S.C.R. 232, (1990), 71 D.L.R. (4th) 68; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, (1990), 67 D.L.R. (4th) 161.

DISTINGUISHED:

Reference re Securities Act, 2011 SCC 66, [2011] 3 S.C.R. 837 (as to the vires of the CASL scheme); *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31, [2009] 2 S.C.R. 295 (as to overbreadth).

CONSIDERED:

Kirkbi AG v. Ritvik Holdings Inc., 2005 SCC 65, [2005] 3 S.C.R. 302; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Parsons v. Citizens' Insurance Co. of Canada* (1881), 7 App. Cas. 96; *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.*, [1935] A.C. 524, [1935] 3 D.L.R. 12 (P.C.); *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, (1988), 54 D.L.R. (4th) 577; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1, 1986 CanLII 12; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344, 281 A.C.W.S. (3d) 297; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, (1991), 84 D.L.R. (4th) 161.

REFERRED TO:

Hunt v. T&N plc, [1993] 4 S.C.R. 289, (1993), 109 D.L.R. (4th) 16; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, (1994), 120 D.L.R. (4th) 12; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, (1993), 157 N.R. 97; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, (1988), 49 D.L.R. (4th) 161; *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, (1989), 64 D.L.R. (4th) 577; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, (1987),

R.C.S. 232, 1990 CanLII 121; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, 1990 CanLII 135.

DÉCISIONS DIFFÉRENCIÉES :

Renvoi relatif à la Loi sur les valeurs mobilières, 2011 CSC 66, [2011] 3 R.C.S. 837 (sur la validité du régime prévu dans la LCAP); *Greater Vancouver Transportation Authority c. Fédération canadienne des étudiantes et étudiants*, 2009 CSC 31, [2009] 2 R.C.S. 295 (sur la question de la portée excessive).

DÉCISIONS EXAMINÉES :

Kirkbi AG c. Gestions Ritvik Inc., 2005 CSC 65, [2005] 3 R.C.S. 302; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *Parsons v. Citizens' Insurance Co. of Canada* (1881), 7 App. Cas. 96; *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.*, [1935] A.C. 524, [1935] 3 D.L.R. 12 (P.C.); *R. c. Sharpe*, 2001 CSC 2, [2001] 1 R.C.S. 45; *R. c. Guignard*, 2002 CSC 14, [2002] 1 R.C.S. 472; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712, 1988 CanLII 19; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, 1986 CanLII 12; *Mahjoub c. Canada (Citoyenneté et Immigration)*, 2017 CAF 157, [2018] 2 R.C.F. 344; *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154, 1991 CanLII 39.

DÉCISIONS CITÉES :

Hunt c. T&N plc, [1993] 4 R.C.S. 289, 1993 CanLII 43; *Nouvelle-Écosse (Workers' Compensation Board) c. Martin; Nouvelle-Écosse (Workers' Compensation Board) c. Laseur*, 2003 CSC 54, [2003] 2 R.C.S. 504; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, 1994 CanLII 39; *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; *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.*, 2012 CSC 67, [2012] 3 R.C.S. 443; *Benhaim c. St-Germain*, 2016 CSC 48, [2016] 2 R.C.S. 352; *Renvoi relatif à la Loi sur les armes à feu (Can.)*, 2000 CSC 31, [2000] 1 R.C.S. 783; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, 2005 CSC 49, [2005] 2 R.C.S. 473; *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401, 1988 CanLII 63; *Little Sisters Book & Art Emporium c. Canada (Ministre de la Justice)*, 2000 CSC 69, [2000] 2 R.C.S. 1120; *Trociuk c. Colombie-Britannique (Procureur général)*, 2003 CSC 34, [2003] 1 R.C.S. 835; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, 1989 CanLII 20; *R. c. Wigglesworth*, [1987] 2 R.C.S. 541, 1987 CanLII

45 D.L.R. (4th) 235; *Dywidag Systems International, Canada Ltd. v. Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705, (1990), 68 D.L.R. (4th) 147; *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue*, [1999] 1 S.C.R. 10, 1999 CanLII 704; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321; *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, (1995), 129 D.L.R. (4th) 129; *143471 Canada Inc. v. Quebec (Attorney General)*; *Tabah v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339, (1994), 48 A.C.W.S. (3d) 64.

41; *Dywidag Systems International, Canada Ltd. c. Zutphen Brothers Construction Ltd.*, [1990] 1 R.C.S. 705, 1990 CanLII 140; *Vancouver Society of Immigrant and Visible Minority Women c. Ministre du Revenu national*, [1999] 1 R.C.S. 10, 1999 CanLII 704; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, 1985 CanLII 69; *R. c. Jarvis*, 2002 CSC 73, [2002] 3 R.C.S. 757; *R. c. Fitzpatrick*, [1995] 4 R.C.S. 154, 1995 CanLII 44; *143471 Canada Inc. c. Québec (Procureur général)*; *Tabah c. Québec (Procureur général)*, [1994] 2 R.C.S. 339, à la page 377, 1994 CanLII 89.

AUTHORS CITED

Canada. *House of Commons Debates*, 40th Parl., 2nd Sess., No. 053 (7 May 2009).
 Canada. *House of Commons Debates*, 40th Parl., 2nd Sess., No. 105 (2 November 2009).
 Canada. *House of Commons Debates*, 40th Parl., 2nd Sess., No. 106 (3 November 2009).
 Canada. Task Force on Spam. *Stopping Spam: Creating a stronger, safer Internet*, Ottawa: Industry Canada, May 2005.
 Canadian Radio-television and Telecommunications Commission. Compliance and Enforcement Information Bulletin CRTC 2012-548. “Guidelines on the interpretation of the *Electronic Commerce Protection Regulations (CRTC)*”, October 10, 2012.
 Organisation for Economic Co-operation and Development (OECD) (2006-04-19), « Report of the OECD Task Force on Spam: Anti-Spam Toolkit of Recommended Policies and Measures », *OECD Digital Economy Papers*, No. 114, OECD Publishing, Paris, online: <https://doi.org/10.1787/231503010627>.
Oxford English Dictionary, (last visited May 13, 2020) online: www.oed.com, “activity”, “commercial”.

APPEALS from compliance and enforcement decisions⁸ of the Canadian Radio-Television and Telecommunications Commission dismissing the appellant’s constitutional

DOCTRINE CITÉE

Canada. *Débats de la Chambre des communes*, 40^e lég., 2^e sess., n° 053 (7 mai 2009).
 Canada. *Débats de la Chambre des communes*, 40^e lég., 2^e sess., n° 105 (2 novembre 2009).
 Canada. *Débats de la Chambre des communes*, 40^e lég., 2^e sess., n° 106 (3 novembre 2009).
 Canada. Groupe de travail sur le pourriel. *Freinons le pourriel : Créer un Internet plus fort et plus sécuritaire*, Ottawa : Industrie Canada, mai 2005.
 Conseil de la radiodiffusion et des télécommunications canadiennes. Bulletin d’information de Conformité et Enquêtes CRTC 2012-548. « Lignes directrices sur l’interprétation du *Règlement sur la protection du commerce électronique (CRTC)* », 10 octobre 2012.
Dictionnaire Larousse en ligne (consulté le 1^{er} juin 2020) : www.larousse.fr/dictionnaires/francais, « activité », « commercial ».
 Organisation de coopération et de développement économiques (OCDE) (2006-04-19), « Report of the OECD Task Force on Spam : Anti-Spam Toolkit of Recommended Policies and Measures », *Documents de travail de l’OCDE sur l’économie numérique*, n° 114, Éditions OCDE, Paris, en ligne : <https://doi.org/10.1787/231503010627>.

APPELS interjetés à l’égard de décisions de conformité et enquêtes⁸ du Conseil de la radiodiffusion et des télécommunications canadiennes, rejetant la contestation

⁸ *Canada’s Anti-Spam Legislation 3510395 Canada Inc., operating as Compu.Finder – Constitutional challenge to Canada’s Anti-Spam Legislation – File number: PDR 9094-201400302-001*, Compliance and Enforcement Decision CRTC 2017-367.

Canada’s Anti-Spam Legislation 3510395 Canada Inc., operating as Compu.Finder – Violations of Canada’s Anti-Spam Legislation – File number: PDR 9094-201400302-001, Compliance and Enforcement Decision CRTC 2017-368.

⁸ *Loi canadienne anti-pourriel 3510395 Canada Inc., exerçant ses activités sous le nom de Compu.Finder – Contestation constitutionnelle de la Loi canadienne anti-pourriel – Numéro de dossier : EPR 9094-201400302-001*, décision de conformité et enquêtes CRTC 2017-367.

Loi canadienne anti-pourriel 3510395 Canada Inc., exerçant ses activités sous le nom de Compu.Finder – Violations de la Loi canadienne anti-pourriel – Numéro de dossier : EPR 9094-201400302-001, Décision de Conformité et Enquêtes CRTC 2017-368.

challenge to Canada's anti spam legislation⁹, finding that the appellant had committed four violations of the Act, and imposed an administrative monetary penalty. Appeals dismissed.

constitutionnelle intentée par l'appelante contre la loi canadienne sur la lutte contre les pourriels⁹, concluant que l'appelante avait commis quatre violations de la Loi et lui infligeant une sanction administrative pécuniaire. Appels rejetés.

APPEARANCES

Barry B. Sookman, Noah Zucker, Charles S. Morgan and Daniel G.C. Glover for appellant.
Lynn Marchildon, Craig Collins-Williams and Joanie Roy for respondent.

ONT COMPARU :

Barry B. Sookman, Noah Zucker, Charles S. Morgan et Daniel G.C. Glover pour l'appelante.
Lynn Marchildon, Craig Collins-Williams et Joanie Roy pour l'intimé.

SOLICITORS OF RECORD

McCarthy Tétrault LLP, Montréal, for appellant.
Deputy Attorney General of Canada for respondent.

AVOCATS INSCRITS AU DOSSIER

McCarthy Tétrault LLP, Montréal, pour l'appelante.
Le sous-procureur général du Canada pour l'intimé.

The following are the reasons for judgment rendered in English by

Ce qui suit est la version française des motifs du jugement rendus par

NADON J.A.:

LE JUGE NADON, J.C.A. :

I. Introduction

[1] Before us are two appeals by 3510395 Canada Inc., operating as CompuFinder (the appellant) in respect of two related compliance and enforcement decisions of the Canadian Radio-Television and Telecommunications Commission (the CRTC). In the first decision, the CRTC dismissed the appellant's constitutional challenge to *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, S.C. 2010, c. 23 (CASL or the Act). The CRTC determined that the Act is *intra vires* Parliament's trade and commerce power under subsection 91(2) of the *Constitution Act, 1867* (the Constitution Act), and that its infringement of freedom of expression pursuant to paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*, being

I. Introduction

[1] La Cour est saisie de deux appels interjetés par 3510395 Canada Inc., faisant affaire sous la raison sociale CompuFinder (l'appelante), à l'égard de deux décisions de conformité et enquêtes connexes du Conseil de la radiodiffusion et des télécommunications canadiennes (le CRTC). Dans la première, le CRTC a rejeté la contestation constitutionnelle intentée par l'appelante contre la *Loi visant à promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne par la réglementation de certaines pratiques qui découragent l'exercice des activités commerciales par voie électronique et modifiant la Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes, la Loi sur la concurrence, la Loi sur la protection des renseignements personnels et les documents électroniques et la Loi sur les télécommunications*, L.C. 2010, ch. 23 (la Loi ou la LCAP). Le CRTC estimait que la Loi relevait de la compétence en matière de trafic et de commerce que le paragraphe 91(2) de la *Loi constitutionnelle de 1867* confère au Parlement et que

⁹ CASL, *supra* note 1.

⁹ LCAP, *supra*, note 1.

Part 1 of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]) (the Charter) section 8, is justified under section 1. In the second decision, the CRTC found that the appellant had committed four violations of CASL and imposed a \$200,000 administrative monetary penalty (AMP).

[2] The appellant appeals the CRTC's decisions pursuant to subsection 27(1) of CASL, which permits appeal to this Court of CRTC decisions made under CASL.

[3] For the reasons that follow, I would dismiss the appeals with costs.

II. Applicable Legislation

[4] A full list of CASL's provisions challenged by the appellant can be found in Appendix A. Key provisions are reproduced throughout the analysis section of these reasons.

III. Facts

[5] CASL was enacted by Parliament in 2010 and came into force in 2014. It provides for the regulation of certain forms of commercial conduct relating to electronic commerce (e-commerce), most notably the sending of commercial electronic messages (CEMs).

[6] The appellant was a small business located in Morin Heights, Quebec. It began operations in 1998 and offered approximately 300 professional training courses in areas such as team management, administrative skills, budget planning and effective use of social media. E-mail marketing was the appellant's primary means of business development.

[7] The appellant conducted three advertising campaigns between July and September 2014 during which it sent 317 CEMs to various recipients. These CEMs promoted the appellant's educational and training services and were sent primarily to individuals working in the

l'atteinte à la liberté d'expression garantie par l'alinéa 2b) de la *Charte canadienne des droits et libertés*, article 8, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.) [L.R.C. (1985), appendice II, n° 44] (la Charte) est justifiée au regard de l'article premier. Dans la seconde décision, le CRTC était d'avis que l'appelante avait commis quatre violations de la Loi et lui a infligé une sanction administrative pécuniaire (SAP) de 200 000 \$.

[2] L'appelante se pourvoit sous le régime du paragraphe 27(1) de la Loi, qui l'autorise à interjeter appel à notre Cour des décisions du CRTC prises en vertu de la Loi.

[3] Pour les motifs qui suivent, je rejeterais les appels avec dépens.

II. Dispositions applicables

[4] Les dispositions de la Loi que l'appelante conteste figurent à l'annexe A. Les principales dispositions sont reproduites dans le corps de l'analyse des présents motifs.

III. Faits

[5] La Loi a été adoptée par le Parlement en 2010 et est entrée en vigueur en 2014. Elle prévoit la réglementation de certaines formes d'activités commerciales relatives au commerce électronique, tout particulièrement, l'envoi de messages électroniques commerciaux (MEC).

[6] Fondée en 1998, l'appelante était une petite entreprise située à Morin Heights, au Québec. Elle offrait environ 300 cours de perfectionnement professionnel sur des sujets comme la gestion d'équipe, les aptitudes administratives, la planification budgétaire et l'utilisation avantageuse des médias sociaux. Le marketing par courriel était son principal mode de prospection commerciale.

[7] L'appelante a mené trois campagnes publicitaires entre juillet et septembre 2014. Dans le cadre de celles-ci, elle a transmis 317 MEC pour promouvoir ses services de formation et de perfectionnement à divers destinataires, principalement des travailleurs du Québec. Le 5 mars

[21] Finally, the CRTC found CASL's benefits proportional to its deleterious effects on free expression. The CRTC first noted that CASL's infringement relates specifically to commercial expression. The CRTC cited *R. v. Keegstra*, [1990] 3 S.C.R. 697, (1990), 114 A.R. 81, [1991] 2 W.W.R. 1 (*Keegstra*) for the proposition that this type of expression lies outside the core values protected by paragraph 2(b). The CRTC then considered that the record shows that CASL's negative effects include causing some businesses to adjust, curtail or even terminate their e-mail marketing practices, and creating a perception among some Canadian businesses that they can no longer compete with their American counterparts. However, the CRTC considered that the evidence also shows no material lessening of the effectiveness of electronic marketing and, at the same time, a 37 percent drop in spam originating from Canada. The CRTC furthermore observed that, while CASL does infringe freedom of expression, the targeted conduct is still permitted so long as the sender obtains recipient consent, identifies itself and includes an unsubscribe mechanism. Thus, CASL is far from a total ban on commercial speech in general or CEMs in particular.

[22] The CRTC found that the Attorney General had met its burden of showing that the deleterious effects of CASL's limits on free expression do not outweigh the limitations' benefits to the greater public good, which include increasing confidence in e-commerce and thereby benefitting the economy as a whole.

[23] The CRTC concluded that CASL's violation of freedom of expression guaranteed by paragraph 2(b) of the Charter is justified under section 1.

(4) *Impugned Provisions Do Not Trigger Section 11 of the Charter*

[24] The CRTC held that the impugned provisions of CASL do not create an offence for the purposes of section 11 of the Charter. The CRTC applied the two-part test from *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3 (*Guindon*) for determining whether a statutory infraction constitutes an offence within the meaning of section 11. First, the CRTC examined the objectives of the legislation

[21] Enfin, selon le CRTC, les avantages de la Loi sont proportionnels à ses effets négatifs sur la liberté d'expression. En premier lieu, le CRTC fait remarquer que la Loi porte atteinte seulement à l'expression commerciale. Invoquant l'arrêt *R. c. Keegstra*, [1990] 3 R.C.S. 697, 1990 CanLII 24 (*Keegstra*), il affirme que ce type d'expression se situe à l'extérieur du champ des valeurs fondamentales au cœur de l'alinéa 2b). En second lieu, le CRTC estime, à la lumière du dossier, que la Loi a notamment comme effet négatif d'obliger des entreprises à modifier, à réduire ou à cesser leurs pratiques de marketing par courriel et de mener certaines entreprises canadiennes à croire qu'elles ne peuvent pas se mesurer à leurs concurrentes américaines. Toutefois, selon le CRTC, le dossier révèle également l'absence d'incidence véritable sur l'efficacité du marketing électronique et une diminution simultanée de 37 p. 100 des pourriels issus du Canada. Il fait aussi observer que, si la Loi porte atteinte à la liberté d'expression, l'activité qu'elle vise est toujours permise, dans la mesure où l'expéditeur obtient le consentement du destinataire, s'identifie et fournit un mécanisme d'exclusion. Partant, la Loi est loin de prévoir une interdiction totale de l'expression commerciale en générale ou des MEC en particulier.

[22] Le CRTC est d'avis que le procureur général s'est acquitté de l'obligation qui lui incombait de démontrer que les effets négatifs de la Loi sur la liberté d'expression ne l'emportent pas sur les avantages pour l'intérêt public général, notamment une confiance accrue à l'égard du commerce électronique, qui profite à l'économie dans son ensemble.

[23] Selon le CRTC, l'atteinte portée à la liberté d'expression garantie par l'alinéa 2b) de la Charte est justifiée au regard de l'article premier.

4) *Les dispositions contestées ne font pas jouer l'article 11 de la Charte*

[24] Le CRTC estime que les dispositions contestées de la Loi n'ont pas pour effet de créer une infraction pour l'application de l'article 11 de la Charte. Il applique pour ce faire le critère en deux volets énoncé dans l'arrêt *Guindon c. Canada*, 2015 CSC 41, [2015] 3 R.C.S. 3 (*Guindon*), servant à décider si une violation constitue une infraction criminelle au sens où il faut l'entendre pour

and the process leading to the imposition of the sanction and concluded that the proceedings were not criminal in nature. According to the CRTC, the objectives of the proceedings, considered in their full legislative context, have a regulatory purpose namely deterring spam and other electronic threats. The purpose of the proceedings, in the CRTC's view, amounts to regulating a limited sphere of activity. The CRTC also found that the process leading to a sanction does not bear any of the hallmarks of a criminal proceeding. For instance, CASL does not use language typically associated with the criminal process, such as "guilt", "acquittal", "indictment", "summary conviction", "prosecution", or "accused", but instead uses terms such as "balance of probabilities", "due diligence", "penalty", "undertaking", and "representations". Neither do proceedings under CASL involve arrest, the laying of charges, a summons to a criminal court nor the possibility of a criminal record. Finally, section 30 of CASL explicitly states that a violation of the Act is not an offence and that section 126 of the *Criminal Code*, R.S.C. 1985, c. C-46 does not apply.

[25] Turning to the second prong of the *Guindon* test, the CRTC found that CASL does not prescribe a true penal consequence. The CRTC considered that, though the maximum quantum possible for an AMP under CASL is high, the jurisprudence has avoided placing an arbitrary upper limit on AMPs. Furthermore, the maximum need not be applied except where truly warranted. The CRTC pointed to case law where it was found that AMPs of similar magnitudes to those under CASL did not trigger section 11. The CRTC also observed that the quantum of an AMP under CASL is determined according to the factors set out in subsection 20(3), which, according to the CRTC, reflect regulatory considerations rather than principles of criminal sentencing. The CRTC further found that no stigma attaches to the imposition of an AMP under CASL. Finally, although AMPs are paid into the Consolidated Revenue Fund, which could suggest a true penal consequence, the CRTC found that this factor alone was not dispositive.

l'application de l'article 11. En premier lieu, le CRTC examine les objets de la loi et la procédure ayant mené à la sanction et arrive à la conclusion que la mesure n'est pas de nature criminelle. Suivant le CRTC, les objets de cette dernière, examinés à la lumière du régime légal dans son ensemble, sont de nature administrative; elle vise à décourager les pourriels et les autres menaces électroniques. De l'avis du CRTC, la mesure a pour objet la réglementation d'un secteur d'activité limité. Le CRTC conclut également que la procédure ayant mené à l'imposition d'une sanction ne comporte aucune des caractéristiques d'une instance de nature criminelle. Par exemple, le libellé de la Loi ne comporte pas les termes qu'on associe généralement à la procédure criminelle, tels que « culpabilité », « acquittement », « mise en accusation », « déclaration de culpabilité par procédure sommaire », « poursuite », « inculpé » ou « accusé ». Or, il comporte des termes comme « prépondérance des probabilités », « précautions », « sanction », « engagement » et « observations ». Les instances intentées sous le régime de la Loi ne prévoient pas non plus d'arrestation, de mise en accusation, de citation à comparaître devant une cour de juridiction criminelle ni de risque de casier judiciaire. Enfin, l'article 30 de la Loi dispose expressément qu'une violation de la Loi ne constitue pas une infraction et que l'article 126 du *Code criminel*, L.R.C. (1985), ch. C-46, ne s'applique pas.

[25] Au second volet du critère énoncé dans l'arrêt *Guindon*, le CRTC conclut que la Loi ne prévoit pas de véritable conséquence pénale. Selon le CRTC, même si le montant maximal d'une SAP peut être élevé, la jurisprudence a empêché qu'il soit arbitraire. En outre, la limite supérieure ne s'applique pas, sauf dans les cas où elle est véritablement justifiée. Le CRTC invoque une jurisprudence selon laquelle des SAP d'une fourchette équivalente à celle prévue dans la Loi ne font pas jouer l'article 11. Il fait également observer que le montant de la SAP infligée sous le régime de la Loi dépend des facteurs prévus au paragraphe 20(3) qui, selon le CRTC, présentent des considérations administratives, et non pas des principes de détermination de la peine. Le CRTC conclut en outre à l'absence de stigmatisation découlant de l'imposition d'une SAP sous le régime de la Loi. Enfin, même si les SAP sont versées au Trésor, ce qui est susceptible de révéler une véritable conséquence pénale, le CRTC est d'avis que ce seul facteur n'est pas déterminant.

(5) *CASL Does Not Violate Sections 7 and 8 of the Charter*

[26] The CRTC found that, because CASL does not create an offence for the purposes of section 11 of the Charter, the rights provided by sections 7 and 8 to individuals subject to penal proceedings also do not apply. The CRTC therefore held that CASL does not violate sections 7 and 8 of the Charter.

B. Notice of Violation Decision

[27] In the second of its two decisions, the CRTC applied CASL to the facts set out in the NOV issued to the appellant and concluded that the appellant did, in fact, violate the Act. The CRTC considered 317 electronic messages sent by the appellant to various recipients between July and September 2014. These messages formed the basis of three alleged violations of paragraph 6(1)(a) of CASL for sending CEMs without the consent of recipients and one alleged violation of paragraph 6(2)(c) for sending CEMs without a functioning unsubscribe mechanism. The CRTC ultimately concluded that the appellant had committed all four violations.

(1) *Preliminary Issues*

(a) Effect of Appellant's Bankruptcy Proceedings

[28] The CRTC found that its review of the NOV was unaffected by the appellant having filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the Bankruptcy Act) on August 9, 2016. The appellant listed the CRTC as an unsecured creditor on November 28, 2016.

(b) The Appellant Did Not Suffer Prejudice During or After the Investigation

[29] The CRTC rejected the appellant's claim that it suffered prejudice at the investigation stage because it was not asked whether any exemptions applied to its circumstances. The CRTC also rejected the appellant's argument that the investigation report supporting the NOV failed to properly consider whether any exemptions applied. The

5) *La Loi n'enfreint pas les articles 7 et 8 de la Charte*

[26] Le CRTC est d'avis que, comme la Loi ne crée pas d'infraction au sens où il faut l'entendre pour l'application de l'article 11 de la Charte, les droits garantis aux articles 7 et 8 de ce même texte aux personnes inculpées ne s'appliquent pas. Le CRTC conclut donc que la Loi n'enfreint pas les articles 7 et 8 de la Charte.

B. Décision sur le procès-verbal de violation

[27] Dans la seconde décision, le CRTC applique la Loi aux faits consignés dans le procès-verbal de violation délivré à l'appelante et conclut à une violation de la Loi. Le CRTC examine 317 messages électroniques envoyés par l'appelante à divers destinataires entre juillet et septembre 2014. Ces messages constituent le fondement de trois violations reprochées de l'alinéa 6(1)a) de la Loi, à savoir l'envoi de MEC sans le consentement des destinataires, et une violation reprochée de l'alinéa 6(2)c), à savoir l'envoi de MEC qui ne comportent pas de mécanismes d'exclusion. Le CRTC finit par conclure que l'appelante a commis les quatre violations.

1) *Questions préliminaires*

a) Effet de la faillite de l'appelante

[28] Le CRTC estime que son examen de la décision sur le procès-verbal de violation n'est en rien modifié par le fait que l'appelante a présenté un avis de son intention de faire une proposition en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3 (la Loi sur la faillite), le 9 août 2016. L'appelante a indiqué le CRTC parmi ses créanciers non garantis le 28 novembre 2016.

b) L'appelante n'a pas subi de préjudice pendant ou après l'enquête

[29] Le CRTC rejette la prétention de l'appelante selon laquelle elle a subi un préjudice à l'étape de l'enquête, car on ne lui a pas demandé si des exemptions s'appliquaient dans son cas. Il rejette également l'argument de l'appelante voulant que le rapport d'enquête étayant le procès-verbal de violation faisait fi de la possibilité

[201] The appellant questions whether these benefits are actually attributable to CASL, highlighting the Committee's statement that "[w]hether the Act effectively reduced spam originating from Canada is difficult to ascertain" (appellant's constitutional memorandum, at paragraph 74; JAB, at page 13987). While the appellant seeks to infer that this is an indication that the Committee shares its view that CASL's benefits are illusory, it is telling that the Committee's report suggests no major overhauls and only minor clarifications to CASL so that it "continues" to promote the efficiency and adaptability of the Canadian economy" (JAB, at page 13978, my emphasis).

[202] In conclusion, I find that CASL's benefits outweigh its detrimental effects on freedom of expression.

C. Does CASL Violate Section 11 of the Charter?

[203] The appellant also argues that CASL's AMP regime violates paragraph 11(d) of the Charter. Section 11 guarantees a number of procedural protections to "any person charged with an offence". Proceedings resulting in administrative sanctions do not trigger section 11 protections (*Guindon*, at paragraph 44). The appellant's section 11 argument thus hinges on a finding that it has been charged with a criminal offence. A statutory infraction is a criminal offence for the purposes of section 11 where the process by which the penalty is imposed is criminal by its very nature or where a true penal consequence flows from the sanction (*Guindon*, at paragraphs 44 and 51).

(1) *Is the AMP Proceeding "Criminal in Nature"?*

[204] The Supreme Court highlighted three factors that guide the determination of whether proceedings are

période et que les ventes au détail en ligne ont également augmenté (mémoire de l'intimé sur les questions constitutionnelles, au paragraphe 21, citant le dossier d'appel conjoint, à la page 14060; décision sur la constitutionnalité, au paragraphe 180).

[201] L'appelante met en doute le fait que ces avantages soient véritablement issus de la Loi, soulignant la déclaration du Comité selon laquelle « [i]l est difficile d'établir que la diminution des pourriels provenant du Canada est attribuable à la Loi » (mémoire de l'appelante sur les questions constitutionnelles, au paragraphe 74; dossier d'appel conjoint, à la page 13987). Bien que l'appelante tente d'en déduire que le Comité partage son opinion voulant que les avantages apportés par la Loi soient illusoire, il est révélateur que le rapport du Comité ne propose aucune refonte majeure de la Loi, mais seulement des éclaircissements mineurs pour que la Loi « continue de "promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne" » (dossier d'appel conjoint, à la page 13978, non souligné dans l'original).

[202] Au bout du compte, je conclus que les avantages de la Loi l'emportent sur ses effets préjudiciables sur la liberté d'expression.

C. La Loi enfreint-elle l'article 11 de la Charte?

[203] L'appelante soutient également que le régime de SAP enfreint l'alinéa 11d) de la Charte. L'article 11 offre diverses protections procédurales à « tout inculpé ». Les procédures résultant de sanctions administratives ne donnent pas lieu à l'application des protections prévues à l'article 11 (*Guindon*, au paragraphe 44). Pour que l'argument de l'appelante fondé sur l'article 11 soit retenu, il faudrait conclure qu'elle a été accusée d'une infraction criminelle. Les contraventions à une loi sont de nature criminelle pour l'application de l'article 11 lorsque, par sa nature même, la procédure est criminelle ou lorsqu'une véritable conséquence pénale découle de la sanction (*Guindon*, au paragraphes 44 et 51).

1) *Le régime de la SAP est-il de nature criminelle?*

[204] La Cour suprême du Canada a mis en évidence trois facteurs à utiliser pour déterminer si une procédure est de

criminal or administrative in nature: the objectives of the legislation; the objectives of the sanction; and the process leading to the imposition of the sanction (*Guindon*, at paragraph 52).

(a) Objectives of the Legislation

[205] This inquiry considers whether the objectives of the proceedings, examined in their full legislative context, have a regulatory or penal purpose (*Guindon*, at paragraph 53). While penal proceedings typically aim to “bring the subject of the proceedings ‘to account to society’ for conduct ‘violating the public interest’”, administrative proceedings seek to maintain compliance or regulate conduct within a limited sphere of activity (*Guindon*, at paragraphs 45 and 53).

[206] As discussed, the impugned legislative scheme regulates the sending of unsolicited CEMs to prevent impairment of the e-economy and costs to businesses and consumers, as well as to protect confidential information and Canadians’ confidence in e-commerce. The scheme thus aims to regulate conduct in a limited sphere of activity—the sending of CEMs—to protect Canadians by regulating certain commercial conduct. CASL’s AMP proceedings are part of a regulatory framework for the protection of the public and are “generally not the sort of proceedings that engage s. 11” (*Guindon*, at paragraph 53, citing *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, (1987), 45 D.L.R. (4th) 235).

[207] Hansard also suggests CASL’s AMP regime has a regulatory purpose:

One of the best ways to combat spam is through effective legislation. Bill C-27 puts in place important provisions that would protect Canadian consumers and businesses from the most damaging and deceptive forms of electronic harm. It provides a regulatory regime to promote compliance and protect the privacy and personal security of Canadians in the online environment. It provides a clear set of rules that will benefit all Canadians. It will encourage confidence in online communications and e-commerce.”

nature criminelle ou administrative : l’objet de la loi, l’objectif de la sanction et le processus menant à la sanction (*Guindon*, au paragraphe 52).

a) L’objet de la loi

[205] Cette partie de l’analyse consiste à examiner si l’objet de la procédure, considéré dans son contexte législatif global, est de nature réglementaire ou pénale (*Guindon*, au paragraphe 53). La procédure qui est de nature criminelle vise à « amener la personne en cause “à rendre compte à la société” d’une conduite “contraire à l’intérêt public” », tandis que la procédure qui est de nature administrative vise l’observation des règles ou la réglementation de la conduite dans une sphère d’activité limitée (*Guindon*, au paragraphes 45 et 53).

[206] Il a été établi plus haut que le régime législatif contesté régit l’envoi de MEC non sollicités pour empêcher les nuisances à la cyberéconomie et l’imposition de coûts aux entreprises et aux consommateurs ainsi que pour protéger les renseignements confidentiels et la confiance des Canadiens dans le commerce électronique. Le régime a donc pour objet de régir une conduite dans une sphère d’activité limitée — l’envoi de MEC — pour protéger les Canadiens par la réglementation de certaines pratiques commerciales. Les procédures menant aux SAP prévues par la Loi font partie d’un cadre administratif assurant la protection du public et ne sont « généralement pas de celles qui emportent l’application de l’art. 11 » (*Guindon*, au paragraphe 53, citant *R. c. Wigglesworth*, [1987] 2 R.C.S. 541, 1987 CanLII 41).

[207] Le Hansard donne également à penser que le régime de SAP de la Loi a un but administratif :

L’un des meilleurs moyens de combattre les pourriels est une loi efficace. Le projet de loi C-27 met en place des dispositions importantes qui visent à protéger les consommateurs et les entreprises au Canada contre les formes les plus graves et trompeuses de préjudice électronique. Il prévoit un régime de réglementation pour favoriser la conformité et protéger la vie privée et la sécurité personnelle des Canadiens en ligne. Il propose un ensemble clair de règles qui seront à l’avantage de tous les Canadiens. Il favorisera la confiance dans les communications en ligne et le commerce électronique.

This bill combats spam and related online threats in two ways. It provides regulatory powers to administer monetary penalties and it gives individuals and businesses the right to sue spammers. Bill C-27 makes use of the federal trade and commerce power rather than the law enforcement authorities in the Criminal Code. A civil administrative regime such as that in the ECPA [i.e. the Electronic Commerce Protection Act] is consistent with the approach taken internationally.

(*House of Commons Debates*, 40th Parl., 2nd Sess., No. 105 (2 November 2009) (Hon. Mike Lake), at pages 6459–6460; JAB, at pages 1135–1136.)

I find that the objectives of CASL's AMP proceedings, examined in their full legislative context, have a regulatory purpose.

(b) Objectives of the Sanction

[208] Where the sanction at issue is an AMP, the objectives of the sanction are relevant at both this stage of the inquiry and the second stage considering whether the AMP is a true penal consequence. To avoid repetition, this factor will be analysed at the second stage only (*Guindon*, at paragraph 52).

(c) The Process

[209] The focus here is the extent to which CASL's AMP proceedings bear the traditional hallmarks of a criminal proceeding. The Supreme Court described some of the relevant considerations as follows: "whether the process involved the laying of a charge, an arrest, a summons to appear before a court of criminal jurisdiction, and whether a finding of responsibility leads to a criminal record" (*Guindon*, at paragraph 63). The use of words typically associated with the criminal process is also an indicator of whether a provision refers to a criminal proceeding.

[210] AMP proceedings under CASL begin with the issuance of a NOV by a person designated by the CRTC under

Le projet de loi combat les pourriels et les autres formes de menaces en ligne de deux façons. Il donne les pouvoirs de réglementation nécessaires pour imposer des sanctions monétaires et donner aux particuliers et aux entreprises le droit de poursuivre les polluposteurs. Il a recours au pouvoir fédéral en matière de commerce plutôt qu'aux pouvoirs d'exécution du Code criminel. Un régime administratif civil comme celui de la Loi sur la protection du commerce électronique est conforme à ce qui se fait ailleurs dans le monde.

(*Débats de la Chambre des communes*, 40^e lég., 2^e sess., n° 105 (2 novembre 2009) (hon. Mike Lake), aux pages 6459 et 6460; dossier d'appel conjoint, aux pages 1135 et 1136.)

Je conclus que l'objet des procédures menant aux SAP prévues par la Loi, considérée dans leur contexte législatif global, est de nature administrative.

b) L'objectif de la sanction

[208] Lorsque la sanction en cause est une SAP, l'objectif de la sanction est pertinent tant lors de cette étape de l'examen que lors de la seconde étape consistant à déterminer si la SAP constitue une véritable conséquence pénale. Par souci de concision, ce facteur sera analysé à la seconde étape seulement (*Guindon*, au paragraphe 52).

c) Le processus menant à la sanction

[209] L'élément central ici consiste à déterminer dans quelle mesure les procédures de SAP prévues par la Loi comportent les caractéristiques traditionnelles des procédures criminelles. La Cour suprême a décrit certaines des considérations pertinentes de la manière suivante : « celle de savoir si le processus comprend le dépôt d'une accusation, une arrestation ou une assignation à comparaître devant une cour de juridiction criminelle, et celle de savoir si une conclusion de responsabilité conduit à un casier judiciaire » (*Guindon*, au paragraphe 63). L'emploi de termes habituellement liés au processus criminel est également utile pour déterminer si une disposition renvoie à une procédure criminelle.

[210] Les procédures menant aux SAP prévues par la Loi commencent par la signification d'un procès-verbal de

section 14 to any person believed on reasonable grounds to have contravened sections 6–9 of the Act (CASL, section 22). The subject of an NOV may elect to pay the AMP set out therein, or, alternatively, make representations to the CRTC regarding the alleged violation or penalty amount (CASL, section 24). If the person chooses to make representations, the CRTC decides on a balance of probabilities whether the person in fact committed the violation. The CRTC may then maintain, reduce or waive the initial penalty (CASL, subsection 25(1)). Appeal from a decision by the CRTC lies with this Court (CASL, section 27). Ultimately, a person served with an NOV may be subject to an AMP pursuant to subsection 20(1) and a restraining order directing the cessation of contravening conduct pursuant to subsection 26(1).

[211] The process associated with CASL’s AMP regime does not bear any of the hallmarks of a criminal proceeding, nor do the relevant provisions of CASL use any of the words traditionally associated with the criminal process. Instead, as the CRTC observed at paragraph 203 of its Constitutional Decision, “words such as ‘balance of probabilities,’ ‘due diligence,’ ‘penalty,’ ‘undertaking,’ or ‘representations’” appear throughout the Act’s AMP-related provisions.

[212] I conclude that CASL’s AMP proceedings are not criminal in nature.

(2) *Does the Sanction Give Rise to a True Penal Consequence?*

[213] A true penal consequence “is imprisonment or a fine which, having regard to its magnitude and other relevant factors, is imposed to redress the wrong done to society at large rather than simply to secure compliance” (*Guindon*, at paragraph 75). Whether a monetary fine meets this threshold depends on whether it is, in purpose or effect, punitive. This assessment considers factors including the magnitude of the fine, whether the fine’s

violation à la personne dont la personne désignée par le CRTC en vertu de l’article 14 a des motifs raisonnables de croire qu’elle a contrevenu aux articles 6 à 9 de la Loi (LCAP, article 22). La personne à qui a été signifié le procès-verbal de violation peut choisir soit de payer la SAP qui y est inscrite, soit de présenter au CRTC des observations à l’égard de la violation présumée ou du montant de la sanction (LCAP, article 24). Si la personne choisit de présenter des observations, le CRTC détermine, selon la prépondérance des probabilités, si la personne a bel et bien commis la violation. Il peut ensuite maintenir la sanction prévue dans le procès-verbal, en réduire le montant ou y renoncer (LCAP, paragraphe 25(1)). Il peut être interjeté appel de cette décision devant notre Cour (LCAP, article 27). Au bout du compte, la personne à qui est signifié un procès-verbal de violation peut se faire imposer une SAP en vertu du paragraphe 20(1) ainsi qu’une ordonnance lui enjoignant de cesser la pratique interdite en vertu du paragraphe 26(1).

[211] Le processus lié au régime de SAP établi par la Loi ne comporte aucune des caractéristiques propres aux procédures en matière criminelle, pas plus que les dispositions pertinentes de la Loi n’utilisent de termes traditionnellement associés aux procédures en matière criminelle. Au contraire, comme l’a fait observer le CRTC au paragraphe 203 de sa décision sur la constitutionnalité, des « termes comme “prépondérance des probabilités”, “diligence raisonnable”, “sanction”, “engagement” ou “observations” » se voient partout dans les dispositions de la Loi portant sur les SAP.

[212] Je conclus que les procédures menant aux SAP prévues dans la Loi ne sont pas de nature criminelle.

2) *Est-ce qu’il découle de la sanction une véritable conséquence pénale?*

[213] La véritable conséquence pénale s’entend « de la peine d’emprisonnement ou de l’amende qui, compte tenu de son importance et d’autres considérations pertinentes, est infligée dans le but de réparer le tort causé à la société en général plutôt que d’assurer l’observation de la loi » (*Guindon*, au paragraphe 75). L’amende pécuniaire satisfait à ce critère si elle a un but ou un effet punitif. Cet examen prend en compte plusieurs facteurs dont le

magnitude is determined by regulatory considerations or principles of criminal sentencing, whether stigma is associated with the penalty and to whom the penalty is paid (*Guindon*, at paragraph 76).

[214] CASL's AMP-related provisions strongly suggest that the objective of the Act's sanctions regime is to secure compliance with the Act's regulatory requirements. Sections 15, 17 and 19, setting out designated persons' investigatory powers, indicate that these powers may only be exercised to verify compliance with the Act, uncover contraventions of the Act or assist foreign investigations into conduct similar to that prohibited by the Act. Subsection 20(2) also explicitly states that the purpose of penalties administered under CASL "is to promote compliance with this Act and not to punish". Finally, section 30 makes clear that violations are not offences for the purposes of the *Criminal Code*. The purpose of CASL's AMP regime is therefore to promote compliance with the Act's regulatory scheme.

[215] The magnitude of fines levied under CASL may reach \$1 000 000 in the case of an individual and \$10 000 000 in the case of any other person, including corporations (CASL, subsection 20(4)). Though considerable, these amounts do not necessarily signal that the sanction's purpose is to denounce or punish morally or socially reprehensible conduct. The Supreme Court has acknowledged that "significant penalties" may be required to achieve the regulatory purpose of deterring non-compliance by ensuring AMPs do not become simply a cost of doing business. To require that penalties reflect regulatory objectives "is not to say that very large penalties cannot be imposed under administrative monetary penalty regimes" (*Guindon*, at paragraph 77).

[216] As the CRTC pointed out, the Supreme Court in *Guindon* cited a case in which the Ontario Superior Court found that a \$10 000 000 AMP under the *Competition*

montant de l'amende, la question de savoir si son importance tient à des considérations réglementaires plutôt qu'à des principes de détermination de la peine en matière criminelle, la question de savoir si la sanction stigmatise ou non et la personne à qui l'amende est payée (*Guindon*, au paragraphe 76).

[214] Les dispositions de la Loi portant sur les SAP donnent fortement à penser que l'objectif du régime de sanctions de la Loi est d'assurer l'observation des exigences réglementaires de la Loi. Les articles 15, 17 et 19, établissant les pouvoirs d'enquête de la personne désignée, précisent que ces pouvoirs ne peuvent être exercés que pour vérifier le respect de la Loi, découvrir si une contravention à la Loi a été commise ou faciliter une enquête sur une contravention à une loi étrangère visant des comportements essentiellement semblables à ceux interdits par la Loi. En outre, le paragraphe 20(2) dispose expressément que l'imposition de sanctions en vertu de la Loi « vise non pas à punir, mais plutôt à favoriser le respect de la présente loi ». Enfin, l'article 30 dispose en toutes lettres que les violations ne sont pas des infractions pour l'application du *Code criminel*. Le but du régime de SAP établi par la Loi est donc d'assurer le respect des exigences réglementaires de la Loi.

[215] Les amendes imposées en vertu de la Loi peuvent s'élever au maximum à 1 000 000 \$ dans le cas d'une personne physique et à 10 000 000 \$ dans le cas de toute autre personne, dont les sociétés (LCAP, paragraphe 20(4)). Bien qu'importantes, ces sommes ne signifient pas nécessairement que la sanction a pour but de dénoncer ou de punir un comportement moralement ou socialement répréhensible. La Cour suprême a reconnu qu'une « pénalité d'un montant substantiel » peut être nécessaire pour la réalisation de l'objectif de nature administrative de décourager l'inobservation du régime en évitant que les SAP ne deviennent un simple coût d'exploitation. Exiger que les sanctions soient conformes à des objectifs de nature administrative « ne veut pas dire qu'une pénalité d'un montant très élevé ne puisse être infligée à titre de sanction pécuniaire administrative » (*Guindon*, au paragraphe 77).

[216] Comme le CRTC l'a souligné, la Cour suprême, dans l'arrêt *Guindon*, a renvoyé à une décision de la Cour supérieure de justice de l'Ontario dans laquelle celle-ci

Act did not trigger section 11 of the Charter (*Guindon*, at paragraph 80). I am not prepared to hold that the possibility of similarly significant monetary penalties is not also necessary to deter non-compliance with CASL by large commercial entities that may anticipate considerable economic gain from indiscriminate email-marketing campaigns. I also reiterate the CRTC's observation at paragraph 214 of its Constitutional Decision that \$1 000 000 and \$10 000 000 are maximum amounts—upper limits that provide flexibility to ensure the regulatory objectives of promoting compliance and deterring non-compliance can be achieved when individuals or corporations with considerable resources commit particularly egregious violations.

[217] There is also little overlap between the considerations for determining the magnitude of an AMP, enumerated in subsection 20(3), and the principles of criminal sentencing found at section 718 of the *Criminal Code*. The absence of a “purely economic” or “mathematical” basis for determining penalties, which the appellant points to, does not compel the conclusion that criminal sentencing objectives rather than regulatory objectives determine the quantum of penalties under CASL.

[218] The appellant has not argued that stigma attaches to an AMP administered under CASL and I do not find that it does. Such penalties are imposed for violating economic regulations rather than for conduct that, by its very nature, warrants moral opprobrium. Accordingly, little, if any, stigma is associated with CASL's sanctions, especially relative to criminal convictions.

[219] Finally, AMPs levied under CASL are payable to the Receiver General and so ultimately end up in the Consolidated Revenue Fund (CASL, subsection 29(1)).

avait conclu qu'une SAP de 10 000 000 \$ imposée en vertu de la *Loi sur la concurrence* ne faisait pas jouer l'article 11 de la Charte (*Guindon*, au paragraphe 80). Je ne suis pas prêt à conclure qu'une sanction pécuniaire éventuelle de cette importance n'est pas également nécessaire pour décourager l'inobservation de la Loi par une grande organisation commerciale qui s'attendrait à faire des profits considérables par des campagnes de marketing consistant en l'envoi massif de courriels à tout vent. Aussi, je réitérerais l'observation du CRTC au paragraphe 214 de sa décision sur la constitutionnalité selon laquelle les montants de 1 000 000 \$ et de 10 000 000 \$ sont les amendes maximales : les sanctions maximales, qui offrent une certaine souplesse dans la réalisation des objectifs de nature administrative consistant à veiller au respect de la Loi et à en décourager l'inobservation, peuvent être infligées dans les cas où des personnes physiques ou morales disposant de ressources considérables commettent des violations particulièrement répréhensibles.

[217] Également, il y a peu de recoupements entre les éléments servant à déterminer l'importance de la SAP, énumérés au paragraphe 20(3), et les principes de détermination de la peine en matière criminelle figurant à l'article 718 du *Code criminel*. L'absence de fondement [TRADUCTION] « purement économique » ou [TRADUCTION] « mathématique » pour le calcul de la peine, qu'invoque l'appelante, ne mène pas à la conclusion que le montant des sanctions infligées en vertu de la Loi est établi de manière à répondre à des objectifs de détermination de la peine en matière criminelle plutôt qu'à des objectifs de nature administrative.

[218] L'appelante n'a pas soutenu que les SAP infligées en vertu de la Loi entraînent une stigmatisation, et j'estime que ce n'est pas le cas. Ces sanctions sont infligées pour des violations de règles économiques et non pour une conduite qui, de par sa nature, suscite moralement l'opprobre. Par conséquent, à supposer qu'une stigmatisation découlât des sanctions infligées en vertu de la Loi, elle serait petite, surtout en comparaison avec une déclaration de culpabilité à des infractions criminelles.

[219] Enfin, les SAP infligées en vertu de la Loi sont payables au receveur général, donc sont versées au Trésor (LCAP, paragraphe 29(1)). Bien que cela puisse

While potentially indicative of a true penal consequence, this factor alone is not determinative, especially where the other relevant factors point in the opposite direction (*Guindon*, at paragraph 88).

[220] Based on the above, I conclude that CASL does not prescribe proceedings that allow for the imposition of true penal consequences generally.

D. Does the AMP Applied in This Case Violate Section 11 of the Charter?

[221] Turning to the \$1 100 000 fine set out in the NOV, the question of whether this sanction amounted to a true penal consequence is a question of mixed fact and law. The CRTC's findings on this question must therefore be reviewed on the highly deferential standard of palpable and overriding error, rather than correctness (*Housen*, at paragraph 36). This standard of review only admits of interference with a first-instance decision where that decision contains an error that is both obvious and goes to the very core of the case's outcome (*Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at paragraph 38).

[222] The CRTC's reasons for finding that the appellant's fine was not a true penal consequence are set out at paragraphs 120–124 of its Notice of Violation Decision. The CRTC reached its conclusions following its application of the appropriate legal principles to the circumstances leading to the issuance of an NOV to the appellant.

[223] The CRTC assessed the appellant's \$1 100 000 fine against the factors for determining the amount of a penalty enumerated in subsection 20(3) of the Act. The CRTC found the AMP applied in this instance was "out of proportion to what is required to achieve regulatory purposes and to promote compliance with the Act going forward." (Notice of Violation Decision, at paragraph 119). The CRTC properly acknowledged that where the quantum of a penalty is "out of proportion to the amount required to achieve regulatory purposes, this suggests that it is a true penal consequence" (Notice of Violation Decision, at

constituer un indice qu'il s'agit d'une véritable conséquence pénale, ce facteur seul n'est pas déterminant, surtout lorsque d'autres facteurs pertinents indiquent le contraire (*Guindon*, au paragraphe 88).

[220] Compte tenu de ce qui précède, je conclus que la Loi ne prévoit pas de procédures donnant généralement lieu à de véritables conséquences pénales.

D. La SAP infligée en l'espèce était-elle une violation de l'article 11 de la Charte?

[221] En ce qui concerne l'amende de 1 100 000 \$ prévue dans le procès-verbal de violation, la question de savoir si cette sanction constituait une véritable conséquence pénale est une question mixte de fait et de droit. Les conclusions du CRTC à cet égard doivent donc être examinées selon la norme demandant une grande retenue de l'erreur manifeste et dominante plutôt que celle de la décision correcte (*Housen*, au paragraphe 36). Cette norme de contrôle n'admet l'intervention dans la décision de première instance que lorsque celle-ci comporte une erreur qui à la fois est évidente et touche directement à l'issue de l'affaire (*Benhaim c. St-Germain*, 2016 CSC 48, [2016] 2 R.C.S. 352, au paragraphe 38).

[222] Le CRTC expose les motifs à l'appui de sa conclusion selon laquelle l'amende infligée à l'appelante ne constituait pas une véritable conséquence pénale aux paragraphes 120 à 124 de sa décision sur le procès-verbal de violation. Le CRTC en est venu à sa conclusion après avoir examiné, en appliquant les critères juridiques appropriés, les circonstances ayant mené à la signification à l'appelante du procès-verbal de violation.

[223] Le CRTC a examiné l'amende de 1 100 000 \$ infligée à l'appelante en fonction des facteurs servant à établir le montant de la sanction, énumérés au paragraphe 20(3) de la Loi. Le CRTC a conclu que la SAP infligée en l'espèce était « disproportionnée par rapport au montant requis pour atteindre les objectifs réglementaires et promouvoir la conformité à la Loi à l'avenir » (décision sur le procès-verbal de violation, au paragraphe 119). Le CRTC a à juste titre reconnu que, lorsque le montant de la sanction est « disproportionné par rapport au montant qui permettrait d'atteindre les objectifs réglementaires, il

paragraph 122). However, the CRTC went on to explain that a fine's magnitude is just one of several factors in determining whether a monetary sanction is, in purpose or effect, punitive and therefore constitutes a true penal consequence. The other factors—to whom the penalty is paid, whether the quantum is determined by regulatory considerations or the principles of criminal sentencing and whether stigma attaches to the penalty—were considered by the CRTC in its assessment of CASL's AMP proceedings generally at paragraphs 211–223 of the Constitutional Decision.

[224] The CRTC ultimately decided, on balance, that the relevant factors do not suggest a true penal consequence in this case (Notice of Violation Decision, at paragraph 123). This is certainly not the only conclusion that could have been reached based on the CRTC's analysis. However, even if this Court could have reached a different conclusion, this would not justify interfering with the CRTC's decision on this point. As Stratas J.A., writing for this Court, stated at paragraph 70 of *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344, 281 A.C.W.S. (3d) 297:

.... If an appellate court had a free hand, it might weigh the evidence differently and come to a different result. It might be inclined to draw different inferences or see different factual implications from the evidence. But these things, without more, do not rise to the level of palpable and overriding error.

[225] The CRTC's determination that the appellant's fine did not constitute a true penal consequence, and its legal reasoning supporting that conclusion, do not evince the type of obvious error going to the core of a case required to justify judicial intervention on the palpable and overriding error standard.

y a lieu de penser qu'il s'agit d'une véritable conséquence pénale » (décision sur le procès-verbal de violation, au paragraphe 122). Cependant, le CRTC a ensuite expliqué que l'importance de l'amende n'était qu'un facteur parmi d'autres servant à déterminer si la sanction pécuniaire était, par son objet ou son effet, punitive et constituait de ce fait une véritable conséquence pénale. Les autres facteurs — la personne à qui est payée l'amende, la question de savoir si l'importance de la peine tient à des considérations administratives plutôt qu'à des principes de détermination de la peine en matière criminelle, la question de savoir si la sanction stigmatise ou non — ont été pris en compte par le CRTC dans son examen du régime général de SAP établi par la Loi, aux paragraphes 211 à 223 de sa décision sur la constitutionnalité.

[224] Le CRTC a décidé, au bout du compte, que les facteurs pertinents n'étaient pas la conclusion selon laquelle la sanction constituait une véritable conséquence pénale en l'espèce (décision sur le procès-verbal de violation, au paragraphe 123). Ce n'est certainement pas la seule conclusion qui aurait pu être tirée sur le fondement de l'analyse effectuée par le CRTC. Cependant, même si notre Cour aurait pu tirer une conclusion différente, cela ne justifie pas qu'elle intervienne dans la décision du CRTC à cet égard. Le juge Stratas, s'exprimant pour la Cour, a affirmé ce qui suit, au paragraphe 70 de l'arrêt *Mahjoub c. Canada (Citoyenneté et Immigration)*, 2017 CAF 157, [2018] 2 R.C.F. 344 :

[...] Si une cour d'appel avait carte blanche, elle pourrait pondérer différemment les éléments de preuve et parvenir à un résultat différent. Elle pourrait être portée à tirer des inférences différentes ou à voir des implications factuelles différentes dans les éléments de preuve. Mais ces choses, sans plus, n'équivalent pas à l'erreur manifeste et dominante.

[225] La conclusion du CRTC selon laquelle l'amende infligée à l'appelante ne constitue pas une véritable conséquence pénale, ainsi que son raisonnement juridique l'étayant, ne présente pas le type d'erreur évidente touchant directement à l'issue de l'affaire qui justifierait l'intervention de notre Cour selon la norme de l'erreur manifeste et dominante.

E. Does CASL Violate Section 7 of the Charter?

[226] The appellant briefly refers to CASL's violation of both section 7 and section 8 of the Charter (appellant's constitutional memorandum, at paragraphs 84(a), 87).

[227] The appellant's section 7 argument must fail because, as the preceding sections of these reasons make clear, the appellant does not face penal proceedings. The appellant, as a corporation, therefore has no standing to bring a claim under section 7 of the Charter.

[228] It is well established that "everyone", as that term appears in section 7, "exclude[s] corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include[s] only human beings" (*Irwin Toy*, at page 1004; see also *Dywidag Systems International, Canada Ltd. v. Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705, at page 709, (1990), 68 D.L.R. (4th) 147 (*Dywidag Systems*)). A corporation cannot, as a general principle, avail itself of the protections provided by section 7.

[229] The exception to this rule is that a corporation charged with a penal provision may challenge that provision on the basis that it violates a human being's section 7 rights. This exception was first articulated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321 and has been reaffirmed by the Supreme Court on several occasions (see, for example, *Irwin Toy*, at page 1004; *Dywidag Systems*, at page 709; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at page 179, (1991), 84 D.L.R. (4th) 161 (*Wholesale Travel*)). In light of my finding that the appellant corporation is not defending against a criminal charge, "[t]here are no penal proceedings pending in the case at hand, so the principle articulated in *Big M Drug Mart* is not involved" (*Irwin Toy*, at page 1004). The appellant thus remains constrained by the general principle that corporations may not avail themselves of the protections offered by section 7 of the Charter. The appellant's section 7 claim must therefore fail.

E. La Loi enfreint-elle l'article 7 de la Charte?

[226] L'appelante affirme brièvement que la Loi enfreint l'article 7 ainsi que l'article 8 de la Charte (mémoire de l'appelante sur les questions constitutionnelles, aux paragraphes 84(a) et 87).

[227] L'argument de l'appelante fondé sur l'article 7 ne peut être retenu parce que, comme il est clairement établi dans les sections précédentes des présents motifs, l'appelante ne fait pas l'objet d'une procédure pénale. Étant donné qu'elle est une société, l'appelante n'a pas qualité pour invoquer la protection de l'article 7 de la Charte.

[228] Il est bien établi que le terme « chacun », utilisé à l'article 7, « exclu[t] les sociétés et autres entités qui ne peuvent jouir de la vie, de la liberté et de la sécurité de la personne, et [...] ne compren[d] que les êtres humains » (*Irwin Toy*, à la page 1004; voir également *Dywidag Systems International, Canada Ltd. c. Zutphen Brothers Construction Ltd.*, [1990] 1 R.C.S. 705, à la page 709, 1990 CanLII 140 (*Dywidag Systems*)). En règle générale, les sociétés ne peuvent se prévaloir des protections conférées par l'article 7.

[229] L'exception à cette règle est que la société accusée au titre d'une disposition pénale peut contester cette disposition au motif qu'elle enfreint les droits d'un être humain garantis par l'article 7. Cette exception a été exposée pour la première fois dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, 1985 CanLII 69, et a depuis été réitérée par la Cour suprême dans plusieurs arrêts (voir notamment *Irwin Toy*, à la page 1004; *Dywidag Systems*, à la page 709; *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154, à la page 179, 1991 CanLII 39 (*Wholesale Travel*)). Étant donné ma conclusion selon laquelle l'appelante ne se défend pas contre des accusations de nature criminelle, « [i]l n'y a aucune poursuite pénale en cours en l'espèce de sorte que le principe formulé dans l'arrêt *Big M Drug Mart* n'entre pas en jeu » (*Irwin Toy*, à la page 1004). L'appelante demeure donc assujettie au principe général voulant que les sociétés ne puissent se prévaloir des protections conférées par l'article 7 de la Charte. L'argument de l'appelante fondé sur l'article 7 ne peut donc être retenu.

F. Does CASL Violate Section 8 of the Charter?

[230] Section 8 of the Charter, unlike section 7, does find application in the present circumstances. However, in my view, no unreasonable seizure arises on the facts of this case. The appellant's section 8 claim pertains to the notice to produce issued to it pursuant to section 17 of CASL. The notice sought information regarding the appellant's practices for recording and tracking consent of individuals on the appellant's contact list of potential email recipients.

[231] The case law makes clear that the exercise of statutory powers of compelled production may constitute a seizure for the purposes of section 8 even where such powers are regulatory in nature (*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at pages 640–642, (1990), 68 D.L.R. (4th) 568). However, Charter interpretation is contextual and a right or freedom may have a different meaning depending on the context in which it is asserted (*Wholesale Travel*, at pages 225–226). More specifically, “a Charter right may have different scope and implications in a regulatory context than in a truly criminal one” (*Wholesale Travel*, at page 226). In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, (1990), 67 D.L.R. (4th) 161 (*Thomson Newspapers* 1990), which considered statutory orders to produce pursuant to section 17 of what was then the *Combines Investigation Act*, R.S.C. 1970, c. C-23, the parameters of a reasonable search and seizure were heavily influenced by the regulatory character of the legislation. I find the reasons of La Forest J. in that decision persuasive. He explained that, in modern society [at page 507], “regulation must necessarily involve the inspection of private premises or documents by agents of the state.” Consequently,

It follows that there can be only a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which,

F. La Loi enfreint-elle l'article 8 de la Charte?

[230] L'article 8 de la Charte, contrairement à l'article 7, s'applique en l'espèce. Cependant, à mon avis, les faits de la présente affaire ne montrent pas qu'il y a eu saisie abusive. L'argument de l'appelante fondé sur l'article 8 concerne l'avis de communication qu'on lui a signifié en vertu de l'article 17 de la Loi. L'avis exigeait la communication de renseignements concernant les pratiques utilisées par l'appelante pour consigner le consentement des personnes à figurer sur sa liste d'envoi à titre de destinataire potentiel de courriels et pour assurer le suivi à cet égard.

[231] La jurisprudence établit clairement qu'une communication ordonnée dans l'exercice de pouvoirs conférés par la loi peut constituer une saisie au sens de l'article 8 même lorsque ces pouvoirs sont de nature administrative (*R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627, aux pages 640 à 642, 1990 CanLII 137). Cependant, la Charte doit être interprétée de façon contextuelle, et un droit ou une liberté peut avoir un sens différent selon le contexte dans lequel il est revendiqué (*Wholesale Travel*, aux pages 225 et 226). Plus précisément, « un droit garanti par la Charte peut avoir dans un cadre réglementaire une portée et une incidence différentes de celles qu'[il] aurai[t] dans un contexte criminel à proprement dit » (*Wholesale Travel*, à la page 226). 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, 1990 CanLII 135 (*Thomson Newspapers* 1990), qui portait sur les ordonnances de production rendues en vertu de l'article 17 de ce qui était alors la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, ch. C-23, les paramètres de ce qui constitue une fouille, une perquisition ou une saisie non abusive ont été lourdement influencés par le caractère administratif du texte législatif. Je trouve les motifs du juge La Forest dans cet arrêt convaincants. Il explique que, dans une société moderne [à la page 507], « cette réglementation doit nécessairement comporter l'inspection de lieux ou de documents de nature privée par des fonctionnaires de l'État ». Par conséquent :

Il s'ensuit que les attentes des particuliers ne peuvent être très élevées quant au respect de leur droit à la vie privée dans le cas de lieux ou de documents utilisés ou produits

though lawful, are subject to state regulation as a matter of course. In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature of participation in such activity.

(*Thompson Newspaper* 1990, at page 507.)

[232] Subsequent jurisprudence leaves no doubt that records and documents produced in the ordinary course of a business's regulated activities attract a diminished expectation of privacy (see, for example, *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757, at paragraph 72; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, (1995), 129 D.L.R. (4th) 129, at paragraph 50; *143471 Canada Inc. v. Quebec (Attorney General)*; *Tabah v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339, at page 377, (1994), 48 A.C.W.S. (3d) 64). It is precisely this species of record or document that the appellant was ordered to produce.

[233] It is also important to note that section 17 of CASL only grants authority for compelling production of documents rather than physical searches of premises—the former being a far less intrusive power than the latter. In *Thomson Newspapers* 1990, as in this case, the relevant contextual factors were “the limited scope of the power to order the production of documents, together with the limited privacy interests that can be said to reside in the records and documents that can be lawfully demanded” (*Thomson Newspapers* 1990, at page 522). In that case, La Forest J. found that the safeguards required for a reasonable seizure were “less strenuous and more flexible” than the “stringent standards of reasonableness usually applicable in criminal investigations” (*Thomson Newspapers* 1990, at pages 506 and 520). More particularly, La Forest J. held that the appropriate constitutional limit on the regulatory order to produce was simply that “[t]he material sought must be relevant to the inquiry in progress” (*Thomson Newspapers* 1990, at page 530). Given the similarities between that case and the one now before us in these appeals, and that the appellant has provided not a modicum of argument on the proper scope of section 8 in the specific circumstances of this case, I find that the standard articulated by La Forest J. in *Thomson Newspapers* 1990 is also the appropriate standard

dans l'exercice d'activités qui, bien que légales, sont normalement réglementées par l'État. Dans une société où l'on reconnaît le besoin de réglementer efficacement certains domaines d'activités privées et où l'on y donne suite, l'inspection de lieux et de documents par l'État est un aspect routinier auquel les particuliers s'attendent en exerçant cette activité.

(*Thompson Newspapers* 1990, à la page 507.)

[232] La jurisprudence subséquente confirme sans le moindre doute que les registres et les documents produits dans le cours normal d'activités commerciales réglementées font l'objet d'une attente réduite quant au respect de la vie privée (voir par exemple *R. c. Jarvis*, 2002 CSC 73, [2002] 3 R.C.S. 757, au paragraphe 72; *R. c. Fitzpatrick*, [1995] 4 R.C.S. 154, 1995 CanLII 44, au paragraphe 50; *143471 Canada Inc. c. Québec (Procureur général)*; *Tabah c. Québec (Procureur général)*, [1994] 2 R.C.S. 339, à la page 377, 1994 CanLII 89). C'est exactement ce type de registre ou dossier que l'appelante s'est fait ordonner de communiquer.

[233] Il est également important de souligner que l'article 17 de la Loi confère uniquement le pouvoir d'ordonner la communication de documents et non celui de perquisitionner des lieux — le premier pouvoir étant beaucoup moins intrusif que le second. Dans l'arrêt *Thomson Newspapers* 1990, comme en l'espèce, les facteurs contextuels pertinents étaient « la portée restreinte du pouvoir d'ordonner la production de documents, ainsi que le peu de renseignements de nature privée susceptibles de se trouver dans les dossiers et documents qui peuvent être légalement exigés » (*Thomson Newspapers* 1990, à la page 522). Le juge La Forest avait conclu que, dans cette affaire, la norme du caractère raisonnable des saisies était « moins sévère et plus souple » que les « normes sévères du caractère raisonnable habituellement applicables dans les enquêtes criminelles » (*Thomson Newspapers* 1990, aux pages 506 et 520). Plus précisément, le juge La Forest a conclu que la limite constitutionnelle appropriée pour les ordonnances administratives de communication était que « [l]es documents recherchés doivent se rapporter à l'enquête en cours » (*Thomson Newspapers* 1990, à la page 530). Étant donné les similitudes entre cette affaire et celle dont nous sommes saisis, et étant donné que l'appelante n'a pas dit un mot sur la portée qu'il convient de

for a reasonable seizure under section 17 of CASL. I find that the notice to produce issued to the appellant meets this modest standard and I therefore reject the appellant's section 8 claim.

IX. Notice of Violation Decision

A. Preliminary issue: Application of the Bankruptcy Act

[234] In view of the respondent's concession that the AMP imposed on the appellant in the NOV is unenforceable outside the insolvency process, this Court need not address the CRTC's allusions as to whether or not the AMP was compromised by the appellant's proposal under the Bankruptcy Act. The respondent is the party that would stand to benefit from the AMP's ongoing enforceability. It is also the entity that would go about enforcing it, if this were possible. The respondent has conceded this is not possible. It is not necessary for this Court to say more. Both parties agree that the appellant's Bankruptcy Act proceedings did not otherwise affect the CRTC's ability to conduct the review proceedings at issue. I agree (see Bankruptcy Act, subsection 69.6(2)).

B. Did the CRTC Err in Its Interpretation and Application of the Business-to-Business Exemption?

[235] The CRTC rejected the appellant's argument that a number of its emails were exempt from the consent and content requirements of section 6 of CASL by virtue of the "business-to-business" exemption set out in subparagraph 3(a)(ii) of the Governor in Council Regulations:

Excluded messages – Section 6 of Act

3 Section 6 of the Act does not apply to a commercial electronic message

donner à l'article 8 dans les circonstances propres à la présente affaire, je conclus que la norme énoncée par le juge La Forest dans l'arrêt *Thomson Newspapers* 1990 est également la norme à appliquer pour juger du caractère raisonnable de la saisie effectuée en vertu de l'article 17 de la Loi. Je conclus que l'avis de communication signifié à l'appelante satisfait à cette norme peu élevée et, par conséquent, je ne retiens pas l'argument fondé sur l'article 8 de l'appelante.

IX. Décision sur le procès-verbal de violation

A. Question préliminaire : application de la Loi sur la faillite

[234] Étant donné que l'intimé a reconnu que la SAP imposée à l'appelante dans le procès-verbal de violation ne pouvait être exécutée en dehors de la procédure d'insolvabilité, notre Cour n'a pas à se prononcer sur les allusions du CRTC concernant la question de savoir si la SAP était compromise par la proposition faite par l'appelante sous le régime de la Loi sur la faillite. L'intimé est la partie qui tirerait un bénéfice s'il était donné suite à l'exécution de la SAP. Il est également la partie qui serait chargée de veiller à l'exécution de la SAP, à supposer que cela soit possible. L'intimé a concédé que ce n'était pas possible. Notre Cour n'a pas à en dire plus. Les deux parties conviennent que les procédures entamées sous le régime de la Loi sur la faillite n'ont par ailleurs aucun effet sur la capacité du CRTC de mener à bien sa procédure de révision. Je partage cet avis (voir Loi sur la faillite, paragraphe 69.6(2)).

B. Le CRTC a-t-il commis une erreur dans son interprétation et son application de l'exception pour les communications interentreprises?

[235] Le CRTC n'a pas souscrit à l'observation de l'appelante selon laquelle elle n'était pas tenue d'obtenir de consentement pour plusieurs de ses courriels ni d'y inclure le contenu exigé à l'article 6 de la Loi en raison de l'exception pour les communications interentreprises prévue au sous-alinéa 3a)(ii) du Règlement :

Article 6 de la Loi – messages exemptés

3 L'article 6 de la Loi ne s'applique pas au message électronique commercial :

(c) assisting an investigation or proceeding in respect of a contravention of the laws of a foreign state that address conduct that is substantially similar to conduct prohibited under any of sections 6 to 9.

Particulars of notice

(3) The notice must require the document to be produced to a person named in the notice within the time, at the place and in the form specified in the notice.

Conditions

(4) The designated person may impose conditions in the notice to prevent the disclosure of some or all of its contents or its existence if they have reasonable grounds to believe that the disclosure would jeopardize the conduct of

(a) an investigation under this Act; or

(b) an investigation or proceeding in respect of a contravention of the laws of a foreign state that address conduct that is substantially similar to conduct prohibited under any of sections 6 to 9.

Expiry and revocation of conditions

(5) A condition imposed to prevent disclosure expires six months after the day on which the notice is served on the person unless, before its expiry, a notice extending the condition for an additional period of six months is served on them. A condition may not be extended more than once and a notice revoking the condition may be served on the person at any time.

Return of documents not required

(6) Documents and copies of documents that are produced under this section need not be returned to the person who produced them.

...

Violations

20 (1) Every person who contravenes any of sections 6 to 9 commits a violation for which they are liable to an administrative monetary penalty.

Purpose of penalty

(2) The purpose of a penalty is to promote compliance with this Act and not to punish.

c) faciliter une enquête, instance ou poursuite relative à une contravention à une loi d'un État étranger visant des comportements essentiellement semblables à ceux interdits par l'un des articles 6 à 9.

Contenu de l'avis

(3) L'avis précise le lieu et la forme de la communication, le délai dans lequel elle doit être faite ainsi que le nom de la personne à qui elle doit l'être.

Conditions

(4) La personne désignée peut assortir l'avis de conditions visant à empêcher la divulgation de tout ou partie de son contenu, ou de son existence si elle a des motifs raisonnables de croire que cette divulgation compromettrait le déroulement :

(a) soit d'une enquête menée au titre de la présente loi;

(b) soit d'une enquête, instance ou poursuite relative à une contravention à une loi d'un État étranger visant des comportements essentiellement semblables à ceux interdits par l'un des articles 6 à 9.

Expiration et annulation des conditions

(5) Les conditions visant à empêcher la divulgation expirent six mois après la signification de l'avis, à moins qu'avant l'expiration de celles-ci un avis les renouvelant — pour une période additionnelle de six mois — n'ait été signifié à la personne en question. L'avis renouvelant les conditions ne peut être signifié qu'une seule fois et un avis les annulant peut l'être à tout moment.

Aucune restitution

(6) Il n'est pas nécessaire de retourner à la personne les documents ou copies de documents qu'elle a communiqués en application du présent article.

[...]

Violations

20 (1) Toute contravention à l'un des articles 6 à 9 constitue une violation exposant son auteur à une sanction administrative pécuniaire.

But de la sanction

(2) L'imposition de la sanction vise non pas à punir, mais plutôt à favoriser le respect de la présente loi.

Factors for penalty

(3) The following factors must be taken into account when determining the amount of a penalty:

- (a) the purpose of the penalty;
- (b) the nature and scope of the violation;
- (c) the person's history with respect to any previous violation under this Act, any previous conduct that is reviewable under section 74.011 of the *Competition Act* and any previous contravention of section 5 of the *Personal Information Protection and Electronic Documents Act* that relates to a collection or use described in subsection 7.1(2) or (3) of that Act;
- (d) the person's history with respect to any previous undertaking entered into under subsection 21(1) and any previous consent agreement signed under subsection 74.12(1) of the *Competition Act* that relates to acts or omissions that constitute conduct that is reviewable under section 74.011 of that Act;
- (e) any financial benefit that the person obtained from the commission of the violation;
- (f) the person's ability to pay the penalty;
- (g) whether the person has voluntarily paid compensation to a person affected by the violation;
- (h) the factors established by the regulations; and
- (i) any other relevant factor.

Maximum penalties

(4) The maximum penalty for a violation is \$1,000,000 in the case of an individual, and \$10,000,000 in the case of any other person.

Regulations

(5) The Governor in Council may make regulations

...

Détermination du montant de la sanction

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

- a) le but de la sanction;
- b) la nature et la portée de la violation;
- c) les antécédents de l'auteur de la violation, à savoir violation à la présente loi, comportement susceptible d'examen visé à l'article 74.011 de la *Loi sur la concurrence* et contravention à l'article 5 de la *Loi sur la protection des renseignements personnels et les documents électroniques* qui met en cause une collecte ou une utilisation visée aux paragraphes 7.1(2) ou (3) de cette loi;
- d) ses antécédents au regard des engagements contractés en vertu du paragraphe 21(1) et des consentements signés en vertu du paragraphe 74.12(1) de la *Loi sur la concurrence* concernant des actes ou omissions qui constituent des comportements susceptibles d'examen visés à l'article 74.011 de cette loi;
- e) tout avantage financier qu'il a retiré de la commission de la violation;
- f) sa capacité de payer le montant de la sanction;
- g) tout versement d'une somme qu'il a fait volontairement, à titre de dédommagement, à toute personne touchée par la violation;
- h) tout critère prévu par règlement;
- i) tout autre élément pertinent.

Plafond de la sanction

(4) Le montant maximal de la sanction pour une violation est de 1 000 000 \$, dans le cas où l'auteur est une personne physique, et de 10 000 000 \$ dans le cas de toute autre personne.

Pouvoir réglementaire

(5) Le gouverneur en conseil peut, par règlement :

- a) désigner les dispositions dont la contravention constitue une violation distincte pour chacun des jours au cours desquels la contravention se continue;
- b) prévoir les critères pour l'application de l'alinéa (3)h).

[...]

TAB 43

The British Columbia Human Rights Commission, the Commissioner of Investigation and Mediation, the British Columbia Human Rights Tribunal and Andrea Willis *Appellants*

v.

Robin Blencoe *Respondent*

and

Irene Schell *Intervener*

and

The Attorney General for Ontario, the Attorney General of British Columbia, the Saskatchewan Human Rights Commission, the Ontario Human Rights Commission, the Nova Scotia Human Rights Commission, the Manitoba Human Rights Commission, the Canadian Human Rights Commission, the Commission des droits de la personne et des droits de la jeunesse, the British Columbia Human Rights Coalition and the Women's Legal Education and Action Fund *Intervenors*

INDEXED AS: BLENCOE v. BRITISH COLUMBIA (HUMAN RIGHTS COMMISSION)

Neutral citation: 2000 SCC 44.

File No.: 26789.

2000: January 24; 2000: October 5.

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

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL

Constitutional law — Charter of Rights — Application — Human Rights Commission — Commission implementing specific governmental program and exercising statutory authority — Commission independent

La British Columbia Human Rights Commission, le Commissioner of Investigation and Mediation, le British Columbia Human Rights Tribunal et Andrea Willis *Appelants*

c.

Robin Blencoe *Intimé*

et

Irene Schell *Intervenante*

et

Le procureur général de l'Ontario, le procureur général de la Colombie-Britannique, la Saskatchewan Human Rights Commission, la Commission ontarienne des droits de la personne, la Nova Scotia Human Rights Commission, la Commission des droits de la personne du Manitoba, la Commission canadienne des droits de la personne, la Commission des droits de la personne et des droits de la jeunesse, la British Columbia Human Rights Coalition et le Fonds d'action et d'éducation juridiques pour les femmes *Intervenants*

RÉPERTORIÉ: BLENCOE c. COLOMBIE-BRITANNIQUE (HUMAN RIGHTS COMMISSION)

Référence neutre: 2000 CSC 44.

Nº du greffe: 26789.

2000: 24 janvier; 2000: 5 octobre.

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 LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Application — Commission des droits de la personne — Commission mettant en œuvre un programme gouvernemental particulier et exerçant un pouvoir conféré par la loi

of the person would be to stretch the meaning of this right.

3. Importing the Notion of “Stigma” from the Criminal Law Context

In *Mills* (1986), *supra*, at pp. 919-20, Lamer J., in dissent, found that the combination of loss of privacy, stigma, and disruption of family life engaged an individual’s security of the person in the context of s. 11(b) of the *Charter*, stating that:

... security of the person is not restricted to physical integrity; rather, it encompasses protection against “overlong subjection to the vexations and vicissitudes of a pending criminal accusation”. . . . These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

However, it must be emphasized that this statement was made in the context of s. 11(b) of the *Charter* which provides that a person charged with an offence has the right “to be tried within a reasonable time”. The qualifier to this right is that it applies to individuals who have been “charged with an offence”. The s. 11(b) right therefore has no application in civil or administrative proceedings. This Court has often cautioned against the direct application of criminal justice standards in the administrative law area. We should not blur concepts which under our *Charter* are clearly distinct. The s. 11(b) guarantee of a right to an accused person to be tried within a reasonable time cannot be imported into s. 7. There is no analogous provision to s. 11(b) which applies to administrative proceedings, nor is there a constitutional right outside the criminal context to be “tried” within a reasonable time.

Lamer C.J. later reiterated this statement from *Mills* (1986) in *G. (J.)*, at para. 62. In so doing, however, this Court did not make freedom from stigma a free-standing right. Nor did it establish

choix essentiels dans leur vie. Accepter que le préjudice subi par l’intimé en l’espèce équivaut à une atteinte de l’État au droit qu’il a à la sécurité de sa personne serait forcer le sens de ce droit.

3. Transposition de la notion de «stigmatisation» dans le contexte du droit criminel

Dans l’arrêt *Mills* de 1986, précité, aux pp. 919 et 920, le juge Lamer, dissident, a conclu que, prises ensemble, l’atteinte à la vie privée, la stigmatisation et les perturbations de la vie familiale mettaient en cause la sécurité de la personne dans le contexte de l’al. 11b) de la *Charte*:

... la notion de sécurité de la personne ne se limite pas à l’intégrité physique; elle englobe aussi celle de protection contre [TRADUCTION] «un assujettissement trop long aux vexations et aux vicissitudes d’une accusation criminelle pendante». [. . .] Celles-ci comprennent la stigmatisation de l’accusé, l’atteinte à la vie privée, la tension et l’anxiété résultant d’une multitude de facteurs, y compris éventuellement les perturbations de la vie familiale, sociale et professionnelle, les frais de justice et l’incertitude face à l’issue et face à la peine.

Il faut cependant souligner que ces propos ont été tenus dans le contexte de l’al. 11b) de la *Charte*, qui prévoit que tout inculpé a le droit «d’être jugé dans un délai raisonnable». Pour que ce droit s’applique, il faut que la personne en question soit «inculpée». Le droit garanti par l’al. 11b) ne s’applique donc pas dans le cas de procédures civiles ou administratives. Notre Cour a souvent fait des mises en garde contre l’application directe en droit administratif des normes de la justice criminelle. Nous devrions éviter de confondre des notions qui, suivant notre *Charte*, sont clairement distinctes. Le droit d’être jugé dans un délai raisonnable que l’al. 11b) garantit à tout inculpé ne peut être transposé dans l’art. 7. Aucune disposition analogue à l’al. 11b) ne s’applique aux procédures administratives, et le droit constitutionnel d’être «jugé» dans un délai raisonnable ne s’applique qu’en matière criminelle.

Par la suite, le juge en chef Lamer a réitéré, au par. 62 de l’arrêt *G. (J.)*, cet énoncé tiré de l’arrêt *Mills* de 1986. Ce faisant, notre Cour n’a toutefois pas fait de la protection contre la stigmatisation un

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that respondents in sexual harassment proceedings suffer so greatly that s. 11(b) principles should apply to them. As will be demonstrated below, the nature of the harm caused by human rights delay is different.

droit distinct. Elle n'a pas non plus décidé que les personnes visées par des procédures en matière de harcèlement sexuel souffrent à tel point que les principes de l'al. 11b) devraient s'appliquer à elles. Comme nous le verrons plus loin, le préjudice causé par un délai dans des procédures en matière de droits de la personne diffère sur le plan de sa nature.

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In *Kodellas*, *supra*, the Saskatchewan Court of Appeal clearly equated criminal sexual assault charges with human rights sex discrimination complaints. Bayda C.J.S. (dissenting on another issue) conveyed this as follows, at pp. 152-53:

Dans l'arrêt *Kodellas*, précité, la Cour d'appel de la Saskatchewan a clairement assimilé les accusations criminelles d'agression sexuelle à des plaintes de discrimination sexuelle fondées sur les droits de la personne. Le juge en chef Bayda (dissident sur un autre point) s'est exprimé ainsi, aux pp. 152 et 153:

For the purpose of determining the effect upon the "security of the person" I see no logical distinction of substance between the subjection to the vexations and vicissitudes of "a pending criminal accusation" based upon sexual harassment and sexual assault and the subjection to the vexations and vicissitudes of a pending accusation in penal (*i.e.*, *quasi-criminal*) proceedings under s. 35(2) of the Code, of discrimination based upon sexual harassment and sexual assault. It is but a small step from there to find that for the same purpose no distinction of substance can be made between an accusation in a penal proceeding under the Code and an identical accusation in remedial proceedings under ss. 27 to 33 of the Code. Whether they occur in a criminal context, or in the context of a penal proceeding, such as that provided for in the Code, or in the context of remedial proceedings (which, as will be shown later, is the context relevant to this case) the "vexations and vicissitudes" will invariably "include stigmatization of the (alleged discriminator), loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction". This is so because the hurt to the alleged discriminator emanates from the accusation, not from the type of proceedings in which the accusation is made. After all, it matters not a whit to all of the relevant actors — the public, the persons who are the source of the hurt, those who are indirectly affected by the hurt (such as the alleged discriminator's family) and the alleged discriminator, who is directly affected by the hurt and who is the subject and direct object of the hurt — whether the

[TRADUCTION] Pour déterminer l'incidence sur la «sécurité de la personne», je ne vois aucune distinction logique, sur le plan du fond, entre l'assujettissement aux vexations et aux vicissitudes d'une «accusation criminelle pendante» fondée sur le harcèlement sexuel et l'agression sexuelle, et l'assujettissement aux vexations et aux vicissitudes d'une accusation pendante de discrimination fondée sur le harcèlement sexuel et l'agression sexuelle, qui a été portée en matière pénale (c'est-à-dire quasi criminelle) en vertu du par. 35(2) du Code. Pourtant, il n'y a qu'un pas à faire pour conclure que, à des fins identiques, aucune distinction de fond ne peut être établie entre une accusation portée dans des procédures pénales fondées sur le Code et une accusation identique portée dans des procédures engagées en vertu des art. 27 à 33 du Code dans le but d'obtenir un redressement. Qu'elles soient occasionnées dans le contexte de procédures criminelles ou dans celui de procédures pénales, comme celles que prévoit le Code, ou encore dans celui de procédures visant l'obtention d'un redressement (qui, nous le verrons plus loin, est le contexte pertinent en l'espèce), les «vexations» et les «vicissitudes» comprennent inmanquablement «la stigmatisation de (l'auteur allégué de la discrimination), l'atteinte à la vie privée, la tension et l'anxiété résultant d'une multitude de facteurs, y compris éventuellement les perturbations de la vie familiale, sociale et professionnelle, les frais de justice et l'incertitude face à l'issue et à la peine». Il en est ainsi parce que le mal causé à l'auteur allégué de la discrimination découle de l'accusation, et non du genre de procédures dans lesquelles l'accusation est portée. Après tout, il est parfaitement égal à tous les acteurs pertinents — le public, les personnes qui sont à l'origine du mal causé, celles qui sont indirectement touchées par ce mal (comme les membres de la famille de l'auteur

accusation is made in one procedural forum or another. What matters is the *fact* of the accusation. . . .

In determining whether prejudice occurred in a given situation, it is important to note that it is in the very nature of this form of prejudice (*i.e.*, feelings of mental hurt or “stigmatization”) that it arises automatically upon a formal accusation being made. Lamer J. in *Rahey*, while elucidating this form of prejudice (in the context of s. 11(b) of the Charter), recognized this when he said at p. [609]:

With respect to the security of the person, I do not believe that actual impairment need be proven by the accused to render the section operative. An objective standard is the only realistic means through which the security interest of the accused may be protected under the section. Otherwise, each individual accused would have the burden of demonstrating that he or she has subjectively suffered a form of anxiety, stress or stigmatization as a result of the criminal charge. We are dealing largely with the impairment of mental well-being, a matter which can only be established with considerable difficulty at considerable cost. [Underlining added; italics in original.]

The majority of the Court of Appeal in the case at bar followed the above reasoning in *Kodellas*. The effect of the Appeal Court decision in *Blencoe* was to import a requirement for a hearing within a reasonable time into the processing of human rights complaints. Although the majority of the Court of Appeal disclaimed a direct s. 11(b) right, numerous references were made in its reasons, equating sexual harassment proceedings to criminal proceedings for sexual assault where s. 11(b) would apply. Indeed, the majority speaks of “this type of sexual assault” (para. 47), “stigma against the accused” (para. 56), “prosecution of these complaints” (para. 58), a “straightforward case of sexual assault” (para. 102), “[allegations] which are tantamount to . . . sexual assault” (para. 108), and “unproven charges of sexual harassment” (para. 57). The basis for the majority of the Court of Appeal’s reasons in this case is the treatment of

allégué de la discrimination) et l’auteur allégué de la discrimination, qui est directement touché par le mal et qui en est directement victime — que l’accusation soit portée dans le cadre de l’une ou l’autre instance. Ce qui importe, c’est le *fait* de l’accusation. . .

Pour déterminer si un préjudice a été causé dans une situation donnée, il importe de souligner qu’il est dans la nature même de cette forme de préjudice (c’est-à-dire le sentiment de souffrance morale ou de «stigmatisation») qu’elle prenne naissance dès qu’une accusation officielle est portée. Dans *Rahey*, le juge Lamer l’a reconnu en expliquant cette forme de préjudice (dans le contexte de l’application de l’al. 11b) de la Charte), à la p. [609]:

Au sujet de la sécurité de la personne, je ne crois pas que ce soit à l’inculpé qu’il incombe de prouver qu’il y a effectivement eu atteinte pour que l’article soit applicable. Une norme objective est le seul moyen réaliste de protéger, en vertu de cet article, l’intérêt du prévenu en matière de sécurité. Autrement, chaque prévenu aurait la charge de démontrer qu’il ou elle a subjectivement souffert d’angoisse, de tension ou de stigmates par suite d’une accusation criminelle. Nous avons largement affaire à un préjudice moral, ce qui ne peut être établi qu’au prix de difficultés et de frais considérables. [Je souligne; en italique dans l’original.]

Dans la présente affaire, la Cour d’appel à la majorité a suivi le raisonnement susmentionné de l’arrêt *Kodellas*. L’arrêt *Blencoe* de la Cour d’appel a eu pour effet de transposer dans le traitement d’une plainte en matière de droits de la personne l’exigence qu’une audience ait lieu dans un délai raisonnable. Bien qu’elle ait écarté l’application directe d’un droit garanti par l’al. 11b), la Cour d’appel à la majorité a assimilé, à maintes reprises dans ses motifs, les procédures relatives au harcèlement sexuel à des procédures criminelles en matière d’agression sexuelle où l’al. 11b) s’appliquerait. En fait, les juges majoritaires parlent de [TRADUCTION] «ce genre d’agression sexuelle» (par. 47), de «stigmatisation de l’accusé» (par. 56), de «poursuites relatives à ces plaintes» (par. 58), de «simple cas d’agression sexuelle» (par. 102), d’«[allégations] équivalant à [. . .] une accusation d’agression sexuelle» (par. 108) et d’«accusations non prouvées de harcèlement sexuel» (par. 57). En l’espèce, les motifs majoritaires de la Cour d’appel reposent sur l’assimilation des plaintes de harcèle-

sexual harassment human rights complaints as akin to a pending criminal sexual assault charge.

ment sexuel fondées sur les droits de la personne à une accusation criminelle pendante d'agression sexuelle.

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With respect, the Court of Appeal in *Kodellas* and the majority of the Court of Appeal in the case at bar have erred in transplanting s. 11(b) principles set out in the criminal law context to human rights proceedings under s. 7. Not only are there fundamental differences between criminal proceedings and human rights proceedings that the majority failed to recognize, but, more importantly, s. 11(b) of the *Charter* is restricted to a pending criminal case. The effect of the Court of Appeal's decision was to extract an element of s. 11(b) — the element of stigma, which may be sufficient in the context of criminal proceedings and s. 11(b), to create a deprivation of the security of the person — and apply it to a process that differs with respect to objectives, consequences and procedures. As this Court has recently confirmed in *Mills* (1999), *supra*, at paras. 61 and 64, *Charter* rights must be interpreted and defined in a contextual manner, because they often inform, and are informed by, other similarly deserving rights and values at play in particular circumstances. The Court of Appeal has failed to examine the rights protected by s. 7 in the context of this case.

En toute déférence, la Cour d'appel dans l'arrêt *Kodellas* et la Cour d'appel à la majorité en l'espèce ont eu tort de transposer dans des procédures en matière de droits de la personne fondées sur l'art. 7 des principes énoncés relativement à l'al. 11b) dans le contexte du droit criminel. Non seulement y a-t-il des différences fondamentales entre des procédures criminelles et des procédures en matière de droits de la personne, que les juges majoritaires n'ont pas reconnues, mais encore l'al. 11b) de la *Charte* ne s'applique qu'aux affaires criminelles pendantes. L'arrêt de la Cour d'appel a eu pour effet d'extirper un élément de l'al. 11b) — celui de la stigmatisation qui peut suffire, dans le contexte de procédures criminelles et de l'al. 11b), pour qu'il y ait atteinte à la sécurité de la personne — et de l'appliquer à un processus différent sur le plan des objectifs, des conséquences et de la procédure. Comme notre Cour l'a récemment confirmé dans l'arrêt *Mills* de 1999, précité, aux par. 61 et 64, les droits garantis par la *Charte* doivent être interprétés et définis en fonction du contexte, car ils sous-tendent ou s'inspirent souvent d'autres droits ou valeurs aussi louables qui sont en jeu dans des circonstances particulières. La Cour d'appel n'a pas examiné les droits garantis par l'art. 7 dans le contexte de la présente affaire.

93

In the criminal law context, the test to be applied under s. 11(b) is an objective one, and prejudice may be inferred from unreasonable delay. This stands in sharp contrast to the two-tiered approach to s. 7 of the *Charter*, where the mere passage of time in resolving a complaint does not automatically give rise to the kind of prejudice that is presumed to follow from the laying of a charge under s. 11(b) of the *Charter*. In this regard, Lamer J.'s comments in *Mills* (1986), *supra*, are premised on the fact that there has already been an "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" (p. 919). This is a finding that would be made not at the threshold stage of the s. 7 analysis but is rather to be examined at the principles of fundamental justice

Dans le contexte du droit criminel, le critère applicable suivant l'al. 11b) est objectif et il est possible de déduire qu'un délai déraisonnable a causé un préjudice. Cela contraste fortement avec l'interprétation en deux étapes de l'art. 7 de la *Charte*, selon laquelle le seul fait qu'un délai s'écoule entre le dépôt de la plainte et son règlement ne cause pas automatiquement le genre de préjudice qui est présumé résulter du dépôt d'une accusation fondée sur l'al. 11b) de la *Charte*. À cet égard, dans les observations qu'il formule dans l'arrêt *Mills* de 1986, précité, le juge Lamer tient pour acquis qu'il y a déjà eu «assujettissement trop long aux vexations et au vicissitudes d'une accusation criminelle pendante» (p. 919). Il s'agit là d'une conclusion qui serait tirée non pas à l'étape

stage. The Court of Appeal in *Kodellas* and in the case at bar erred in conflating the two stages of the s. 7 analysis. Philip Bryden similarly concluded that the two stages of the s. 7 analysis were merged by the majority of the Court of Appeal in this case (“*Blencoe v. British Columbia (Human Rights Commission): A Case Comment*” (1999), 33 *U.B.C. L. Rev.* 153, at p. 158):

In my view, Chief Justice McEachern’s formulation of when s. 7 applies tends to conflate the threshold question of whether liberty or personal security have been denied with the ultimate question of whether the process in place satisfies the requirements of fundamental justice. The main reason we use threshold tests for the applicability of constitutional protection is to focus our attention on the situations where we believe the special safeguards associated with constitutional protection are needed.

In discussing the nature and purpose of s. 11(b), Lamer J. emphasized in *Mills* (1986), *supra*, that the need for protecting the individual in such cases arises “from the nature of the criminal justice system and of our society” (p. 920). He described the criminal justice process as “adversarial and conflictual” and states that the very nature of the criminal process will heighten the stress and anxiety that results from a criminal charge. In contrast to the criminal realm, the filing of a human rights complaint implies no suspicion of wrongdoing on the part of the state. The investigation by the Commission is aimed solely at determining what took place and ultimately to settle the matter in a non-adversarial manner. The purpose of human rights proceedings is not to punish but to eradicate discrimination. Tribunal orders are compensatory rather than punitive. The investigation period in the human rights process is not one where the Commission “prosecutes” the respondent. The Commission has an investigative and conciliatory role until the time comes to make a recommendation whether to refer the complaint to the Tribunal for hearing. These human rights proceedings are designed to vindicate private rights and address grievances. As stated by Dickson C.J. in *Canada*

préliminaire de l’analyse de l’art. 7, mais plutôt à l’étape de l’examen des principes de justice fondamentale. Dans l’arrêt *Kodellas* et en l’espèce, la Cour d’appel a commis une erreur en confondant les deux étapes de l’analyse de l’art. 7. Philip Bryden a lui aussi conclu que la Cour d’appel à la majorité en l’espèce avait confondu les deux étapes de l’analyse de l’art. 7 («*Blencoe v. British Columbia (Human Rights Commission): A Case Comment*» (1999), 33 *U.B.C. L. Rev.* 153, à la p. 158):

[TRADUCTION] À mon avis, en précisant les cas où l’art. 7 s’applique, le juge en chef McEachern tend à confondre la question préliminaire de savoir s’il y a eu atteinte au droit à la liberté ou à la sécurité de la personne avec la question de savoir, en fin de compte, si la procédure établie satisfait aux exigences de la justice fondamentale. Si nous utilisons des critères préliminaires d’applicabilité de la protection constitutionnelle, c’est principalement pour nous concentrer sur les situations où, croyons-nous, les garanties spéciales liées à la protection constitutionnelle sont requises.

En analysant la nature et l’objet de l’al. 11b) dans l’arrêt *Mills* de 1986, précité, le juge Lamer a souligné que la nécessité de protéger l’individu en pareils cas «tient à la nature même du système de la justice criminelle et de notre société» (p. 920). Il a dit que la justice criminelle procède selon une procédure «contradictoire et conflictuelle» et que la nature même du processus en matière criminelle intensifie le stress et l’angoisse résultant d’une accusation criminelle. Contrairement à ce qui se passe en matière criminelle, le dépôt d’une plainte fondée sur les droits de la personne n’implique aucun soupçon de méfait de la part de l’État. L’enquête menée par la Commission vise uniquement à déterminer ce qui s’est passé et, en fin de compte, à régler l’affaire selon une procédure non contradictoire. L’objectif des procédures en matière de droits de la personne est non pas de punir, mais de mettre fin à la discrimination. Les ordonnances du Tribunal sont de nature compensatoire et non punitive. Lors de l’enquête liée au processus en matière de droits de la personne, la Commission ne «poursuit» pas la personne qui fait l’objet d’une plainte. Elle joue un rôle d’enquêteur et de médiateur jusqu’au moment où il y a lieu de recommander ou non de renvoyer la plainte au Tribunal pour qu’il

(*Human Rights Commission*) v. *Taylor*, [1990] 3 S.C.R. 892, at p. 917:

It is essential, however, to recognize that, as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality in the community, the *Canadian Human Rights Act* is very different from the *Criminal Code*. The aim of human rights legislation, and of s. 13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.

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In criminal proceedings, the accusation alone may engage a security interest because of the grave social and personal consequences to the accused — including potential loss of physical liberty, subjection to social stigma and ostracism from the community — which are the unavoidable consequences of an open and adversarial judicial system. However, this Court in *Taylor*, *supra*, at pp. 932-33, has commented directly on the diminished role of stigma in the human rights context:

... the present appeal concerns an infringement of s. 2(b) in the context of a human rights statute. The chill placed upon open expression in such a context will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to a criminal conviction is a significant degree of stigma and punishment, whereas the extent of opprobrium connected with the finding of discrimination is much diminished and the aim or remedial measures is more upon compensation and protection of the victim. As was stated in *Canadian National Railway Co. v. Canada* (*Canadian Human Rights Commission*), [1987] 1 S.C.R. 1114, at p. 1134, under a human rights regime:

It is the (discriminatory) practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.

tienne une audience. Ces procédures en matière de droits de la personne sont conçues pour faire valoir des droits privés et redresser des torts. Comme l'a dit le juge en chef Dickson dans *Canada (Commission des droits de la personne) c. Taylor*, [1990] 3 R.C.S. 892, à la p. 917:

Il est essentiel toutefois de reconnaître qu'en tant qu'outil expressément conçu pour empêcher la propagation des préjugés et pour favoriser la tolérance et l'égalité au sein de la collectivité, la *Loi canadienne sur les droits de la personne* diffère nettement du *Code criminel*. La législation sur les droits de la personne, et en particulier le par. 13(1), n'a pas pour objet de faire exercer contre une personne fautive le plein pouvoir de l'État dans le but de lui infliger un châtiment. Au contraire, les dispositions des lois sur les droits de la personne tendent plutôt, en règle générale, à éviter ce genre d'affrontement en permettant autant que possible un règlement par voie de conciliation et, lorsqu'il y a discrimination, en prévoyant des redressements destinés davantage à indemniser la victime.

Dans des procédures criminelles, l'accusation peut à elle seule faire intervenir un droit à la sécurité en raison de ses graves conséquences sociales et personnelles sur l'accusé — dont le risque d'être privé de liberté, ainsi que la stigmatisation et l'exclusion sociales — qu'entraîne inévitablement un système judiciaire public et contradictoire. Toutefois, dans l'arrêt *Taylor*, précité, aux pp. 932 et 933, notre Cour a commenté directement le rôle moins important de la stigmatisation dans le contexte des droits de la personne:

... le présent pourvoi concerne une atteinte à l'al. 2b) résultant d'une loi sur les droits de la personne. La paralysie de la libre expression dans un tel contexte sera normalement moins grave que s'il s'agissait d'une loi pénale, car toute déclaration de culpabilité, au pénal, s'accompagne de stigmates et de peines importants, alors que l'opprobre attaché à une conclusion de discrimination est beaucoup moins grand et qu'en outre les mesures réparatrices visent plutôt la compensation et la protection de la victime. Comme le dit l'arrêt *Compagnie des chemins de fer nationaux du Canada c. Canada* (*Commission canadienne des droits de la personne*), [1987] 1 R.C.S. 1114, à la p. 1134, sous le régime d'une loi sur les droits de la personne:

C'est l'acte discriminatoire lui-même que l'on veut prévenir. La loi n'a pas pour objet de punir la faute, mais bien de prévenir la discrimination.

The last point is an important one and it deserves to be underscored. There is no indication that the purpose of the *Canadian Human Rights Act* is to assign or to punish moral blameworthiness.

I do not doubt that parties in human rights sex discrimination proceedings experience some level of stress and disruption of their lives as a consequence of allegations of complainants. Even accepting that the stress and anxiety experienced by the respondent in this case was linked to delays in the proceedings, I cannot conclude that the scope of his security of the person protected by s. 7 of the *Charter* covers such emotional effects nor that they can be equated with the kind of stigma contemplated in *Mills* (1986), *supra*, of an overlong and vexatious pending criminal trial or in *G. (J.)*, *supra*, where the state sought to remove a child from his or her parents. If the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private rights, some amount of stress and stigma attached to the proceedings must be accepted. This will also be the case when dealing with the regulation of a business, profession, or other activity. A civil suit involving fraud, defamation or the tort of sexual battery will also be “stigmatizing”. The Commission’s investigations are not public, the respondent is asked to provide his version of events, and communication goes back and forth. While the respondent may be vilified by the press, there is no “stigmatizing” state pronouncement as to his “fitness” that would carry with it serious consequences such as those in *G. (J.)*. There is thus no constitutional right or freedom against such stigma protected by the s. 7 rights to “liberty” or “security of the person”.

(f) Conclusion on Liberty and Security of the Person

To summarize, the stress, stigma and anxiety suffered by the respondent did not deprive him of his right to liberty or security of the person. The

Ce dernier point est important et mérite d’être souligné. Rien n’indique que l’objet de la *Loi canadienne sur les droits de la personne* soit d’attribuer une responsabilité morale ou de la punir.

Je ne doute pas que les parties à des procédures relatives à des plaintes de discrimination sexuelle fondées sur les droits de la personne éprouvent un certain stress et voient leur existence perturbée en raison des allégations des plaignants. Même en acceptant que le stress et l’angoisse ressentis par l’intimé en l’espèce étaient liés au délai dans les procédures, je suis incapable de conclure que la sécurité de sa personne garantie par l’art. 7 de la *Charte* englobe une telle incidence sur le plan émotif ou que cette incidence est assimilable au genre de stigmatisation prévu dans l’arrêt *Mills* de 1986, précité, qui résulte d’un procès criminel trop long et vexatoire, ou dans l’arrêt *G. (J.)*, précité, où l’État cherchait à retirer la garde d’un enfant à ses parents. Si les procédures contestées visent à fournir un moyen de faire valoir des droits privés, ou à faire fonction d’arbitre en la matière, le stress et la stigmatisation liés à ces procédures sont acceptables jusqu’à un certain point. Il en va également de même lorsqu’il s’agit de réglementer une activité commerciale, professionnelle ou autre. Les poursuites civiles pour fraude, diffamation ou voies de fait de nature sexuelle sont également «stigmatisantes». Les enquêtes menées par la Commission ne sont pas publiques, la personne qui fait l’objet de la plainte est appelée à donner sa version des faits et l’information circule dans les deux sens. Même si la personne qui fait l’objet de la plainte peut être vilipendée par la presse, l’État ne rend, relativement à son «aptitude», aucune décision «stigmatisante» qui aurait des conséquences graves comme dans l’affaire *G. (J.)*. Le droit à la «liberté» ou à la «sécurité de [l]a personne» garanti par l’art. 7 ne comporte donc aucun droit constitutionnel à la protection contre d’une telle stigmatisation.

(f) Conclusion relative à la liberté et à la sécurité de la personne

En résumé, le stress et l’angoisse que l’intimé a éprouvés et la stigmatisation dont il a été victime n’ont pas porté atteinte à son droit à la liberté ou à

framers of the *Charter* chose to employ the words, “life, liberty and security of the person”, thus limiting s. 7 rights to these three interests. While notions of dignity and reputation underlie many *Charter* rights, they are not stand-alone rights that trigger s. 7 in and of themselves. Freedom from the type of anxiety, stress and stigma suffered by the respondent in this case should not be elevated to the stature of a constitutionally protected s. 7 right.

la sécurité de sa personne. Les rédacteurs de la *Charte* ont choisi d'utiliser les termes «vie, [. . .] liberté et [. . .] sécurité de [l]a personne», de sorte que l'art. 7 ne garantit que ces trois droits. Même si des notions de dignité et de réputation sous-tendent maints droits garantis par la *Charte*, ce ne sont pas des droits distincts qui déclenchent en soi l'application de l'art. 7. La protection contre le genre d'angoisse et de stress que l'intimé a éprouvés et contre le genre de stigmatisation dont il a été victime en l'espèce ne devrait pas être élevée au rang de droit constitutionnel garanti par l'art. 7.

98 My conclusion that the respondent is unable to cross the first threshold of the s. 7 *Charter* analysis in the circumstances of this case should not be construed as a holding that state-caused delays in human rights proceedings can never trigger an individual's s. 7 rights. It may well be that s. 7 rights can be engaged by a human rights process in a particular case. I leave open the possibility that in other circumstances, delays in the human rights process may violate s. 7 of the *Charter*.

Ma conclusion que l'intimé ne peut pas franchir la première étape préliminaire de l'analyse de l'art. 7 de la *Charte* dans les circonstances de la présente affaire ne doit pas être interprétée comme signifiant que les délais imputables à l'État dans des procédures en matière de droits de la personne ne peuvent jamais faire intervenir les droits que l'art. 7 garantit à une personne. Il peut bien arriver, dans certains cas, qu'un processus en matière de droits de la personne fasse intervenir les droits garantis par l'art. 7. Je n'écarte pas la possibilité que, dans d'autres circonstances, les délais dans le processus en matière de droits de la personne violent l'art. 7 de la *Charte*.

99 Because of my conclusion that there was no deprivation of the respondent's right to liberty or security of the person, I need not proceed to the second stage of the analysis to determine whether the alleged deprivation was in accordance with the principles of fundamental justice. However, for the reasons that immediately follow in the administrative law section, I express the view that the delay, in the circumstances of this case, would not have violated the principles of fundamental justice.

Étant donné que j'ai conclu, dans un premier temps, qu'il n'y a eu aucune atteinte au droit de l'intimé à la liberté ou à la sécurité de sa personne, je n'ai pas à décider, dans un deuxième temps, si l'atteinte alléguée était conforme aux principes de justice fondamentale. Toutefois, pour les motifs exposés immédiatement après la partie relative au droit administratif, j'estime que, dans les circonstances de la présente affaire, le délai écoulé n'aurait pas violé les principes de justice fondamentale.

C. *Was the Respondent Entitled to a Remedy Pursuant to Administrative Law Principles?*

C. *L'intimé avait-il droit à une réparation fondée sur les principes du droit administratif?*

100 While I have concluded that the respondent is not entitled to a remedy under the *Charter*, I must still address the issue of whether the respondent is entitled to a remedy under principles of administrative law. This issue was pleaded before Lowry J. of the British Columbia Supreme Court. Counsel

Bien que j'aie conclu que l'intimé n'a droit à aucune réparation fondée sur la *Charte*, il me reste à déterminer s'il a droit à une réparation fondée sur les principes du droit administratif. La question a été débattue devant le juge Lowry de la Cour suprême de la Colombie-Britannique. À l'au-

TAB 44

City of Calgary *Appellant/Respondent on cross-appeal*

v.

ATCO Gas and Pipelines Ltd. *Respondent/ Appellant on cross-appeal*

and

**Alberta Energy and Utilities Board,
Ontario Energy Board, Enbridge Gas
Distribution Inc. and Union
Gas Limited** *Intervenors*

**INDEXED AS: ATCO GAS AND PIPELINES LTD. v.
ALBERTA (ENERGY AND UTILITIES BOARD)**

Neutral citation: 2006 SCC 4.

File No.: 30247.

2005: May 11; 2006: February 9.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law — Boards and tribunals — Regulatory boards — Jurisdiction — Doctrine of jurisdiction by necessary implication — Natural gas public utility applying to Alberta Energy and Utilities Board to approve sale of buildings and land no longer required in supplying natural gas — Board approving sale subject to condition that portion of sale proceeds be allocated to ratepaying customers of utility — Whether Board had explicit or implicit jurisdiction to allocate proceeds of sale — If so, whether Board's decision to exercise discretion to protect public interest by allocating proceeds of utility asset sale to customers reasonable — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

Administrative law — Judicial review — Standard of review — Alberta Energy and Utilities Board — Standard

Ville de Calgary *Appelante/Intimée au pourvoi incident*

c.

ATCO Gas and Pipelines Ltd. *Intimée/ Appelante au pourvoi incident*

et

**Alberta Energy and Utilities Board,
Commission de l'énergie de l'Ontario,
Enbridge Gas Distribution Inc. et
Union Gas Limited** *Intervenantes*

**RÉPERTORIÉ : ATCO GAS AND PIPELINES LTD. c.
ALBERTA (ENERGY AND UTILITIES BOARD)**

Référence neutre : 2006 CSC 4.

N° du greffe : 30247.

2005 : 11 mai; 2006 : 9 février.

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

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

Droit administratif — Organismes et tribunaux administratifs — Organismes de réglementation — Compétence — Doctrine de la compétence par déduction nécessaire — Demande présentée à l'Alberta Energy and Utilities Board par un service public de gaz naturel pour obtenir l'autorisation de vendre des bâtiments et un terrain ne servant plus à la fourniture de gaz naturel — Autorisation accordée à la condition qu'une partie du produit de la vente soit attribuée aux clients du service public — L'organisme avait-il le pouvoir exprès ou tacite d'attribuer le produit de la vente? — Dans l'affirmative, sa décision d'exercer son pouvoir discrétionnaire de protéger l'intérêt public en attribuant aux clients une partie du produit de la vente était-elle raisonnable? — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

Droit administratif — Contrôle judiciaire — Norme de contrôle — Alberta Energy and Utilities Board

50

Consequently, a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation (see Sullivan, at pp. 154-55). In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1756:

The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

51

The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

Le pouvoir discrétionnaire que le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA confèrent à la Commission n'est donc pas absolu. Comme le dit ATCO, la Commission doit l'exercer en respectant le cadre législatif et les principes généralement applicables en matière de réglementation, dont le législateur est présumé avoir tenu compte en adoptant ces lois (voir Sullivan, p. 154-155). Dans le même ordre d'idées, le passage suivant de l'arrêt *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722, p. 1756, se révèle pertinent :

Les pouvoirs d'un tribunal administratif doivent évidemment être énoncés dans sa loi habilitante, mais ils peuvent également découler implicitement du texte de la loi, de son économie et de son objet. Bien que les tribunaux doivent s'abstenir de trop élargir les pouvoirs de ces organismes de réglementation par législation judiciaire, ils doivent également éviter de les rendre stériles en interprétant les lois habilitantes de façon trop formaliste.

Il incombe à notre Cour de déterminer l'intention du législateur et d'y donner effet (*Bell ExpressVu*, par. 62) sans franchir la ligne qui sépare l'interprétation judiciaire de la formulation législative (voir *R. c. McIntosh*, [1995] 1 R.C.S. 686, par. 26; *Bristol-Myers Squibb Co.*, par. 174). Cela dit, cette règle permet l'application de « la doctrine de la compétence par déduction nécessaire » : sont compris dans les pouvoirs conférés par la loi habilitante non seulement ceux qui y sont expressément énoncés, mais aussi, par déduction, tous ceux qui sont de fait nécessaires à la réalisation de l'objectif du régime législatif : voir Brown, p. 2-16.2; *Bell Canada*, p. 1756. Par le passé, les cours de justice canadiennes ont appliqué la doctrine de manière à investir les organismes administratifs de la compétence nécessaire à l'exécution de leur mandat légal :

[TRADUCTION] Lorsque l'objet de la législation est de créer un vaste cadre réglementaire, le tribunal administratif doit posséder les pouvoirs qui, par nécessité pratique et déduction nécessaire, découlent du pouvoir réglementaire qui lui est expressément conféré.

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174).

I understand the City's arguments to be as follows: (1) the customers acquire a right to the property of the owner of the utility when they pay for the service and are therefore entitled to a return on the profits made at the time of the sale of the property; and (2) the Board has, by necessity, because of its jurisdiction to approve or refuse to approve the sale of utility assets, the power to allocate the proceeds of the sale as a condition of its order. The doctrine of jurisdiction by necessary implication is at the heart of the City's second argument. I cannot accept either of these arguments which are, in my view, diametrically contrary to the state of the law. This is revealed when we scrutinize the entire context which I will now endeavour to do.

After a brief review of a few historical facts, I will probe into the main function of the Board, rate setting, and I will then explore the incidental powers which can be derived from the context.

2.3.3.1 *Historical Background and Broader Context*

The history of public utilities regulation in Alberta originated with the creation in 1915 of the Board of Public Utility Commissioners by *The Public Utilities Act*, S.A. 1915, c. 6. This statute was based on similar American legislation: H. R. Milner, "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101, at p. 101. While the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue.

Pursuant to *The Public Utilities Act*, the first public utility board was established as a

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (H.C. Ont.), p. 658-659, conf. par (1983), 42 O.R. (2d) 731 (C.A.) (voir également *Interprovincial Pipe Line Ltd. c. Office national de l'énergie*, [1978] 1 C.F. 601 (C.A.); *Ligue de la radiodiffusion canadienne c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1983] 1 C.F. 182 (C.A.), conf. par [1985] 1 R.C.S. 174).

Voici quelles sont selon moi les prétentions de la Ville : (1) en acquittant leurs factures, les clients acquièrent un droit sur les biens du propriétaire du service public et ont donc droit à une partie du profit tiré de leur vente; (2) le pouvoir de la Commission d'autoriser ou non la vente des biens d'un service public emporte, par nécessité, celui d'assujettir l'autorisation à une certaine répartition du produit de la vente. La doctrine de la compétence par déduction nécessaire est au cœur de la deuxième prétention de la Ville. Je ne peux faire droit ni à l'une ni à l'autre de ces prétentions qui, à mon avis, sont diamétralement contraires au droit applicable, comme le révèle ci-après l'examen du contexte global.

Après un bref rappel historique, je me pencherai sur la principale fonction de la Commission, l'établissement des tarifs, puis sur les pouvoirs accessoires qui peuvent être déduits du contexte.

2.3.3.1 *Historique et contexte général*

Les services publics sont réglementés en Alberta depuis la création en 1915 de l'organisme appelé Board of Public Utility Commissioners en vertu de la loi intitulée *The Public Utilities Act*, S.A. 1915, ch. 6, inspirée d'une loi américaine similaire : H. R. Milner, « Public Utility Rate Control in Alberta » (1930), 8 *R. du B. can.* 101, p. 101. Bien qu'il faille aborder avec circonspection la jurisprudence et la doctrine américaines dans ce domaine — les régimes politiques des États-Unis et du Canada étant fort différents, tout comme leurs régimes de droit constitutionnel —, elles éclairent la question.

Suivant *The Public Utilities Act*, la première commission des services publics, composée de

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TAB 45

Slaight Communications Incorporated
(operating as Q107 FM Radio) *Appellant*

v.

Ron Davidson *Respondent*

INDEXED AS: SLAIGHT COMMUNICATIONS INC. v.
DAVIDSON

File No.: 19412.

1987: October 8; 1989: May 4.

Present: Dickson C.J. and Beetz, Lamer, Wilson,
Le Dain*, La Forest and L'Heureux-Dubé JJ.

ON APPEAL FROM THE FEDERAL COURT OF
APPEAL

Constitutional law — Charter of Rights — Freedom of expression — Adjudicator ordering employer to give unjustly dismissed employee letter of recommendation with specified content — Adjudicator also ordering employer to answer request for information about employee only by sending letter — Whether orders infringe employer's freedom of expression guaranteed by s. 2(b) of Canadian Charter of Rights and Freedoms — If so, whether limitation on freedom of expression justifiable under s. 1 of Charter — Canada Labour Code, R.S.C. 1970, c. L-1, s. 61.5(9)(c).

Labour relations — Unjust dismissal — Jurisdiction of adjudicator — Adjudicator ordering employer to give unjustly dismissed employee letter of recommendation with specified content — Adjudicator also ordering employer to answer request for information about employee only by sending letter — Whether s. 61.5(9)(c) of Canada Labour Code authorizes adjudicator to make such orders — Whether orders infringe employer's freedom of expression guaranteed by s. 2(b) of Canadian Charter of Rights and Freedoms — If so, whether limitation on freedom of expression justifiable under s. 1 of Charter — Whether orders unreasonable in administrative law sense.

Respondent had been employed by appellant as a "radio time salesman" for three and a half years when he was dismissed on the ground that his performance

* Le Dain J. took no part in the judgment.

Slaight Communications Incorporated
(exploitée sous le nom de station de radio
Q107 FM) *Appelante*

c.

Ron Davidson *Intimé*

RÉPERTORIÉ: SLAIGHT COMMUNICATIONS INC. c.
DAVIDSON

N° du greffe: 19412.

1987: 8 octobre; 1989: 4 mai.

Présents: Le juge en chef Dickson et les juges Beetz,
Lamer, Wilson, Le Dain *, La Forest et

L'Heureux-Dubé.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Liberté d'expression — Arbitre ordonnant à l'employeur de remettre à l'employé congédié injustement une lettre de recommandation ayant un contenu déterminé — Arbitre ordonnant également à l'employeur de ne répondre à une demande de renseignements concernant l'employé que par l'envoi de cette lettre — Les ordonnances portent-elles atteinte à la liberté d'expression de l'employeur garantie par l'art. 2b) de la Charte canadienne des droits et libertés — Dans l'affirmative, la restriction à la liberté d'expression est-elle justifiable en vertu de l'article premier de la Charte — Code canadien du travail, S.R.C. 1970, chap. L-1, art. 61.5(9)(c).

Relations de travail — Congédiement injuste — Juridiction de l'arbitre — Arbitre ordonnant à l'employeur de remettre à l'employé congédié injustement une lettre de recommandation ayant un contenu déterminé — Arbitre ordonnant également à l'employeur de ne répondre à une demande de renseignements concernant l'employé que par l'envoi de cette lettre — L'article 61.5(9)(c) du Code canadien du travail autorise-t-il l'arbitre à rendre de telles ordonnances? — Les ordonnances portent-elles atteinte à la liberté d'expression de l'employeur garantie par l'art. 2b) de la Charte canadienne des droits et libertés — Dans l'affirmative, la restriction à la liberté d'expression est-elle justifiable en vertu de l'article premier de la Charte — Les ordonnances sont-elles déraisonnables au sens du droit administratif?

L'intimé était à l'emploi de l'appelante à titre de «vendeur de temps d'antenne» depuis trois ans et demi lorsqu'il a été congédié au motif que son rendement était

* Le juge Le Dain n'a pas pris part au jugement.

Resolution of the problem involves (1) the construction and the true meaning and effect of para. (c), (2) whether the adjudicator's order in this case infringed freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and (3) if so, whether the infringement is justified under s. 1 of the *Charter*.

Two constitutional questions were stated in this appeal as follows:

1. Do the provisions of the adjudicator's order, pursuant to s. 61.5(9) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended, whereby the appellant was ordered to provide the respondent with a letter of recommendation of specified content combined with the further stipulation that any communication to the appellant relating to the respondent's employment with the appellant be answered exclusively by sending or delivering a copy of the letter of recommendation, infringe or deny the rights and freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*?
2. If the provisions of the adjudicator's order infringe or deny the rights and freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*, are they justified by s. 1 of the *Charter* and therefore not inconsistent with the *Constitution Act, 1982*?

II

The Relationship Between Administrative Law Review and Review Under the Charter

I have had the benefit of reading the opinion of Justice Lamer and I am in complete agreement with his discussion of the applicability of the *Charter* to administrative decision-making. I also agree with his conclusion that the positive order made by adjudicator Joliffe (to draw up and to give the respondent a specified letter of reference) infringes s. 2(b) of the *Charter* but is saved by s. 1. However, with regard to the negative order (that any inquiry about the respondent's employment at Q107 be answered exclusively by the letter of reference which is the subject of the positive order), I must respectfully disagree with the conclusion of Lamer J. that it is patently unreasonable, thereby obviating the need to consider the *Charter*. Furthermore, not only am I of the view that the negative order is reasonable in

La solution du problème est fonction (1) de l'interprétation et du sens et de l'effet véritables de l'al. c), (2) de la question de savoir si l'ordonnance de l'arbitre en l'espèce viole la liberté d'expression garantie à l'al. 2b) de la *Charte canadienne des droits et libertés*, et (3) dans l'affirmative, de la question de savoir si la violation est justifiée en vertu de l'article premier de la *Charte*.

Deux questions constitutionnelles ont été formulées en l'espèce:

1. Les dispositions de l'ordonnance de l'arbitre, rendue conformément au par. 61.5(9) du *Code canadien du travail*, S.R.C. 1970, chap. L-1 et ses modifications, par lesquelles on a ordonné à la requérante de fournir à l'intimé une lettre de recommandation à contenu spécifié assortie de l'obligation supplémentaire de répondre exclusivement aux demandes de renseignements au sujet de l'emploi de l'intimé en envoyant ou en remettant une copie de la lettre de recommandation, violent-elles ou nient-elles les droits et libertés garantis par l'al. 2b) de la *Charte canadienne des droits et libertés*?
2. Si les dispositions de l'ordonnance de l'arbitre violent ou nient les droits et libertés garantis par l'al. 2b) de la *Charte canadienne des droits et libertés*, sont-elles justifiées par l'article premier de la *Charte* et donc compatibles avec la *Loi constitutionnelle de 1982*?

II

Le rapport entre le contrôle en matière de droit administratif et l'examen fondé sur la Charte

J'ai pris connaissance de l'opinion exprimée par le juge Lamer et je suis parfaitement d'accord avec son analyse de l'applicabilité de la *Charte* au processus décisionnel administratif. Je suis également d'accord avec sa conclusion que l'ordonnance positive rendue par l'arbitre Joliffe (celle de rédiger une lettre de recommandation à contenu spécifié et de la remettre à l'intimé) viole l'al. 2b) de la *Charte*, mais qu'elle est sauvegardée par l'article premier. Toutefois, pour ce qui est de l'ordonnance négative (celle de répondre exclusivement aux demandes de renseignements au sujet de l'emploi de l'intimé à la station Q107 en envoyant la lettre de recommandation visée par l'ordonnance positive), je me vois, en toute déférence, dans l'obligation d'exprimer mon désaccord avec la conclusion du juge Lamer selon laquelle elle est manifeste-

the administrative law sense but I also believe that it is reasonable and demonstrably justified in the sense of s. 1 of the *Charter*.

I agree with Mahoney J. of the Federal Court of Appeal, at pp. 260-61, that:

The ordering of provision of a totally factual letter of recommendation and foreclosing the undermining of its effect which, in the circumstances disclosed by the evidence, was patently foreseeable, seems to me to be an equitable remedial requirement. It is not punitive. It is appropriate redress to the wronged employee without, in any way, injuring the employer. In my view, the order was authorized by paragraph 61.5(9)(c).

The precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases. A few comments nonetheless may be in order. A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact (see *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, at pp. 494-95), in the realm of value inquiry the courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*. In contrast to s. 1, patent unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis. It seems to me that had Lamer J. gone on to conduct a s. 1 inquiry, his excellent analysis of the contending values in the context of the positive order would have been equally applicable to the negative order which he has instead found to be patently unreasonable.

ment déraisonnable, ce qui pare à la nécessité d'examiner la *Charte*. De plus, j'estime non seulement que l'ordonnance négative est raisonnable au sens du droit administratif, mais aussi qu'elle est raisonnable et que sa justification peut se démontrer au sens de l'article premier de la *Charte*.

Je souscris aux propos tenus par le juge Mahoney de la Cour d'appel fédérale dans l'arrêt précité, aux pp. 260 et 261:

Le fait d'ordonner l'envoi d'une lettre de recommandation portant uniquement sur des faits et d'empêcher que son effet ne soit sapé, éventuellement manifestement prévisible dans les circonstances révélées par la preuve, me semble être un redressement équitable et non punitif. Il s'agit d'un redressement approprié accordé à l'employé lésé et qui ne porte d'aucune façon préjudice à l'employeur. À mon avis, l'alinéa 61.5(9)(c) autorisait l'ordonnance.

Le rapport précis entre la norme traditionnelle de contrôle, en droit administratif, du caractère déraisonnable manifeste et la nouvelle norme constitutionnelle de contrôle va se dégager de la jurisprudence à venir. Néanmoins, il y a lieu de faire quelques commentaires. Une proposition minimale semblerait être que la norme préliminaire de contrôle que représente le caractère déraisonnable en droit administratif ne devrait pas imposer au gouvernement une norme plus exigeante que ne le ferait l'examen fondé sur la *Charte*. Certes, il importe de maintenir la norme du caractère déraisonnable manifeste pour les questions non touchées par la *Charte*, telles que le contrôle des conclusions de fait (voir *Blanchard c. Control Data Canada Ltée*, [1984] 2 R.C.S. 476, aux pp. 494 et 495); mais, en matière d'examen des valeurs, les tribunaux devraient recourir à cette norme seulement dans les cas les plus évidents où une décision ne saurait être justifiée en vertu de l'article premier de la *Charte*. Par opposition à l'article premier, le caractère déraisonnable manifeste repose, dans une large mesure, sur des valeurs ambiguës et non établies et n'a pas le même degré de structure et de subtilité d'analyse. À mon avis, si le juge Lamer avait procédé à un examen fondé sur l'article premier, son excellente analyse des valeurs opposées dans le contexte de l'ordonnance positive aurait été également applicable à l'ordonnance négative qu'il a plutôt jugée manifestement déraisonnable.

In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal.

In the case at bar I consider that the adjudicator was not authorized by s. 61.5(9)(c) to order the employer not to answer a request for information about respondent except by sending the letter of recommendation containing the aforementioned wording, since such an order is patently unreasonable. Though the adjudicator clearly had jurisdiction to make an order he felt to be equitable and proper, he lost this jurisdiction when he made a patently unreasonable decision.

Appellant further argued that s. 61.5(9)(c) did not empower the adjudicator to make such an order, since that paragraph does not clearly state that the adjudicator can use a remedy that differs from the remedies usually available under the ordinary rules of common law in such circumstances. The principle underlying this argument is that, in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law. There is no need for me to rule on the merits of this principle, since I consider that in the case at bar, by enacting para. (c), the legislator clearly indicated his intent to confer wider powers on the adjudicator than those he usually has under the ordinary rules of common law in such circumstances.

It now remains to assess in light of the *Canadian Charter of Rights and Freedoms* the part of the order we have found to be not unreasonable in terms of the rules of administrative law. The fact that the part of the order relating to sending the letter of recommendation is not unreasonable from an administrative law standpoint does not mean that it is necessarily consistent with the *Charter*.

The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers

En conclusion, une détermination déraisonnable, quelle qu'en soit la source, porte atteinte à la juridiction du tribunal.

a En l'espèce, je suis d'avis que l'arbitre n'était pas autorisé, aux termes de l'al. 61.5(9)c), à ordonner à l'employeur de ne répondre à une demande de renseignements relative à l'intimé que par l'envoi de la lettre de références contenant le b texte précité puisqu'une telle ordonnance est manifestement déraisonnable. Quoique l'arbitre avait c clairement juridiction pour rendre une ordonnance qu'il jugeait équitable et appropriée, il a perdu cette juridiction en rendant une décision manifestement déraisonnable.

L'appelante prétend également que l'al. 61.5(9)c) ne permettait pas à l'arbitre de rendre une telle ordonnance puisque cet alinéa n'indique d pas clairement que l'arbitre peut utiliser un remède qui diffère des remèdes habituellement disponibles en vertu des règles de droit commun dans des circonstances similaires. Le principe à la e base de cet argument est celui selon lequel le législateur n'est pas censé, à défaut de disposition claire au contraire, avoir l'intention de modifier les règles de droit commun pré-existantes. Il n'est pas nécessaire de me prononcer sur la justesse de ce f principe puisqu'en l'espèce je suis d'avis que le législateur, en édictant l'al. c), a clairement indiqué son intention de conférer à l'arbitre des pouvoirs plus larges que ceux qui lui sont habituellement dévolus, dans des circonstances similaires, g par les règles de droit commun.

Il reste maintenant à soumettre au contrôle de la *Charte canadienne des droits et libertés* cette partie de l'ordonnance que nous avons jugée non h déraisonnable eu égard aux principes de droit administratif. Le fait que cette partie de l'ordonnance relative à l'envoi de la lettre de références ne soit pas déraisonnable au sens du droit administratif ne signifie pas, en effet, qu'elle est nécessairement conciliable avec la *Charte*. i

Le fait que la *Charte* s'applique à l'ordonnance rendue par l'arbitre en l'espèce ne fait, à mon avis, j aucun doute. L'arbitre est en effet une créature de la loi; il est nommé en vertu d'une disposition législative et tire tous ses pouvoirs de la loi. La

from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1.

1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. This idea was very well expressed by Professor Hogg when he wrote in his text titled *Constitutional Law of Canada* (2nd ed. 1985), at p. 671:

The reference in s. 32 to the "Parliament" and a "legislature" make clear that the *Charter* operates as a limitation on the powers of those legislative bodies. Any statute enacted by either Parliament or a Legislature which is inconsistent with the *Charter* will be outside the power of (*ultra vires*) the enacting body and will be invalid. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the *Charter*. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the *Charter*, neither body can authorize action which would be in breach of the *Charter*. Thus, the limitations on statutory authority which are imposed by the *Charter* will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, adminis-

Constitution étant la loi suprême du pays et rendant inopérantes les dispositions incompatibles de toute autre règle de droit, il est impossible d'interpréter une disposition législative attributrice de discrétion comme conférant le pouvoir de violer la *Charte* à moins, bien sûr, que ce pouvoir soit expressément conféré ou encore qu'il soit nécessairement implicite. Une telle interprétation nous obligerait en effet, à défaut de pouvoir justifier cette disposition législative aux termes de l'article premier, à la déclarer inopérante. Or, quoique cette Cour ne doive pas ajouter ou retrancher un élément à une disposition législative de façon à la rendre conforme à la *Charte*, elle ne doit pas par ailleurs interpréter une disposition législative, susceptible de plus d'une interprétation, de façon à la rendre incompatible avec la *Charte* et, de ce fait, inopérante. Une disposition législative conférant une discrétion imprécise doit donc être interprétée comme ne permettant pas de violer les droits garantis par la *Charte*. En conséquence, un arbitre exerçant des pouvoirs délégués n'a pas le pouvoir de rendre une ordonnance entraînant une violation de la *Charte* et il excède sa juridiction s'il le fait. Le professeur Hogg a très bien exprimé cette idée lorsqu'il a écrit dans son volume intitulé *Constitutional Law of Canada* (2^e éd. 1985), à la p. 671:

[TRADUCTION] La mention du «Parlement» et d'une «législature» à l'art. 32 montre clairement que la *Charte* agit comme une limite aux pouvoirs de ces organes législatifs. Tout texte de loi adopté par le Parlement ou une législature, qui est incompatible avec la *Charte* excédera les pouvoirs (sera *ultra vires*) de l'organisme qui l'a adopté et sera invalide. Il s'ensuit que tout organisme qui exerce un pouvoir statutaire, par exemple le gouverneur en conseil, le lieutenant-gouverneur en conseil, les ministres, les fonctionnaires, les municipalités, les commissions scolaires, les universités, les tribunaux administratifs, les officiers de police, est également lié par la *Charte*. Les mesures prises en vertu d'un pouvoir statutaire ne sont valides que si elles se situent à l'intérieur de la portée de ce pouvoir. Puisque ni le Parlement ni une législature ne peuvent eux-mêmes adopter une loi qui contrevient à la *Charte*, ni l'un ni l'autre ne peuvent autoriser des mesures qui contreviendraient à la *Charte*. Ainsi, les limites que la *Charte* impose à un pouvoir statutaire s'étendront à la famille des autres pouvoirs statutaires et s'appliqueront aux règlements, aux statuts, aux ordonnances, aux décisions et à toutes les autres mesures (législatives, administrati-

trative or judicial) which depends for its validity on statutory authority.

Section 61.5(9)(c) must therefore be interpreted as conferring on the adjudicator a power to require the employer to do any other thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal, provided however that such an order, if it limits a protected right or freedom, only does so within reasonable limits that can be demonstrably justified in a free and democratic society. It is only if the limitation on a right or freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the *Charter*. The *Charter* does not provide an absolute guarantee of the rights and freedoms mentioned in it. What it guarantees is the right to have such rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. There is thus no reason not to ascribe to Parliament an intent to limit a right or freedom mentioned in the *Charter* or to allow a protected right or freedom to be limited when the language used by Parliament suggests this.

It would be useful, in my view, to describe the steps that must be taken to determine the validity of an order made by an administrative tribunal, which are as follows.

First, there are two important principles that must be borne in mind:

- an administrative tribunal may not exceed the jurisdiction it has by statute; and
- it must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication.

The application of these two principles to the exercise of a discretion leads to one of the following two situations:

ves ou judiciaires) dont la validité dépend d'un pouvoir statutaire.

Il faut donc interpréter l'al. 61.5(9)c) comme conférant à l'arbitre le pouvoir de requérir l'employeur de faire toute autre chose qu'il juge équitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier sous réserve toutefois que cette ordonnance, si elle restreint un droit ou une liberté protégés, ne les restreigne que dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique. Ce n'est en effet que si la restriction apportée à un droit ou à une liberté n'est pas contenue dans des limites qui soient raisonnables et justifiables que l'on peut parler de violation de la *Charte*. La *Charte* ne garantit pas d'une façon absolue les droits et les libertés qu'elle énonce. Elle garantit plutôt le droit de ne pas voir ces droits ou ces libertés restreints autrement 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. Rien ne s'oppose donc à ce que l'on impute au Parlement, lorsque les termes qu'il emploie le laissent croire, l'intention de restreindre un droit ou une liberté énoncés dans la *Charte* ou de permettre qu'un droit ou une liberté protégés soient restreints.

Il me semble utile de décrire la démarche qui doit être effectuée afin de déterminer la validité d'une ordonnance prononcée par un tribunal administratif de la façon suivante.

Il faut tout d'abord garder en vue l'existence de deux principes importants:

- un tribunal administratif ne peut excéder la compétence qui lui est dévolue par la loi; et
- il faut présumer qu'un texte législatif attribuant une discrétion imprecise ne confère pas le pouvoir de violer la *Charte* à moins que ce pouvoir ne soit expressément conféré ou qu'il le soit par implication nécessaire.

L'application de ces deux principes à l'exercice d'une discrétion nous mène alors à l'une ou l'autre des situations suivantes:

TAB 46

**Société des Acadiens et Acadiennes du
Nouveau-Brunswick Inc.** *Appellant*

v.

Her Majesty The Queen *Respondent*

- and -

Marie-Claire Paulin *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Attorney General of New Brunswick and
Commissioner of Official Languages of
Canada** *Interveners*

**INDEXED AS: SOCIÉTÉ DES ACADIENS ET
ACADIENNES DU NOUVEAU-BRUNSWICK INC. v.
CANADA**

Neutral citation: 2008 SCC 15.

File No.: 31583.

2007: October 17; 2008: April 11.*

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

ON APPEAL FROM THE FEDERAL COURT OF
APPEAL

*Constitutional law — Charter of Rights — Language
rights — Communications by public with New Brun-
swick institutions — Royal Canadian Mounted Police
acting as provincial police force in New Brunswick
under agreement between federal and provincial gov-
ernments — Whether Royal Canadian Mounted Police
required to fulfil language obligations imposed on New*

* An application for a rehearing was dismissed on June 26, 2008. The judgment on this application amended para. 27 of both versions of the reasons. The amendment is included in these reasons.

**Société des Acadiens et Acadiennes du
Nouveau-Brunswick Inc.** *Appelante*

c.

Sa Majesté la Reine *Intimée*

- et -

Marie-Claire Paulin *Appelante*

c.

Sa Majesté la Reine *Intimée*

et

**Procureur général du Nouveau-Brunswick
et Commissaire aux langues officielles du
Canada** *Intervenants*

**RÉPERTORIÉ : SOCIÉTÉ DES ACADIENS ET
ACADIENNES DU NOUVEAU-BRUNSWICK INC. c.
CANADA**

Référence neutre : 2008 CSC 15.

N° du greffe : 31583.

2007 : 17 octobre; 2008 : 11 avril*.

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

*Droit constitutionnel — Charte des droits — Droits
linguistiques — Communications entre les administrés
et les institutions du Nouveau-Brunswick — Gendar-
merie royale du Canada jouant le rôle de service de
police provincial au Nouveau-Brunswick en vertu d'une
entente conclue par le fédéral et la province — La Gen-
darmerie royale du Canada est-elle tenue de respecter*

* Une requête en nouvelle audition a été rejetée le 26 juin 2008. Le jugement rejetant cette requête a modifié le par. 27 des deux versions des motifs. La modification a été incorporée dans les présents motifs.

obligations in this way. However, it did not rule on the obligations of Ontario officers performing duties under the agreement with the federal government.

[18] In the instant case, there is no transfer of responsibility for the administration of justice in the province. Under the Agreement between the RCMP and New Brunswick, the New Brunswick Minister of Justice is responsible for setting “the objectives, priorities and goals of the Provincial Police Service” (art. 3.3). The Minister determines the level of service to be provided. The respondent acknowledges, at para. 62 of her factum, that — as the Federal Court observed (para. 39) — New Brunswick retains control over the RCMP’s policing activities. The RCMP remains responsible for internal management only (art. 3.1(a)). What must be concluded from this situation is that the institution in question is an institution of the New Brunswick government, that is, its Minister of Justice, and that the Minister discharges his or her constitutional obligations through the RCMP members designated as New Brunswick peace officers by the provincial legislation. The provision of services by the RCMP must therefore be consistent with the obligations arising under s. 20(2) of the *Charter*.

[19] The RCMP does not act as a separate federal institution in administering justice in New Brunswick; it assumes, by way of contract, obligations related to the policing function. The content of this function is set out in provincial legislation. Thus, in New Brunswick, the RCMP exercises a statutory power — which flows not only from federal legislation but also from New Brunswick legislation — through its members, who work under the authority of the New Brunswick government.

[20] Regard must also be had to the fact that the functions for which the RCMP is responsible in the instant case are government functions that are subject to specific constitutional obligations. The

conclu que le gouvernement fédéral ne pouvait pas se décharger de ses obligations constitutionnelles de cette manière. Elle ne s’est pas toutefois prononcée sur les obligations des agents ontariens dans l’exécution des fonctions découlant de l’entente avec le gouvernement fédéral.

[18] Dans le cas présent, il n’y a pas de transfert de responsabilité à l’égard de l’administration de la justice dans la province. L’entente qui lie la GRC et le Nouveau-Brunswick confie au ministre de la Justice du Nouveau-Brunswick le soin d’établir « les objectifs, les priorités et les buts du Service de police provincial » (art. 3.3). C’est le ministre qui détermine le niveau de services fournis. L’intimée reconnaît, au par. 62 de son mémoire, que le Nouveau-Brunswick garde la maîtrise des activités de police de la GRC, comme l’a constaté la Cour fédérale (par. 39). La GRC conserve la responsabilité sur la gestion interne seulement (par. 3.1a)). Ce qu’il faut conclure de cet état de fait, c’est que l’institution en cause est une institution du gouvernement du Nouveau-Brunswick, son ministre de la Justice notamment, et que celui-ci remplit ses obligations constitutionnelles par l’entremise des membres de la GRC que les lois provinciales désignent comme agents de la paix du Nouveau-Brunswick. La fourniture de services par la GRC doit donc être conforme aux obligations découlant du par. 20(2) de la *Charte*.

[19] La GRC n’agit pas comme institution fédérale distincte pour l’administration de la justice au Nouveau-Brunswick; elle assume par contrat les obligations qui sont reliées à la fonction de service de police. Cette fonction est précisée dans les lois provinciales. La GRC exerce donc au Nouveau-Brunswick un pouvoir d’origine législative — qui découle non seulement de la législation fédérale, mais aussi des lois du Nouveau-Brunswick — par le truchement de ses membres qui travaillent sous l’autorité du gouvernement du Nouveau-Brunswick.

[20] Il faut aussi tenir compte du fait que les fonctions prises en charge par la GRC en l’instance sont des fonctions gouvernementales assujetties à des obligations constitutionnelles spécifiques. La

RCMP may not take on such functions without assuming the obligations associated with them. This principle was articulated by Lamer J. (dissenting on other grounds) in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1077-78:

The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. . . . Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. [Emphasis added; emphasis in original deleted.]

[21] Professor Hogg added the following in *Constitutional Law of Canada* (5th ed. 2007), vol. 2, at pp. 86-87:

Where the Parliament or a Legislature has delegated a power of compulsion to a body or person, then the Charter will apply to the delegate.

. . .

. . . it is the exercise of a power of compulsion that makes the Charter applicable to bodies exercising statutory authority. [Emphasis added.]

[22] These comments correspond to the view of Gauthier J., the trial judge in the case at bar, who stated the following on this point at paras. 39-40 of her reasons:

As Peter Hogg said in *Constitutional Law of Canada*, 4th edition, at page 514, the performance of provincial and municipal police services under a contract between the RCMP and a province is authorized by a statute of the province . . . and by a federal statute . . . and derives in part from the province's power to administer justice under subsection 92(14) of the *Constitution Act, 1867* . . .

GRC ne peut assumer ces fonctions sans assumer les obligations qui s'y rattachent. Ce principe a été exprimé par le juge Lamer (dissident sur d'autres points) dans *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, p. 1077-1078 :

Le fait que la *Charte* s'applique à l'ordonnance rendue par l'arbitre en l'espèce ne fait, à mon avis, aucun doute. L'arbitre est en effet une créature de la loi; il est nommé en vertu d'une disposition législative et tire tous ses pouvoirs de la loi. La Constitution étant la loi suprême du pays et rendant inopérantes les dispositions incompatibles de toute autre règle de droit, il est impossible d'interpréter une disposition législative attributrice de discrétion comme conférant le pouvoir de violer la *Charte* à moins, bien sûr, que ce pouvoir soit expressément conféré ou encore qu'il soit nécessairement implicite. [. . .] Une disposition législative conférant une discrétion imprécise doit donc être interprétée comme ne permettant pas de violer les droits garantis par la *Charte*. En conséquence, un arbitre exerçant des pouvoirs délégués n'a pas le pouvoir de rendre une ordonnance entraînant une violation de la *Charte* et il excède sa juridiction s'il le fait. [Je souligne; soulignement dans l'original omis.]

[21] Aux pages 86 et 87 de son ouvrage *Constitutional Law of Canada* (5^e éd. 2007), vol. 2, le professeur Hogg ajoute pour sa part :

[TRADUCTION] Lorsque le Parlement ou une législature a délégué un pouvoir de contrainte à un organisme ou à une personne, la Charte s'applique au délégué.

. . .

. . . c'est parce qu'ils mettent en œuvre un pouvoir de contrainte que la Charte s'applique aux organismes exerçant un pouvoir d'origine législative. [Je souligne.]

[22] Ces remarques correspondent à l'avis de la juge Gauthier, qui s'exprime sur ce point aux par. 39-40 de ses motifs en première instance dans la présente affaire :

Comme l'indique Peter Hogg dans *Constitutional Law of Canada*, 4^e édition, à la page 514, la prestation des services de police provinciaux et municipaux en vertu d'un contrat entre la GRC et une province, est autorisé par un statut de la province [. . .] de même que par un statut fédéral [. . .] et découle en partie du pouvoir de la province d'administrer la justice en vertu du paragraphe 92(14) de la *Loi constitutionnelle* de 1867 . . .

TAB 47

1120

LITTLE SISTERS BOOK & ART EMPORIUM v. CANADA

[2000] 2 S.C.R.

Little Sisters Book and Art Emporium, B.C. Civil Liberties Association, James Eaton Deva and Guy Allen Bruce Smythe *Appellants*

v.

The Minister of Justice and Attorney General of Canada, the Minister of National Revenue and the Attorney General of British Columbia *Respondents*

and

The Attorney General for Ontario, the Canadian AIDS Society, the Canadian Civil Liberties Association, the Canadian Conference of the Arts, EGALE Canada Inc., Equality Now, PEN Canada and the Women's Legal Education and Action Fund (LEAF) *Interveners*

INDEXED AS: LITTLE SISTERS BOOK AND ART EMPORIUM v. CANADA (MINISTER OF JUSTICE)

Neutral citation: 2000 SCC 69.

File No.: 26858.

2000: March 16; 2000: December 15.

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 BRITISH COLUMBIA

Constitutional law — Charter of Rights — Freedom of expression — Customs and excise — Importation of obscene goods — Customs legislation providing for interception and exclusion of obscene goods and setting out administrative review process — Legislation placing onus on importer to establish that goods are not obscene — Gay and lesbian bookstore importing erotica from United States — Customs officials wrongly delaying, confiscating or prohibiting materials imported by bookstore on numerous occasions — Whether Customs legislation infringes freedom of expression — If so, whether infringement justifiable — Canadian Charter of Rights

Little Sisters Book and Art Emporium, B.C. Civil Liberties Association, James Eaton Deva et Guy Allen Bruce Smythe *Appelants*

c.

Le ministre de la Justice et procureur général du Canada, le ministre du Revenu national et le procureur général de la Colombie-Britannique *Intimés*

et

Le procureur général de l'Ontario, la Société canadienne du SIDA, l'Association canadienne des libertés civiles, la Conférence canadienne des arts, EGALE Canada Inc., Equality Now, PEN Canada et le Fonds d'action et d'éducation juridiques pour les femmes *Intervenants*

RÉPERTORIÉ: LITTLE SISTERS BOOK AND ART EMPORIUM c. CANADA (MINISTRE DE LA JUSTICE)

Référence neutre: 2000 CSC 69.

N° du greffe: 26858.

2000: 16 mars; 2000: 15 décembre.

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 LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Liberté d'expression — Douanes et accise — Importation de marchandises obscènes — Législation douanière pourvoyant à l'interception et à l'exclusion des marchandises obscènes et établissant un mécanisme de révision administrative — Importateurs tenus par la législation douanière de prouver que les marchandises ne sont pas obscènes — Importation de matériel érotique des États-Unis par une librairie gaie et lesbienne — Nombreux cas de retenues, confiscations et prohibitions erronées par les fonctionnaires des douanes de marchandises importées par la librairie — La législation douanière

prohibition, but rarely did so in sufficient detail to be informative.

teurs pouvaient décrire par un mot ou deux le motif de la prohibition, mais le faisaient rarement de façon suffisamment détaillée pour renseigner les intéressés.

77 While these complaints have some substance, they address the statutory scheme as *operated* by officials rather than the statutory scheme itself. The Constitution does not prohibit border inspections: *R. v. Simmons*, [1988] 2 S.C.R. 495. Any border inspection may involve detention and, because Customs officials are only human, erroneous determinations. Thus the trial judge found at para. 234 that:

The deleterious effects of the legislation as opposed to the effects of its administration and application, are that admissible material is sometimes detained to be examined for compliance and that wrong decisions are sometimes made in the classification of materials. [Emphasis added.]

I regard such potential as inherent in any border surveillance scheme. Of themselves, they afford no reason to declare the legislation unconstitutional.

Bien que ces plaintes aient un certain fondement, elles concernent le régime législatif tel qu'il est *appliqué* par les fonctionnaires plutôt que le régime législatif lui-même. La Constitution n'interdit pas les inspections frontalières: *R. c. Simmons*, [1988] 2 R.C.S. 495. Toute inspection frontalière est susceptible de donner lieu à la retenue des marchandises concernées. Puisque les agents des douanes ne sont que des êtres humains, ces retenues risquent d'entraîner des décisions erronées. En conséquence, le juge de première instance a tiré la conclusion suivante, au par. 234:

[TRADUCTION] Les effets préjudiciables de la législation, par opposition aux effets de son administration et de son application, sont le fait que du matériel admissible est parfois retenu aux fins de contrôle de sa conformité et que des décisions erronées sont parfois prises dans le classement du matériel. [Je souligne.]

J'estime que de telles situations sont inhérentes à tout régime de surveillance frontalière. En soi, elles ne constituent pas des motifs justifiant de déclarer les mesures législatives inconstitutionnelles.

78 If Parliament can validly prohibit obscenity, and *Butler* held that it had validly done so, the prohibition can be imposed at the border as well as within the country. The only expressive material that Parliament has authorized Customs to prohibit as obscene is material that is, by definition, the subject of criminal penalties for those who are engaged in its production or trafficking (or have possession of it for those purposes). The concern with prior restraint, discussed by my colleague Iacobucci J. at paras. 232 to 236, operates in such circumstances, if at all, with much reduced importance.

Si le Parlement peut valablement prohiber l'obsécénité — et l'arrêt *Butler* a établi qu'il l'avait fait de manière valide — la prohibition peut être prononcée tant aux frontières du pays qu'à l'intérieur de celui-ci. Le seul matériel expressif que le Parlement a permis aux Douanes de prohiber pour cause d'obsécénité est le matériel qui, par définition, entraîne des sanctions pénales pour ceux qui se livrent à sa production ou à son trafic (ou qui en ont leur possession à ces fins). La préoccupation relative aux restrictions préalables, analysée par mon collègue le juge Iacobucci aux par. 232 à 236 de ses motifs, s'applique dans de telles circonstances, si tant est qu'elle s'applique, mais avec beaucoup moins d'acuité.

79 In the Customs context, procedures are inevitably different than in a prosecution for a criminal offence, but I do not read *Butler's* linkage between

En contexte douanier, les procédures suivies diffèrent inévitablement de celles qui le sont dans la poursuite d'une infraction criminelle, mais je ne

vention is found in the definition of obscenity in s. 163(8) of the *Criminal Code*. Section 163(8) is clearly specified in *Customs Tariff Code* 9956 (which my colleague would declare unconstitutional). Dickson J. did not go on to suggest, as does my colleague, that not only the standard but also the procedures attending its exercise must be spelled out in the legislation. If this is correct, there is a great deal of legislation governing *Charter*-sensitive conduct — by the police, for example — that is constitutionally deficient.

tère» ou seuil légal justifiant l'intervention de l'État réside dans la définition d'obscénité énoncée au par. 163(8) du *Code criminel*. Le paragraphe 163(8) est clairement mentionné dans le code 9956 du *Tarif des douanes* (que mon collègue déclarerait inconstitutionnel). Le juge Dickson n'a pas été jusqu'à indiquer, comme le fait mon collègue, que non seulement le critère mais également les procédures relatives à son application doivent être exposés dans la législation. Si c'est le cas, il y a alors beaucoup de textes de loi régissant des activités délicates du point de vue de la *Charte* — exercées par les policiers par exemple — qui sont déficients sur le plan constitutionnel.

131 In *Bain, supra*, the accused challenged the lack of even-handedness in the selection process for a criminal jury. Parliament gave the Crown the ability to stand aside 48 prospective jurors and to challenge 4 jurors peremptorily. The accused in such case had but 12 peremptory challenges, a legislated advantage to the Crown of over 4 to 1. The Crown assured the court that its power would be exercised responsibly but the court considered that the discriminatory law could not be thus salvaged. *Bain* is the opposite of this case. There it was unsuccessfully argued that a discriminatory law was capable of implementation in a neutral fashion. Here the neutral law was found to have been implemented in a discriminatory fashion. The issues are different and the remedy is therefore not the same.

Dans l'affaire *Bain*, précitée, l'accusé contestait le manque d'équité du processus de sélection du jury dans les affaires criminelles. Le Parlement avait donné au ministère public le pouvoir d'écarter 48 candidats jurés et de récuser 4 jurés péremptoirement. Pour sa part, l'accusé n'avait droit qu'à 12 récusations péremptoires, un avantage de plus de 4 contre 1 accordé par la loi au ministère public. Le ministère public a assuré la cour qu'il exercerait son pouvoir de façon responsable, mais la cour a estimé que la validité des dispositions discriminatoires ne pouvait être sauvegardée de cette façon. L'affaire *Bain* est à l'opposé de la présente affaire. Dans *Bain*, on a prétendu sans succès que des dispositions discriminatoires pouvaient être appliquées de façon neutre. En l'espèce, il a été jugé que des dispositions neutres ont été mises en œuvre de manière discriminatoire. Les questions en litige sont différentes, de sorte que la réparation accordée ne sera pas la même.

132 The *Customs Act*, as is the case with most departmental legislation, is rather short on the detail of how the department is actually to be run. This is for good reason. Departmental priorities change and resources rise and fall in response to a moving government agenda. The Minister requires flexibility to determine how the departmental mandate is to be met.

Comme c'est le cas pour la plupart des lois créant un ministère, la *Loi sur les douanes* est plutôt laconique sur la façon dont celui-ci fonctionnera dans les faits. Il y a une bonne raison à cela. Les priorités du ministère changent et les ressources dont il dispose fluctuent au gré du programme du gouvernement. Le ministre a besoin de souplesse pour décider de quelle façon le ministère s'acquittera de sa mission.

133 A large measure of discretion is granted in the administration of the Act, from the level of the Customs official up to the Minister, but it is well

Un large pouvoir discrétionnaire est accordé aux personnes chargées de l'application de la Loi, et ce à tous les niveaux, de l'agent des douanes jusqu'au

established that such discretion must be exercised in accordance with the *Charter* for the reasons articulated by Professor Peter Hogg in *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 34-11:

Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the *Charter*, neither body can authorize action which would be in breach of the *Charter*. Thus, the limitations on statutory authority which are imposed by the *Charter* will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

Where legislation cannot be so construed, as in *Hunter v. Southam, Morgentaler and Bain*, the infringing statutory measure of course must be justified. In this case, however, I think the Customs legislation is quite capable of being applied in a manner consistent with respect for *Charter* rights. I do not agree with my colleague's conclusion (at para. 204) that:

This Court's precedents demand sufficient safeguards in the legislative scheme itself to ensure that government action will not infringe constitutional rights. In the face of an extensive record of unconstitutional application, it is not enough merely to provide a structure that could be applied in a constitutional manner. This is particularly the case where fundamental *Charter* rights, such as the right to free expression, are at stake. [Emphasis in original.]

Free expression was at stake in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, yet the Court did not require Parliament to amend the *Canada Labour Code*. The Court ruled only that an adjudicator appointed under the *Code* must exercise his or her discretion in accordance with the *Charter*. As Lamer J. (as he then was) stated at p. 1078: "Legislation conferring an imprecise dis-

ministre, mais il est bien établi qu'un tel pouvoir discrétionnaire doit être exercé conformément à la *Charte* pour les raisons énoncées par le professeur Peter Hogg dans l'ouvrage *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 2, à la p. 34-11:

[TRADUCTION] Un acte accompli en vertu d'une autorisation du législateur n'est valide que s'il respecte les limites de cette autorisation. Étant donné que ni le Parlement ni les législatures ne peuvent eux-mêmes voter des lois contraires à la *Charte*, ils ne peuvent pas autoriser un acte qui contreviendrait à la *Charte*. Par conséquent, les limites imposées à l'autorisation du législateur par la *Charte* descendent le long de la chaîne hiérarchique des autorisations du législateur et s'appliquent aux règlements proprement dits, aux règlements administratifs, aux décrets, aux arrêtés, aux ordonnances, aux décisions ainsi qu'à tout autre acte (législatif, administratif ou judiciaire) dont la validité dépend de l'autorisation donnée par le législateur.

Lorsque le texte de loi ne peut être interprété de la sorte, comme c'était le cas dans *Hunter c. Southam, Morgentaler et Bain*, la mesure législative attentatoire doit évidemment être justifiée. En l'espèce, toutefois, j'estime que la législation douanière peut très bien être appliquée d'une manière qui respecte les droits garantis par la *Charte*. Je ne suis pas d'accord avec la conclusion suivante exprimée par mon collègue, au par. 204 de ses motifs:

La jurisprudence de notre Cour exige que le régime législatif lui-même comporte des garanties suffisantes pour faire en sorte que les actes du gouvernement ne portent pas atteinte aux droits garantis par la Constitution. Compte tenu de l'imposant bilan d'application inconstitutionnelle, il n'est pas suffisant de se contenter d'établir un régime qui pourrait être appliqué de manière constitutionnelle. C'est particulièrement vrai dans les cas où des droits fondamentaux garantis par la *Charte*, telle la liberté d'expression, sont en jeu. [Souligné dans l'original.]

Même si la liberté d'expression était en jeu dans l'arrêt *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, notre Cour n'a cependant pas ordonné au Parlement de modifier le *Code canadien du travail*. Notre Cour a seulement jugé que les arbitres nommés en vertu du *Code* devaient exercer leur pouvoir discrétionnaire en conformité avec la *Charte*. Comme l'a dit le juge Lamer (plus

cretion must therefore be interpreted as not allowing *Charter* rights to be infringed". See also *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. Cases dealing with *Charter* rights other than freedom of expression have been similarly disposed of. In *R. v. Beare*, [1988] 2 S.C.R. 387, the Court reversed the Saskatchewan Court of Appeal and upheld as valid the broad discretion given to police officers under a power to fingerprint suspects, despite objections about potential abuse. The *Criminal Code* provides enormous discretion to government officials and the police in matters that directly affect *Charter* rights, yet as La Forest J. pointed out at p. 411:

The *Criminal Code* provides no guidelines for the exercise of discretion in any of these areas. The day to day operation of law enforcement and the criminal justice system nonetheless depends upon the exercise of that discretion.

This Court has already recognized that the existence of prosecutorial discretion does not offend the principles of fundamental justice; see *R. v. Lyons*, [[1987] 2 S.C.R. 309], at p. 348; see also *R. v. Jones*, [1986] 2 S.C.R. 284, at pp. 303-4. The Court did add that if, in a particular case, it was established that a discretion was exercised for improper or arbitrary motives, a remedy under s. 24 of the *Charter* would lie, but no allegation of this kind has been made in the present case.

If Parliament is constitutionally able to confer broad powers on the police and Justice Department officials under the *Criminal Code* without establishing a specific institutional framework to deal with out-of-court *Charter*-sensitive activities, I fail to see how Parliament is nevertheless required to legislate special procedures to govern Customs officials.

tard Juge en chef) à la p. 1078: «Une disposition législative conférant une discrétion imprécise doit donc être interprétée comme ne permettant pas de violer les droits garantis par la *Charte*». Voir également *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Des affaires portant sur des droits garantis par la *Charte*, autres que la liberté d'expression, ont été décidées de la même manière. Dans *R. c. Beare*, [1988] 2 R.C.S. 387, notre Cour a infirmé l'arrêt de la Cour d'appel de la Saskatchewan et confirmé la validité du large pouvoir discrétionnaire conféré aux policiers relativement à la prise des empreintes digitales des suspects, malgré les objections fondées sur les risques d'abus qui ont été formulées. Le *Code criminel* donne aux fonctionnaires de l'État et aux policiers un pouvoir discrétionnaire énorme à l'égard de questions touchant directement les droits garantis par la *Charte* et pourtant, comme l'a souligné le juge La Forest, à la p. 411:

Le *Code criminel* ne donne aucune directive sur l'exercice du pouvoir discrétionnaire dans aucun de ces cas. L'application de la loi et le fonctionnement de la justice criminelle n'en dépendent pas moins, quotidiennement, de l'exercice de ce pouvoir discrétionnaire.

Cette Cour a déjà reconnu que le pouvoir discrétionnaire de la poursuite ne porte pas atteinte aux principes de justice fondamentale, voir *R. c. Lyons*, [[1987] 2 R.C.S. 309], à la p. 348; voir aussi *R. c. Jones*, [1986] 2 R.C.S. 284, aux pp. 303 et 304. La Cour a néanmoins ajouté que si, dans un cas particulier, il était établi qu'un pouvoir discrétionnaire était exercé pour des motifs irréguliers ou arbitraires, il existerait un recours en vertu de l'art. 24 de la *Charte*, mais aucune allégation de ce genre n'a été faite en l'espèce.

Si la Constitution habilite le Parlement à accorder, dans le *Code criminel*, de vastes pouvoirs aux policiers et aux fonctionnaires du ministère de la Justice sans établir de cadre institutionnel précis à l'égard d'activités extrajudiciaires délicates du point de vue de la *Charte*, je ne vois pas pourquoi le Parlement serait par ailleurs tenu d'établir, par voie législative, des procédures spéciales pour régir les fonctionnaires des douanes.

Dans le cas de la législation douanière, le Parlement avait prévu que des dispositions réglementaires plus précises pourraient se révéler néces-

In the case of the Customs legislation, Parliament contemplated that more detailed regulations may be necessary for the guidance of officials and

TAB 48

**Her Majesty The Queen and Attorney
General of Quebec** *Appellants*

v.

Alexandre Bissonnette *Respondent*

and

**Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Nova Scotia,
Attorney General of British
Columbia, Attorney General of
Alberta, Association des avocats
de la défense de Montréal-Laval-
Longueuil, Queen's Prison Law
Clinic, Toronto Police Association,
Canadian Police Association, Karen
Fraser, Jennifer Sweet, Nicole Sweet,
Kim Sweet, John Sweet, J. Robert
Sweet, Charles Sweet, Patricia
Corcoran, Ann Parker, Ted Baylis,
Sharon Baylis, Cory Baylis, Michael
Leone, Doug French, Donna French,
Deborah Mahaffy, Observatory
on National Security Measures,
Independent Criminal Defence
Advocacy Society, Canadian Prison
Law Association, National Council
of Canadian Muslims, Canadian
Civil Liberties Association, British
Columbia Civil Liberties Association
and Canadian Association of Chiefs
of Police** *Interveners*

INDEXED AS: R. v. BISSONNETTE

2022 SCC 23

File No.: 39544.

2022: March 24; 2022: May 27.

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

**Sa Majesté la Reine et procureur
général du Québec** *Appelants*

c.

Alexandre Bissonnette *Intimé*

et

**Procureur général du Canada,
procureur général de l'Ontario,
procureur général de la Nouvelle-
Écosse, procureur général de la
Colombie-Britannique, procureur
général de l'Alberta, Association
des avocats de la défense de
Montréal-Laval-Longueuil, Queen's
Prison Law Clinic, Toronto Police
Association, Association canadienne
des policiers, Karen Fraser, Jennifer
Sweet, Nicole Sweet, Kim Sweet,
John Sweet, J. Robert Sweet,
Charles Sweet, Patricia Corcoran,
Ann Parker, Ted Baylis, Sharon
Baylis, Cory Baylis, Michael Leone,
Doug French, Donna French,
Deborah Mahaffy, Observatoire des
mesures visant la sécurité nationale,
Independent Criminal Defence
Advocacy Society, Canadian Prison
Law Association, Conseil national des
musulmans canadiens, Association
canadienne des libertés civiles, British
Columbia Civil Liberties Association
et Association canadienne des chefs
de police** *Intervenants*

RÉPERTORIÉ : R. c. BISSONNETTE

2022 CSC 23

N° du greffe : 39544.

2022 : 24 mars; 2022 : 27 mai.

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

authorized by s. 745.51 *Cr. C.* constitutes punishment, the constitutionality of which must be determined under s. 12 of the *Charter*.

(2) The Two Prongs of the Right Not to Be Subjected to Cruel and Unusual Punishment

[59] For a proper understanding of the two prongs of the protection afforded by s. 12 of the *Charter*, it is necessary to refocus the analysis on the purpose of this provision. This Court recently stated that the purpose of s. 12 is “to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals” (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at para. 51; the Court was unanimous on this point). Although dignity is not recognized as an independent constitutional right, it is a fundamental value that serves as a guide for the interpretation of all *Charter* rights (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 77). Generally speaking, the concept of dignity evokes the idea that every person has intrinsic worth and is therefore entitled to respect (*Ward v. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, [2021] 3 S.C.R. 176, at para. 56; *Québec (Public Curator) v. Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, at para. 105). This respect is owed to every individual, irrespective of their actions (see C. Brunelle, “La dignité dans la *Charte des droits et libertés de la personne*: de l’ubiquité à l’ambiguïté d’une notion fondamentale”, [2006] *R. du B.* (numéro thématique) 143, at pp. 150-51).

[60] Against this backdrop, the two prongs of the right not to be subjected to cruel and unusual punishment may now be considered. Section 12 protects, first, against the imposition of a punishment that is so excessive as to be incompatible with human dignity and, second, against the imposition of a punishment that is intrinsically incompatible with human dignity (*R. v. Smith*, [1987] 1 S.C.R. 1045, at pp. 1072-74; L. Kerr and B. L. Berger, “Methods and Severity: The

de périodes d’inadmissibilité à la libération conditionnelle autorisé par l’art. 745.51 *C. cr.* constitue une peine, dont la constitutionnalité doit être évaluée au regard de l’art. 12 de la *Charte*.

(2) Les deux volets de la protection contre les peines cruelles et inusitées

[59] Pour bien saisir les deux volets de la protection offerte par l’art. 12 de la *Charte*, il est nécessaire de recentrer l’analyse sur l’objet de cette disposition. Notre Cour a récemment dit de l’art. 12 qu’il a pour objet « d’interdire à l’État d’infliger des douleurs et des souffrances physiques ou psychologiques par des traitements ou peines dégradants et déshumanisants. Cette disposition vise à protéger la dignité humaine et à assurer le respect de la valeur inhérente de chaque personne » (*Québec (Procureure générale) c. 9147-0732 Québec inc.*, 2020 CSC 32, [2020] 3 R.C.S. 426, par. 51, unanime sur ce point). Bien que la dignité ne soit pas reconnue comme un droit constitutionnel autonome, cette valeur fondamentale guide l’interprétation de l’ensemble des droits garantis par la *Charte* (*Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307, par. 77). De manière générale, la notion de dignité évoque l’idée selon laquelle chaque personne possède une valeur intrinsèque et a, de ce fait, droit au respect (*Ward c. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 CSC 43, [2021] 3 R.C.S. 176, par. 56; *Québec (Curateur public) c. Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 R.C.S. 211, par. 105). Ce respect est dû à chaque individu, sans égard à ses agissements (voir C. Brunelle, « La dignité dans la *Charte des droits et libertés de la personne* : de l’ubiquité à l’ambiguïté d’une notion fondamentale », [2006] *R. du B.* (numéro thématique) 143, p. 150-151).

[60] Sur cette toile de fond, il convient maintenant de se pencher sur les deux volets de la protection contre les peines cruelles et inusitées. L’article 12 protège contre l’infliction d’une peine excessive au point de ne pas être compatible avec la dignité humaine, d’une part, et contre l’infliction d’une peine intrinsèquement incompatible avec la dignité humaine, d’autre part (*R. c. Smith*, [1987] 1 R.C.S. 1045, p. 1072-1074; L. Kerr et B. L. Berger, « Methods and

Two Tracks of Section 12” (2020), 94 *S.C.L.R.* (2d) 235, at pp. 235-36). This distinction is often blurred, and it would be helpful in the context of this appeal to clarify certain points in this regard.

[61] The first form of cruel and unusual punishment involves punishment whose effect is grossly disproportionate to what would have been appropriate (*Smith*, at p. 1072). A punishment oversteps constitutional limits when it is grossly disproportionate, and not merely excessive (*Smith*, at p. 1072). A grossly disproportionate sentence is cruel and unusual in that it shows the state’s complete disregard for the specific circumstances of the sentenced individual and for the proportionality of the punishment inflicted on them.

[62] Determining whether a punishment is grossly disproportionate requires a contextual and comparative analysis: a punishment is found to be so in the specific circumstances of a particular case, in relation to the punishment that would have been just and appropriate having regard to the offender’s personal characteristics and the circumstances surrounding the commission of the offence. However, the nature of the punishment inflicted is not problematic from a constitutional perspective. For example, it is accepted that the state may have recourse to fixed-term imprisonment or to the imposition of a fine as punishment. Such punishment is therefore not in itself cruel and unusual, but can become so if its effects make it grossly disproportionate.

[63] The case law on grossly disproportionate punishment has been developed in the context of mandatory sentences imposed without regard for the offender’s particular circumstances (e.g., mandatory minimum prison sentences in *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *Nur*; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. Luxton*, [1990] 2 S.C.R. 711; *Smith*; a mandatory victim surcharge in *Boudreault*; a mandatory weapons prohibition order in *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895). In *Nur*, this Court noted that, to determine whether a minimum sentence is grossly disproportionate, a court must first consider “what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the

Severity : The Two Tracks of Section 12 » (2020), 94 *S.C.L.R.* (2d) 235, p. 235-236). Cette distinction est souvent occultée et il convient d’y apporter certaines précisions dans le cadre du présent pourvoi.

[61] La première forme de peines cruelles et inusitées concerne les peines dont l’effet est exagérément disproportionné par rapport à ce qui aurait été approprié (*Smith*, p. 1072). Une peine outrepassé les limites constitutionnelles lorsqu’elle est exagérément disproportionnée et non simplement excessive (*Smith*, p. 1072). Une peine exagérément disproportionnée est cruelle et inusitée dans la mesure où elle démontre un mépris total de l’État envers les circonstances propres à l’individu condamné et la proportionnalité du châtiment qu’il subit.

[62] Déterminer si une peine est exagérément disproportionnée requiert une analyse contextuelle et comparative : une peine est jugée telle dans les circonstances particulières d’un cas donné, en rapport avec la peine qui aurait été juste et appropriée au regard des caractéristiques propres au contrevenant et des circonstances entourant la commission de l’infraction. En revanche, la nature de la peine infligée ne pose pas problème d’un point de vue constitutionnel. À titre d’exemple, il est reconnu que l’État peut recourir à l’emprisonnement à durée déterminée ou à l’infliction d’une amende comme mesures punitives. De telles peines ne sont donc pas en soi cruelles et inusitées, mais elles peuvent le devenir lorsque leurs effets les rendent exagérément disproportionnées.

[63] La jurisprudence sur les peines exagérément disproportionnées s’est développée dans le domaine des peines obligatoires, infligées sans égard aux circonstances particulières du contrevenant (p. ex. : des peines d’emprisonnement minimales obligatoires dans *R. c. Lloyd*, 2016 CSC 13, [2016] 1 R.C.S. 130; *Nur*; *R. c. Ferguson*, 2008 CSC 6, [2008] 1 R.C.S. 96; *R. c. Luxton*, [1990] 2 R.C.S. 711; *Smith*; une suramende compensatoire obligatoire dans *Boudreault*; une ordonnance obligatoire interdisant à l’intéressé d’avoir une arme en sa possession dans *R. c. Wiles*, 2005 CSC 84, [2005] 3 R.C.S. 895). Dans l’arrêt *Nur*, notre Cour a rappelé que, pour déterminer si une peine minimale est exagérément disproportionnée, le tribunal doit d’abord se demander « ce qui constituerait

Criminal Code” (para. 46). The court must then ask whether the impugned provision requires it to impose a sentence that is grossly disproportionate to one that would be just and appropriate for the offender or for another offender in a reasonable hypothetical case; if the provision does so, it infringes s. 12 of the *Charter* (*Nur*, at para. 46). The *Nur* framework does not apply to discretionary sentences. **Where there is no mandatory minimum sentence, the imposition of a sentence that is acceptable by its nature but that proves to be disproportionate in a particular case can be rectified by way of an appeal against sentence rather than a declaration of unconstitutionality (*Malmo-Levine*, at paras. 167-68).**

[64] The second prong of the protection afforded by s. 12 concerns a narrow class of punishments that are cruel and unusual by nature; these punishments will “always be grossly disproportionate” because they are intrinsically incompatible with human dignity (*Smith*, at p. 1073). These punishments are in themselves contrary to human dignity because of their “degrading and dehumanizing” nature, as this Court put it in 9147-0732 *Québec inc.* (para. 51; the Court was unanimous on this point). A degrading or dehumanizing punishment, by its very nature, outrages “our standards of decency” (*Luxton*, at p. 724).

[65] Since a society’s standards of decency are not frozen in time, what constitutes punishment that is cruel and unusual by nature will necessarily evolve, in accordance with the principle that our Constitution is a living tree capable of growth and expansion within its natural limits so as to meet the new social, political and historical realities of the modern world (*Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at para. 22; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136). As Cory J. pointed out more than 30 years ago while dissenting on another point in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, “[w]hat is acceptable as punishment to a society will vary with the nature of that society, its degree of stability and its level of maturity” (p. 818).

une peine proportionnée à l’infraction eu égard aux objectifs et aux principes de détermination de la peine établis par le *Code criminel* » (par. 46). Il doit ensuite décider si la disposition contestée le contraint à infliger une peine totalement disproportionnée par rapport à la peine juste et appropriée pour le contrevenant ou un autre contrevenant placé dans une situation hypothétique raisonnable, auquel cas la disposition viole l’art. 12 de la *Charte* (*Nur*, par. 46). Le cadre d’analyse de l’arrêt *Nur* ne s’applique pas aux peines discrétionnaires. **En l’absence de peine minimale obligatoire, l’infliction d’une peine dont la nature est acceptable, mais qui s’avère disproportionnée dans un cas particulier, peut être corrigée par un appel visant la justesse de la peine plutôt que par une déclaration d’inconstitutionnalité (*Malmo-Levine*, par. 167-168).**

[64] Le deuxième volet de la protection conférée par l’art. 12 vise une catégorie restreinte de peines cruelles et inusitées par nature, des peines qui sont « toujours exagérément disproportionné[es] » parce qu’intrinsèquement incompatibles avec la dignité humaine (*Smith*, p. 1074). De telles peines sont, en soi, incompatibles avec la dignité humaine en raison de leur caractère « dégradan[t] et déshumanisan[t] », pour reprendre les termes utilisés par notre Cour dans 9147-0732 *Québec inc.* (par. 51, unanime sur ce point). De par sa nature même, une peine dégradante ou déshumanisante porte atteinte « à nos normes de décence » (*Luxton*, p. 724).

[65] Comme les normes de décence d’une société ne sont pas figées dans le temps, ce qui constitue une peine cruelle et inusitée par nature est appelé à évoluer, conformément au principe selon lequel notre Constitution est un arbre vivant capable de croître et de se développer à l’intérieur de ses limites naturelles, de manière à répondre aux nouvelles réalités sociales, politiques et historiques du monde contemporain (*Renvoi relatif au mariage entre personnes du même sexe*, 2004 CSC 79, [2004] 3 R.C.S. 698, par. 22; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 155-156; *Edwards c. Attorney-General for Canada*, [1930] A.C. 124 (C.P.), p. 136). Comme le soulignait le juge Cory il y a plus de 30 ans, alors dissident sur un autre point dans l’affaire *Kindler c. Canada (Ministre de la Justice)*, [1991] 2 R.C.S. 779, « [c]e qui est une peine acceptable pour une société dépend de la nature

Punishments that we regard as incompatible with human dignity today were common and accepted in the past. Professor A. N. Doob rightly states that “[t]he reason we no longer whip or hang people is not that we ran out of leather or rope. Rather, it is because those punishments are no longer congruent with Canadian values” (Department of Justice Canada, *A Values and Evidence Approach to Sentencing Purposes and Principles* (2017), at p. 4).

de cette dernière, de son degré de stabilité et de son niveau de maturité » (p. 818). Les châtimens que nous considérons aujourd’hui comme incompatibles avec la dignité humaine étaient répandus et acceptés à une autre époque. Le professeur A. N. Doob affirme avec justesse que « [l]a raison pour laquelle nous ne fouettons et ne pendons plus les gens n’est pas le manque de cuir ou de corde. C’est plutôt parce que ces châtimens ne sont plus en adéquation avec les valeurs canadiennes » (Ministère de la Justice du Canada, *Une approche des objectifs et des principes de détermination de la peine basée sur les valeurs et sur les preuves* (2017), p. 4).

[66] Among the punishments and treatments that have so far been held to be intrinsically incompatible with human dignity are “the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed . . . the lobotomisation of certain dangerous offenders or the castration of sexual offenders” (*Smith*, at p. 1074). Torture also falls into this category, for it has as its end “the denial of a person’s humanity” (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 51).

[66] Parmi les peines et traitements reconnus à ce jour comme intrinsèquement incompatibles avec la dignité humaine, mentionnons « l’imposition d’un châtiment corporel comme la peine du fouet, sans égard au nombre de coups de fouet imposé [. . .], la lobotomie de certains criminels dangereux, ou la castration d’auteurs de crimes sexuels » (*Smith*, p. 1074). La torture appartient également à cette catégorie, le but ultime de ce supplice étant « de priver une personne de son humanité » (*Suresh c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3, par. 51).

[67] A punishment is cruel and unusual by nature if the court is convinced that, having regard to its nature and effects, it could never be imposed in a manner consonant with human dignity in the Canadian criminal context. A punishment that is cruel and unusual by nature is “so inherently repugnant that it could never be an appropriate punishment, however egregious the offence” (*Suresh*, at para. 51). To determine whether a punishment is intrinsically incompatible with dignity, the court must determine whether the punishment is, by its very nature, degrading or dehumanizing. The effects that the punishment may have on all offenders on whom it is imposed can also inform the court and provide support for its analysis of the nature of the punishment.

[67] Une peine est cruelle et inusitée par nature si le tribunal est convaincu que, compte tenu de sa nature et de ses effets, cette peine ne pourrait jamais être infligée d’une manière conforme à la dignité humaine dans le contexte pénal canadien. Une peine cruelle et inusitée par nature est « si intrinsèquement répugnante qu’elle ne saurait jamais constituer un châtiment approprié, aussi odieuse que soit l’infraction » (*Suresh*, par. 51). Pour déterminer si une peine est intrinsèquement incompatible avec la dignité, le tribunal doit évaluer si la peine est, par sa nature, dégradante ou déshumanisante. Les effets susceptibles d’être causés à l’ensemble des contrevenants condamnés à un tel châtiment peuvent également éclairer le tribunal et appuyer son analyse de la nature de la peine.

[68] The court’s analysis must remain focused on the nature of the punishment rather than on considerations of proportionality between the punishment and the offender’s moral culpability. A punishment that is cruel and unusual by nature will by definition “always

[68] L’analyse du tribunal doit demeurer centrée sur la nature de la peine plutôt que sur des considérations de proportionnalité entre la peine et la culpabilité morale du contrevenant. En effet, une peine cruelle et inusitée par nature est, par définition, « toujours

be grossly disproportionate” (*Smith*, at p. 1073). Such a punishment must quite simply be excluded from the arsenal of sanctions available to the state, which means that the state cannot circumvent s. 12 by providing for specific exemptions for the imposition of the punishment or by making its imposition subject to judicial discretion. In other words, the mere possibility that a punishment that is cruel and unusual by nature may be imposed is enough to infringe s. 12 of the *Charter*.

[69] In sum, a punishment may infringe s. 12 for two distinct reasons, either because it is grossly disproportionate in a given case or because it is intrinsically incompatible with human dignity. Where both prongs of the protection of s. 12 are in issue in the same case, the analysis of the nature of the punishment must precede that of gross disproportionality. If the punishment that might be imposed is cruel and unusual by nature, and hence intrinsically incompatible with human dignity, it will be unnecessary — and I would even say pointless — to consider whether it is grossly disproportionate in a given case, because a punishment that is cruel and unusual by nature will “always be grossly disproportionate” (*Smith*, at p. 1073; see also Kerr and Berger, at p. 238).

[70] In their analysis under s. 12 of the *Charter*, the courts must show deference to Parliament’s policy decisions with respect to sentencing (*Lloyd*, at para. 45). The limit set by the Constitution for a sentence to be found grossly disproportionate is intended to be demanding and will be attained only rarely (*Boudreault*, at para. 45; *Lloyd*, at para. 24; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417; *Lyons*, at p. 345). Likewise, the courts must be cautious and deferential when a sentence is contested on the basis that it falls into the narrow category of punishment that is cruel and unusual by nature. Nevertheless, “the final judgment as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function” (*Lloyd*, at para. 45, quoting *R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont. Dist. Ct.), at p. 238). That is the analysis we must now undertake.

exagérément disproportionné[e] » (*Smith*, p. 1074). Une peine cruelle et inusitée par nature doit tout simplement être exclue de l’arsenal de sanctions à la disposition de l’État, ce qui signifie que ce dernier ne peut contourner les prescriptions de l’art. 12 en prévoyant certaines exemptions à l’infliction de cette peine ou en assujettissant celle-ci à la discrétion du tribunal. En d’autres termes, la simple possibilité qu’une peine cruelle et inusitée par nature puisse être infligée suffit pour enfreindre l’art. 12 de la *Charte*.

[69] En résumé, une peine peut violer l’art. 12 pour deux motifs distincts, soit parce qu’elle est exagérément disproportionnée dans un cas donné, soit parce qu’elle est intrinsèquement incompatible avec la dignité humaine. Lorsque les deux volets de la protection de l’art. 12 sont en cause dans une même affaire, l’analyse de la nature de la peine doit précéder celle de la disproportion exagérée. En effet, si la peine susceptible d’être infligée est cruelle et inusitée par nature, et donc intrinsèquement incompatible avec la dignité humaine, il n’est pas nécessaire — et je dirais même inutile — de s’interroger sur son caractère exagérément disproportionné dans un cas donné, puisqu’une peine cruelle et inusitée par nature est « toujours exagérément disproportionné[e] » (*Smith*, p. 1074; voir aussi Kerr et Berger, p. 238).

[70] Dans leur analyse de l’art. 12 de la *Charte*, les tribunaux doivent faire preuve de déférence envers les décisions de politique générale du législateur en matière de peines (*Lloyd*, par. 45). La limite fixée par la Constitution pour qu’une peine soit jugée exagérément disproportionnée se veut exigeante et ne sera atteinte qu’en de rares occasions (*Boudreault*, par. 45; *Lloyd*, par. 24; *Steele c. Établissement Mountain*, [1990] 2 R.C.S. 1385, p. 1417; *Lyons*, p. 345). De la même manière, les tribunaux doivent faire montre de prudence et de retenue lorsqu’une peine est contestée au motif qu’elle fait partie de la catégorie restreinte de peines cruelles et inusitées par nature. Cependant, [TRADUCTION] « le jugement définitif quant à savoir si une peine excède les limites constitutionnelles fixées par la Charte constitue à bon droit une fonction judiciaire » (*Lloyd*, par. 45, citant *R. c. Guiller* (1985), 48 C.R. (3d) 226 (C. dist. Ont.), p. 238). C’est l’analyse qu’il nous incombe maintenant d’effectuer.

E. *Does Section 745.51 Cr. C. Infringe Section 12 of the Charter?*

[71] I will begin by observing that this appeal concerns only the constitutionality, under s. 12 of the *Charter*, of a provision that allows a court to impose consecutive parole ineligibility periods in a context involving multiple murders. Specifically, in the case of first degree murders, the court is authorized, through the combined effect of ss. 745.51 and 745(a) *Cr. C.*, to add up ineligibility periods of 25 years for each murder. Whether it is unconstitutional for a court to impose any ineligibility period greater than 25 years is therefore not at issue in this case.

[72] To answer the question before the Court, I will begin by defining the scope of s. 745.51 *Cr. C.* and the punishment that flows from it. I will then inquire into the nature of that punishment to determine whether it is intrinsically incompatible with human dignity and thus cruel and unusual by nature. To support my analysis of the nature of the punishment, I will consider the potential effects of the punishment on all offenders and I will also look at international and comparative law. I will finish on this topic by discussing whether the judicial discretion and the royal prerogative of mercy affect the constitutionality of the impugned provision.

[73] For the reasons that follow, I conclude that, by allowing consecutive 25-year parole ineligibility periods to be imposed in cases involving first degree murders, s. 745.51 *Cr. C.* authorizes the imposition of sentences of imprisonment for life without a realistic possibility of parole before death for all offenders who must serve such periods consecutively. Such sentences are degrading in nature and thus incompatible with human dignity, because they deny offenders any possibility of reintegration into society, which presupposes, definitively and irreversibly, that they lack the capacity to reform and re-enter society. The conclusion that a sentence of imprisonment without a realistic possibility of parole is incompatible with human dignity is supported by an analysis of the effects that such a sentence may have on all offenders on whom it is imposed, as well as by a review of

E. *L'article 745.51 C. cr. contrevient-il à l'art. 12 de la Charte?*

[71] D'entrée de jeu, le présent pourvoi concerne uniquement la constitutionnalité, au regard de l'art. 12 de la *Charte*, d'une disposition qui permet au tribunal de cumuler des périodes d'inadmissibilité à la libération conditionnelle dans un contexte de meurtres multiples. Plus particulièrement, en cas de meurtres au premier degré, le tribunal est autorisé, par le jeu de l'art. 745.51 et de l'al. 745a) *C. cr.*, à additionner des périodes d'inadmissibilité de 25 ans pour chaque meurtre. En conséquence, il ne s'agit pas en l'espèce de décider si l'infliction de toute période d'inadmissibilité supérieure à 25 ans est inconstitutionnelle.

[72] Pour répondre à la question dont notre Cour est saisie, je vais d'abord circonscrire la portée de l'art. 745.51 *C. cr.* et la peine qui en découle. Je procéderai ensuite à l'examen de la nature de cette peine pour déterminer si elle est intrinsèquement incompatible avec la dignité humaine et donc cruelle et inusitée par nature. Pour appuyer l'analyse de la nature de la peine, je vais me pencher sur les effets susceptibles d'être causés par le châtiment sur l'ensemble des contrevenants, ainsi que sur le droit international et le droit comparé. Enfin, je vais examiner l'incidence du pouvoir discrétionnaire du tribunal et de la prérogative royale de clémence sur la constitutionnalité de la disposition contestée.

[73] Pour les motifs qui suivent, je conclus que, par le cumul de périodes d'inadmissibilité à la libération conditionnelle de 25 ans en cas de meurtres au premier degré, l'art. 745.51 *C. cr.* autorise l'infliction de peines d'emprisonnement à vie sans possibilité réaliste de libération conditionnelle avant la mort de tous les contrevenants qui sont assujettis à un tel cumul. De telles peines sont de nature dégradante, et donc contraires à la dignité humaine, puisqu'elles retirent aux contrevenants toute possibilité de réinsertion sociale, ce qui présuppose, de manière finale et irréversible, que ces derniers ne possèdent pas la capacité de s'amender et de réintégrer la société. L'analyse des effets susceptibles d'être causés à l'ensemble des contrevenants assujettis à une peine d'emprisonnement sans possibilité réaliste de libération conditionnelle, ainsi qu'un tour d'horizon du

international and comparative law. Finally, the judicial discretion cannot save the impugned provision, and the royal prerogative of mercy does not offer a realistic possibility of release for an individual serving a sentence of imprisonment for which there is no other review mechanism.

(1) Scope of Section 745.51 Cr. C.

[74] An accused who is convicted of first or second degree murder will be sentenced to imprisonment for life (s. 235(2) *Cr. C.*) and will be eligible for full parole only after serving an ineligibility period of, respectively, 25 years or 10 to 25 years (s. 745(a) and (c) *Cr. C.*). Section 745.51 *Cr. C.* provides that the judge who presided at the trial may, by order, decide that the periods without eligibility for parole for each murder conviction are to be served consecutively, in a departure from the general principle that parole ineligibility periods are to be served concurrently (ss. 718.2(c) and 718.3(4) *Cr. C.*). According to the interpretation proposed by the parties — which we will assume to be correct for the purposes of this appeal, insofar as it is not determinative — s. 745.51 *Cr. C.* applies regardless of whether the multiple murders were committed at the same time or during separate events, and it applies in the absence of a previous conviction.

[75] I agree with the trial judge and the Court of Appeal in this case that s. 745.51 *Cr. C.* does not authorize a court to order that an offender convicted of first degree murder serve only a portion of a 25-year ineligibility period consecutively to another period imposed for another first degree murder (Sup. Ct. reasons, at para. 824; C.A. reasons, at para. 64). The provision in question allows only the imposition of consecutive 25-year periods. Parliament's intention, which I will discuss below, was clear on this point. I would add that s. 745.51 *Cr. C.* sets no ceiling for the total length of the ineligibility period a court may impose. This provision merely states the criteria that

droit international et du droit comparé, appuient la conclusion selon laquelle une telle peine est contraire à la dignité humaine. Enfin, le pouvoir discrétionnaire du tribunal ne peut sauvegarder la disposition contestée et la prérogative royale de clémence ne constitue pas une possibilité réaliste de remise en liberté pour l'individu purgeant une peine d'emprisonnement qui n'est assortie d'aucun autre mécanisme de révision.

(1) La portée de l'art. 745.51 C. cr.

[74] Lorsqu'un accusé est déclaré coupable de meurtre au premier degré ou de meurtre au deuxième degré, il est condamné à une peine d'emprisonnement à perpétuité (par. 235(2) *C. cr.*) et il ne devient admissible à une libération conditionnelle totale qu'après un temps d'épreuve de 25 ans ou de 10 à 25 ans respectivement (al. 745a) et c) *C. cr.*). L'article 745.51 *C. cr.* permet au juge qui préside le procès d'ordonner que les périodes d'inadmissibilité à la libération conditionnelle pour chaque condamnation pour meurtre soient purgées consécutivement, par dérogation au principe général selon lequel les périodes d'inadmissibilité à la libération conditionnelle doivent être purgées concurremment (al. 718.2c) et par. 718.3(4) *C. cr.*). Suivant l'interprétation proposée par les parties — et que nous tiendrons pour acquise pour les besoins du présent pourvoi, dans la mesure où elle n'est pas déterminante — l'art. 745.51 *C. cr.* s'applique indépendamment du fait que les meurtres multiples ont été commis lors d'une même occasion ou lors d'événements distincts, ainsi qu'en l'absence d'une condamnation antérieure.

[75] À l'instar du premier juge et de la Cour d'appel en l'espèce, je suis d'avis que l'art. 745.51 *C. cr.* n'habilite pas le tribunal à ordonner qu'un contrevenant condamné pour meurtre au premier degré purge seulement une partie de la période d'inadmissibilité de 25 ans de manière consécutive à une autre période imposée pour un autre meurtre au premier degré (motifs de la C.S., par. 824; motifs de la C.A., par. 64). La disposition en question autorise uniquement le cumul de périodes de 25 ans. L'intention du législateur, sur laquelle je reviendrai, était claire sur ce point. Je souligne d'ailleurs que l'art. 745.51 *C. cr.* ne fixe aucun plafond en ce qui concerne la

1 W.L.R. 3964, at paras. 31-35; *Hutchinson*, at §§ 70 and 72). I will come back to this point later.

[108] In summary, although s. 12, like any other *Charter* provision, must be interpreted primarily by reference to Canadian law and history (9147-0732 *Québec inc.*, at para. 20; see also *Kindler*, at p. 812), a parallel can be drawn between the approach taken in Canadian criminal law and the approaches taken in international law and in the law of various countries similar to Canada with respect to sentences of imprisonment for life without the possibility of parole, which are generally considered to be incompatible with human dignity.

(d) *Does the Judicial Discretion to Impose Consecutive Parole Ineligibility Periods Affect the Constitutionality of the Impugned Provision?*

[109] In support of its position that s. 745.51 *Cr. C.* is constitutional, the Crown stresses the discretionary nature of the power granted to courts by this provision (see to the same effect *R. v. Millard*, 2018 ONSC 1299; *R. v. Granados-Arana*, 2017 ONSC 6785, 356 C.C.C. (3d) 340; *R. v. Husbands*, [2015] O.J. No. 2673 (QL), 2015 CarswellOnt 7677 (WL) (S.C.J.), rev'd 2017 ONCA 607, 353 C.C.C. (3d) 317, but not on this point). According to this reasoning, the imposition of a disproportionate sentence results from an erroneous exercise of judicial discretion and can therefore be rectified by way of an appeal rather than a declaration of unconstitutionality.

[110] It is true that the imposition of consecutive parole ineligibility periods is not mandatory. Section 745.51 *Cr. C.* provides that a court *may* order that the parole ineligibility periods applicable for each murder conviction are to be served consecutively. In exercising

ainsi que la CEDH considèrent qu'il existe en droit anglais un mécanisme véritable de réexamen des peines à perpétuité du fait de l'existence du pouvoir de libération du ministre prévu à l'art. 30 de la loi intitulée *Crime (Sentences) Act 1997* (R.-U.), 1997, c. 43 (*R. c. McLoughlin*, [2014] EWCA Crim 188, [2014] 1 W.L.R. 3964, par. 31-35; *Hutchinson*, §§ 70 et 72). Je reviendrai sur ce point plus loin.

[108] En somme, bien que, comme toute autre disposition de la *Charte*, l'art. 12 doit d'abord et avant tout être interprété au regard du droit et de l'histoire du Canada (9147-0732 *Québec inc.*, par. 20; voir aussi *Kindler*, p. 812), un parallèle peut être établi entre l'approche du droit pénal canadien et celles du droit international et du droit de différents pays similaires au Canada en ce qui concerne les peines d'emprisonnement à perpétuité sans possibilité de libération conditionnelle, qui sont généralement considérées comme étant incompatibles avec à la dignité humaine.

d) *Le pouvoir discrétionnaire du tribunal de cumuler les périodes d'inadmissibilité à la libération conditionnelle a-t-il une incidence sur la constitutionnalité de la disposition contestée?*

[109] Au soutien de sa position selon laquelle l'art. 745.51 *C. cr.* est constitutionnel, le ministère public insiste sur la nature discrétionnaire du pouvoir conféré au tribunal par cette disposition (voir, dans le même sens, *R. c. Millard*, 2018 ONSC 1299; *R. c. Granados-Arana*, 2017 ONSC 6785, 356 C.C.C. (3d) 340; *R. c. Husbands*, [2015] O.J. No. 2673 (QL), 2015 CarswellOnt 7677 (WL) (C.S.J.), inf. par 2017 ONCA 607, 353 C.C.C. (3d) 317, mais non sur ce point). Suivant ce raisonnement, l'infliction d'une peine disproportionnée résulte d'une application erronée de ce pouvoir discrétionnaire par le tribunal et, partant, peut être corrigée au moyen d'un appel plutôt que d'une déclaration d'inconstitutionnalité.

[110] Il est vrai que l'infliction de périodes consécutives d'inadmissibilité à la libération conditionnelle n'est pas obligatoire. L'article 745.51 *C. cr.* indique en effet que le tribunal *peut* ordonner le cumul des périodes d'inadmissibilité à la libération conditionnelle

its discretion, the court must take into consideration the character of the offender, the nature of the offence and the circumstances surrounding its commission. In this regard, I note that the court's obligation to stack ineligibility periods in blocks of 25 years, if it chooses to exercise its discretion, is difficult to reconcile with the principles of proportionality and individualization in sentencing.

[111] In any event, I am of the view, as explained above, that the existence of a discretion cannot save a provision that authorizes the imposition of a punishment that is cruel and unusual by nature. No crime, no matter how appalling it might be, can justify imposing a punishment that is intrinsically incompatible with human dignity, like a sentence of imprisonment for life without a realistic possibility of parole. Since such a punishment must quite simply be excluded from the arsenal of punishments available to the state, the mere possibility that it may be imposed constitutes an infringement of s. 12 of the *Charter*. By way of analogy, a provision authorizing corporal punishment as a sentence for the commission of multiple murders — a sentence that would be imposed at a court's discretion and reserved for the vilest of criminals — could not, for obvious reasons, be held to be consistent with s. 12 of the *Charter*. The same conclusion must apply here.

(e) *Can the Royal Prerogative of Mercy Save the Impugned Provision?*

[112] Lastly, it is necessary to determine whether the impugned provision can be found to be constitutional based on the existence of the royal prerogative of mercy, since there is some debate over this question. In my view, the parole system is currently the only mechanism that offers a realistic possibility of release for individuals serving a sentence of life imprisonment under Canadian law. The royal prerogative of mercy cannot be considered a true sentence review mechanism, because it is exercised only in exceptional circumstances.

applicables pour chaque condamnation pour meurtre. Dans l'exercice de son pouvoir discrétionnaire, le tribunal prend en considération le caractère du contrevenant, la nature de l'infraction et les circonstances entourant sa perpétration. À cet égard, je souligne que l'obligation du tribunal de cumuler des périodes d'inadmissibilité par bonds de 25 ans, s'il choisit d'exercer son pouvoir discrétionnaire, se concilie mal avec le principe de la proportionnalité, ainsi que celui de l'individualisation des peines.

[111] Quoi qu'il en soit, je suis d'avis, comme il a été expliqué précédemment, que l'existence d'un pouvoir discrétionnaire ne saurait sauvegarder une disposition qui permet l'infliction d'une peine cruelle et inusitée par nature. En effet, aucun crime, aussi odieux soit-il, ne peut justifier l'infliction d'une peine intrinsèquement incompatible avec la dignité humaine, telle une peine d'emprisonnement à perpétuité sans possibilité réaliste de libération conditionnelle. Étant donné qu'une telle peine doit purement et simplement être exclue de l'arsenal des mesures punitives à la disposition de l'État, la simple possibilité qu'elle puisse être infligée constitue une violation de l'art. 12 de la *Charte*. Par analogie, une disposition qui prévoirait l'infliction d'un châtiment corporel à titre de peine pour la commission de meurtres multiples — peine qui serait infligée à la discrétion du tribunal et réservée aux criminels les plus ignobles — ne saurait, pour des raisons évidentes, être déclarée conforme à l'art. 12 de la *Charte*. La même conclusion s'impose ici.

e) *La prérogative royale de clémence peut-elle sauvegarder la disposition contestée?*

[112] En dernier lieu, il est nécessaire de trancher la question de savoir si la disposition contestée peut être jugée constitutionnelle en raison de l'existence de la prérogative royale de clémence, puisque cette question est l'objet d'un certain débat. À mon avis, le système de libération conditionnelle constitue actuellement le seul mécanisme offrant une possibilité réaliste de remise en liberté aux individus purgeant une peine d'emprisonnement à perpétuité en droit canadien. La prérogative royale de clémence ne peut être considérée comme un véritable mécanisme de révision de la peine, puisqu'elle n'est exercée que dans des circonstances exceptionnelles.

TAB 49

**Robin Susan Eldridge, John Henry Warren
and Linda Jane Warren** *Appellants*

v.

**The Attorney General of British Columbia
and the Medical Services
Commission** *Respondents*

and

**The Attorney General of Canada, the
Attorney General for Ontario, the Attorney
General of Manitoba, the Attorney General
of Newfoundland, the Women's Legal
Education and Action Fund, the Disabled
Women's Network Canada, the Charter
Committee on Poverty Issues, the Canadian
Association of the Deaf, the Canadian
Hearing Society and the Council of
Canadians with Disabilities** *Intervenors*

INDEXED AS: ELDRIDGE v. BRITISH COLUMBIA (ATTORNEY
GENERAL)

File No.: 24896.

1997: April 24; 1997: October 9.

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

*Constitutional law — Charter of Rights — Equality
rights — Physical disability — Publicly funded medi-
care — Medicare not providing for sign language inter-
preters — Whether, and in what manner, the Charter
applies to the decision not to provide sign language
interpreters for the deaf as part of the publicly funded
scheme for the provision of medical care — Whether not
providing for this service under Acts establishing medi-
care and hospitalization infringing s. 15(1) equality
rights of disabled — If so, whether legislation saved
under s. 1 — Appropriate remedy if Charter violation
found — Canadian Charter of Rights and Freedoms,
ss. 1, 15(1) — Hospital Insurance Act, R.S.B.C. 1979,*

**Robin Susan Eldridge, John Henry Warren
et Linda Jane Warren** *Appellants*

c.

**Le procureur général de la Colombie-
Britannique et la Medical Services
Commission** *Intimés*

et

**Le procureur général du Canada, le
procureur général de l'Ontario, le
procureur général du Manitoba, le
procureur général de Terre-Neuve, le Fonds
d'action et d'éducation juridiques pour les
femmes, le Réseau d'action des femmes
handicapées du Canada, le Charter
Committee on Poverty Issues, l'Association
des sourds du Canada, la Société
canadienne de l'ouïe et le Conseil des
Canadiens avec déficiences** *Intervenants*

RÉPERTORIÉ: ELDRIDGE c. COLOMBIE-BRITANNIQUE
(PROCUREUR GÉNÉRAL)

N° du greffe: 24896.

1997: 24 avril; 1997: 9 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

*Droit constitutionnel — Charte des droits — Droits à
l'égalité — Déficience physique — Soins de santé
financés sur les deniers publics — Services d'interpréta-
tion gestuelle non couverts par le régime d'assurance-
maladie — La Charte s'applique-t-elle à la décision de
ne pas fournir des services d'interprétation gestuelle
dans le cadre du régime public de soins de santé et,
dans l'affirmative, de quelle manière s'y applique-t-
elle? — Le fait de ne pas fournir de tels services en
vertu de lois établissant des régimes de soins de santé et
d'hospitalisation porte-t-il atteinte aux droits à l'égalité
garantis par l'art. 15(1) aux personnes handicapées? —
Dans l'affirmative, cette atteinte est-elle justifiée con-*

poses, as well as telephone advice and cosmetic procedures, are not insured. Sign language interpretation is not included. In the usual course, the determination of what constitutes a benefit is left to the discretion of the Medical Services Commission, a nine-member panel composed of representatives from the government, the British Columbia Medical Association and health care consumers. Pursuant to s. 4(1)(j) of the Act, the Commission is authorized to “determine whether a service is a benefit or whether any matter is related to the rendering of a benefit”. Conversely, s. 4(1)(c) empowers it to determine the services that are “not benefits under [the] Act”. The only limit on the Commission’s discretion is set out in s. 4(2), which cautions that its powers must not be exercised “in a manner that does not satisfy the criteria described in section 7 of the *Canada Health Act*”.

assurés, par exemple les consultations téléphoniques, la chirurgie esthétique et les services fournis uniquement à des fins d’ordre juridique ou industriel, ou à des fins d’assurance. L’interprétation gestuelle n’est pas incluse. Dans le cours normal des choses, la détermination de ce qui constitue un avantage est laissée à l’appréciation de la commission des services médicaux, organisme de neuf membres composé de représentants du gouvernement, de la British Columbia Medical Association et de consommateurs de soins de santé. En vertu de l’al. 4(1)j) de la Loi, la commission est autorisée à [TRADUCTION] «décider si un service constitue un avantage ou si quelque chose se rapporte à la fourniture d’un avantage». Inversement, l’al. 4(1)c) habilite la commission à décider quels services ne sont «pas des avantages visés par la Loi». La seule limite au pouvoir discrétionnaire de la commission est énoncée au par. 4(2), qui précise que les pouvoirs de cette dernière ne peuvent pas être exercés «d’une manière incompatible avec les conditions d’octroi énumérés à l’art. 7 de la *Loi canadienne sur la santé*».

29

Assuming that the failure to provide sign language interpreters in medical settings violates s. 15(1) of the *Charter* in some circumstances, I do not see how the *Medical and Health Care Services Act* can be interpreted as mandating that result. The legislation simply does not, either expressly or by necessary implication, prohibit the Medical Services Commission from determining that sign language interpretation is a “medically required” service and hence a benefit under the Act. Indeed, the appellants assert in relation to the s. 15(1) issue that sign language interpretation, where it is necessary for effective communication, is integrally related to the provision of general medical services. Their theory, about which I will have more to say later, is that the failure to provide sign language interpreters violates s. 15(1) because it prevents deaf patients from benefiting equally from the provision of medical services in comparison to hearing patients. If this is correct, then the *Charter* demands that free sign language interpretation be provided as part of any medical service offered to the general public, at least where the service requires a level of communication that only an

À supposer que le fait de ne pas fournir des services d’interprètes gestuels en contexte médical viole le par. 15(1) de la *Charte* dans certaines circonstances, je ne vois pas comment la *Medical and Health Care Services Act* peut être interprétée comme ayant pour effet de commander ce résultat. Cette loi n’interdit tout simplement pas à la commission des services médicaux, ni expressément ni par implication nécessaire, de décider que l’interprétation gestuelle est un service «médicalement nécessaire» et donc un avantage visé par la Loi. De fait, les appelants affirment, relativement à la question touchant le par. 15(1), que l’interprétation gestuelle — lorsqu’elle est nécessaire à l’efficacité des communications — fait partie intégrante de la prestation des services médicaux généraux. Suivant leur thèse, sur laquelle je vais revenir plus loin, le fait de ne pas fournir de services d’interprètes gestuels viole le par. 15(1) parce qu’il empêche les patients atteints de surdité de bénéficier de la prestation des services médicaux d’une manière égale aux personnes qui entendent. Si cette thèse est fondée, alors la *Charte* exige que l’interprétation gestuelle soit fournie gratuitement

interpreter can ensure. Under this approach, the legislation must be interpreted to include sign language interpretation as a “medically required service” in these circumstances. It is clear, therefore, that the failure to provide expressly for sign language interpretation in the *Medical and Health Care Services Act* does not violate s. 15(1) of the *Charter*. The Act does not list those services that are to be considered benefits; instead, it delegates the power to make that determination to a subordinate authority. It is the decision of authority that is constitutionally suspect, not the statute itself.

I pause to emphasize that not every conferral of statutory discretion may be interpreted consistently with the *Charter*. Some grants of discretion will necessarily infringe *Charter* rights notwithstanding that they do not expressly authorize that result; see, e.g., *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1984), 5 D.L.R. (4th) 766 (Ont. C.A.), affirming (1983), 147 D.L.R. (3d) 58 (Ont. Div. Ct.). In such cases it will generally be the statute, and not its application, that attracts *Charter* scrutiny; see June M. Ross, “Applying the Charter to Discretionary Authority” (1991), 29 *Alta. L. Rev.* 382. In the present case, however, the discretion accorded to the Medical Services Commission to determine whether a service qualifies as a benefit does not necessarily or typically threaten the equality rights set out in s. 15(1) of the *Charter*. It is possible, of course, for the Commission to infringe these rights in the course of exercising its authority. That possibility, however, is incidental to the purpose of discretion, which is to ensure that all medically required services are paid for by the government.

dans le cadre de tout service médical offert à la population en général, du moins quand le service exige un niveau de communication que seul un interprète permet d’assurer. Suivant cette approche, la loi doit être interprétée comme incluant l’interprétation gestuelle au titre des «services médicalement nécessaires» dans de telles circonstances. Par conséquent, il est clair que le fait de ne pas pourvoir expressément à la fourniture de l’interprétation gestuelle dans la *Medical and Health Care Services Act* ne viole pas le par. 15(1) de la *Charte*. La Loi n’énumère pas les services qui doivent être considérés comme des avantages. Au contraire, elle délègue le pouvoir de prendre cette décision à un organisme subordonné. C’est la décision de l’organisme qui est constitutionnellement suspecte, et non la loi elle-même.

J’ouvre une parenthèse pour souligner que ce ne sont pas toutes les dispositions attributives d’un pouvoir discrétionnaire qui peuvent être interprétées d’une manière compatible avec la *Charte*. Certaines dispositions de cette nature portent nécessairement atteinte à des droits garantis par la *Charte*, même si elles n’autorisent pas expressément ce résultat; voir, par exemple, *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1984), 5 D.L.R. (4th) 766 (C.A. Ont.), confirmant (1983), 147 D.L.R. (3d) 58 (C. div. Ont.). En pareil cas, c’est généralement la loi et non son application qui entraîne l’examen fondé sur la *Charte*; voir June M. Ross, «Applying the Charter to Discretionary Authority» (1991), 29 *Alta. L. Rev.* 382. Dans le présent cas, toutefois, le pouvoir discrétionnaire qui est accordé à la commission des services médicaux pour lui permettre de décider si un service constitue un avantage ne menace pas nécessairement ou généralement les droits à l’égalité garantis au par. 15(1) de la *Charte*. Il est évidemment possible que la commission viole ces droits dans l’exercice de son pouvoir. Cependant, cette possibilité est une conséquence de l’objet du pouvoir discrétionnaire, qui est de faire en sorte que tous les services médicalement nécessaires soient payés par le gouvernement.

TAB 50

Rowan et al. v. Ontario Securities Commission

[Indexed as: Rowan v. Ontario Securities Commission]

110 O.R. (3d) 492

2012 ONCA 208

Court of Appeal for Ontario,
Sharpe, Blair and Juriansz JJ.A.
March 29, 2012

Securities regulation -- Penalties -- Administrative penalties -- Ontario Securities Commission correctly dismissing appellants' application to strike down s. 127(1)(9) of Securities Act (which authorizes administrative penalties of up to \$1 million for each failure to comply with Ontario securities law) on basis that it violates s. 11(d) of Charter -- Administrative tribunal's power to impose substantial monetary penalties must be assessed on basis of penalty imposed rather than on basis of penalties that are theoretically possible -- Administrative [page493] penalty of \$1 million per infraction not prima facie penal -- Administrative penalties of up to \$520,000 imposed on appellants not sufficiently high to amount to true penal consequence -- Commission not erring by taking conduct contrary to public interest into account as contextual factor when imposing administrative penalties -- Canadian Charter of Rights and Freedoms, s. 11(d) -- Securities Act, R.S.O. 1990, c. S.5, s. 127(1)(9).

The appellant R was president and chief operating officer of the appellant WCI, a broker and registered investment dealer. The appellant C was the chairman, chief executive officer and ultimate designated person of WCI, and the appellant M was the chief financial officer and chief compliance officer. The Ontario Securities Commission found that R breached Ontario

- (c) in respect of a person or company, a decision of the Commission or a Director to which the person or company is subject;

.

"regulations" means the regulations made under this Act and, unless the context otherwise indicates, includes the rules

.

"rules" means,

- (a) the rules made under section 143, and
- (b) orders, rulings and policies listed in the Schedule[.][page503]

[32] The Charter of Rights and Freedoms, s. 11(d) provides:

11. Any person charged with an offence has the right

.

- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal[.]

[33] The respondent concedes that the appellants were not accorded the rights guaranteed by s. 11(d) and, accordingly, the issue is whether the appellants were entitled to s. 11(d) protections: that is, were they persons "charged with an offence" because they were in jeopardy of having the Commission impose the AMPs authorized by s. 127(1)(9).

[34] The appellants argue that s. 127(1)(9) allows the Commission to impose an AMP of virtually unlimited magnitude. In the present case, if the maximum fine of \$1 million per infraction were multiplied by the thousands of infractions Rowan was found to have committed, a penalty in the billions of dollars would be theoretically possible. The appellants say that a fine of that magnitude cannot possibly qualify as an administrative sanction and that it is necessarily penal in nature. They submit that a person put in jeopardy of having such a penalty imposed must be someone "charged with an offence" and therefore entitled to the rights conferred by s. 11(d) of the Charter. They insist that whether a proceeding is

covered by s. 11 must be assessed ex ante, on the basis of the amount of the potential fine, and not ex post, on the basis of the actual monetary penalty imposed.

[35] The starting point for analysis of the Charter challenge is the decision of the Supreme Court of Canada in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, [1987] S.C.J. No. 71, the seminal case on the meaning of the phrase "charged with an offence" in s. 11. *Wigglesworth* rejected the proposition that all persons subject to proceedings leading to the imposition of a penalty should be regarded as charged with an offence for the purposes of s. 11. Wilson J., who wrote the majority opinion, took a narrower view and held, at p. 558 S.C.R., that s. 11 should be restricted "to the most serious offences known to our law, i.e., criminal and penal matters".

[36] There are two categories of "criminal or penal matters". A matter may be a criminal or penal matter either because "by its very nature it is a criminal proceeding" or "because a conviction in respect of the offence may lead to a true penal consequence": p. 559 S.C.R. Matters "of a public nature, intended to promote public order and welfare within a public sphere of activity" are by their very nature criminal or penal while "private, domestic [page504] or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity" are not: p. 560 S.C.R. "Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of 'offence' proceedings to which s. 11 is applicable": p. 560 S.C.R.

[37] The appellants do not suggest that the proceedings they faced before the Commission met the "by nature" test as being criminal or penal. The proceedings were clearly regulatory in nature and designed to enhance public confidence in the integrity and reliability of the capital markets. The appellants base their challenge to s. 127(1)(9) on the "true penal consequence" test. They contend that because of the potential magnitude of the AMP the Commission could impose,

they were faced with "a true penal consequence", thereby triggering the protection of s. 11 of the Charter.

[38] Wigglesworth holds that a private, domestic or disciplinary matter that escapes the reach of the first "by nature" test may still be caught by s. 11 because the matter could lead to "a true penal consequence". This was explained by Wilson J., at p. 561 S.C.R.:

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

[39] However, at pp. 561-62 S.C.R., Wilson J. added what she described as "two caveats". Both caveats bear directly on the issue posed in this case. Wilson J.'s first caveat was that [at p. 561 S.C.R.]:

[T]he possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose.

(Emphasis added)

[40] Wilson J.'s second caveat was that only rarely would a proceeding fail to qualify for s. 11 protection under the "by nature" test but fall under s. 11 by virtue of the "true penal consequence test". As Wilson J. put it [at p. 561 S.C.R.], it is highly doubtful that "any body or official which exists in order to [page505] achieve some administrative or private disciplinary purpose can ever imprison an individual". However, where [at p. 562 S.C.R.] "an individual is to be subject to penal consequences such as imprisonment -- the most severe

deprivation of liberty known to our law -- then he or she, in my opinion, should be entitled to the highest procedural protection known to our law".

[41] In my view, Wilson J.'s first caveat is fatal to the appellant's argument that we should strike down s. 127(1)(9) on the ground that it allows for the imposition of a monetary penalty of potential virtually unlimited magnitude. The italicized portion of the passage I have quoted above stands for the proposition that the appropriate remedy to protect the rights guaranteed by s. 11 in the case of an unlimited power to impose a fine is not to nullify the power altogether, but rather to limit the tribunal's discretion so that it may only impose penalties that are consistent with the purpose of maintaining discipline and order within a particular sphere of activity.

[42] The appellants contend that the italicized passage cannot mean what it appears to say given the actual decision in Wigglesworth. In his careful argument, Prof. Hogg pointed out that in Wigglesworth, the accused RCMP officer was charged with a disciplinary offence for which he could be fined and sentenced to imprisonment by the tribunal. The officer was given a modest fine and not sent to jail, yet the Supreme Court of Canada held that the possibility of imprisonment brought the proceedings within s. 11 because the officer faced the possibility of "true penal consequences". Professor Hogg submits that the actual holding in Wigglesworth was to assess whether s. 11 applied *ex ante*, on the basis of the potential penalty, not *ex post*, on the basis of the actual penalty. He submits that we should take the same approach and effectively disregard the italicized passage as non-binding obiter dictum.

[43] I am unable to accept that argument for the following reasons.

[44] It is clear from Wilson J.'s "second caveat" that she regarded Wigglesworth as an exceptional case. What made Wigglesworth exceptional was that a domestic tribunal was given the power to imprison, a possibility that Wilson J. regarded as difficult to imagine. When explaining her conclusion that the

RCMP officer did face "true penal consequences", she wrote, at pp. 563-64 S.C.R.: "This would seem, therefore, to be that unusual case where proceedings have failed the 'by nature' test but have passed the 'true penal consequence' test." The power to order imprisonment is so obviously penal in nature and so exceptional in the setting of administrative tribunals that the [page506] mere possibility of a sentence of imprisonment was sufficient, in Wilson J.'s view, to colour the proceedings as having "true penal consequences" and thereby to trigger the protection of s. 11.

[45] In my view, we should decline the invitation to follow and to extend reasoning intended to meet the exceptional and rarely encountered power to imprison to the circumstances of this case. Instead, I would apply the plain language of the passage in Wigglesworth dealing with the power to fine that is commonly encountered in administrative proceedings.

[46] There is now an established line of authority holding that the power of an administrative tribunal to impose substantial monetary penalties is to be assessed on the basis of the penalty imposed rather than on penalties that are theoretically possible. This is consistent not only with the language of Wigglesworth, but also with the general principles that "legislation conferring an imprecise discretion does not confer the power to infringe the Charter unless that power is conferred expressly or by necessary implication" and that "[l]egislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed": *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, [1989] S.C.J. No. 45, at pp. 1078-79 S.C.R.

[47] In *Lavallee v. Alberta (Securities Commission)*, [2010] A.J. No. 144, 2010 ABCA 48, 317 D.L.R. (4th) 373, the Alberta Court of Appeal upheld the power of the Alberta Securities Commission to impose administrative penalties of \$1 million per infraction. Similarly, in *Canada (Attorney General) v. United States Steel Corp.*, [2011] F.C.J. No. 726, 2011 FCA 176, 333 D.L.R. (4th) 1, the Federal Court of Appeal upheld a provision of the Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.), s. 40, authorizing a penalty of up to \$10,000 per day for

failure to comply with a ministerial directive. The court held, at para. 80:

A statutory power to impose fines that comes along with little statutory guidance will not be subject to s. 11 as long as it is exercised in a way so as to achieve proper administrative aims. If, as U.S. Steel contends, the procedure provided for in section 40 does not meet the standard of subsection 11(d) of the Charter, this simply means that the Court is limited in the goals it can consider in imposing monetary fines . . . [This] accords with the principle that we should not assume before the fact that judges will exercise their discretion in an unconstitutional way[.]

[48] The appellants contend that both cases were wrongly decided and that we should set Ontario law on a different course. I disagree. These decisions are consistent with Wigglesworth and I am not persuaded that we should depart from the established pattern in the jurisprudence. [page507]

[49] Penalties of up to \$1 million per infraction are, in my view, entirely in keeping with the Commission's mandate to regulate the capital markets where enormous sums of money are involved and where substantial penalties are necessary to remove economic incentives for non-compliance with market rules. The recommendation of the Securities Act Five Year Review Committee that the Commission be given the power to impose administrative penalties of up to \$1 million per contravention was based on the need to ensure that the administrative penalty would not simply be viewed as a "cost of doing business" or a "licensing fee" for unscrupulous market participants: Ontario, Five Year Review Committee Final Report: Reviewing the Securities Act (Ontario) (Toronto: Queen's Printer for Ontario, 2003), at p. 214. The Committee noted the importance of allowing "the Commission to send an appropriate deterrent message, having regard to, among other things, the gravity and impact of the conduct under consideration and the nature of the respondents that are the subject of the proceedings".

[50] As the Commission indicated in its Sanctions decision, the level of penalty permitted by s. 127(1)(9) is in keeping with legislation in other provinces. One million dollar penalties are authorized in Nova Scotia, Alberta and British Columbia, while Quebec allows for penalties of up to \$2 million: Securities Act, R.S.N.S. 1989, c. 418, s. 135; Securities Act, R.S.A. 2000, c. S-4, s. 199; Securities Act, R.S.B.C. 1996, c. 418, s. 162; Securities Act, R.S.Q., c. V-1.1, s. 273.1. The United States Securities and Exchange Commission can impose administrative fines of varying levels up to a maximum of \$100,000 for natural persons and \$500,000 for companies: Securities Exchange Act of 1934 (U.S.), 15 U.S.C. 78u-2(b)(3). There is no specified maximum on administrative monetary penalties that can be imposed by the United Kingdom Financial Services Authority: Financial Services and Markets Act 2000 (U.K.), 2000 c. 8, s. 206. Penalties at the \$1 million level are also in keeping with those levied by self-regulatory agencies operating in the securities field: see paras. 53-55 of the Commission's Sanctions reasons.

[51] Penalties at the level of \$1 million almost certainly have a deterrent purpose, but that does not make them penal in nature. As the Supreme Court of Canada held in *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, [2004] S.C.J. No. 22, 2004 SCC 26, in carrying out their regulatory and preventative mandate provincial securities commissions may legitimately consider deterrence when imposing a monetary penalty. Writing for the court, Le Bel J. stated, at para. 60, that "it is reasonable to view general deterrence as an appropriate, and perhaps necessary, [page508] consideration in making orders that are both protective and preventative". See, also, *Martineau v. M.N.R.*, [2004] 3 S.C.R. 737, [2004] S.C.J. No. 58, 2004 SCC 81, at para. 38.

[52] I agree with the the Commission's conclusion, at para. 56, that an administrative penalty of \$1 million is not *prima facie* penal [2009 LNONOSC 941]:

In pursuit of the legitimate regulatory goal of deterring others from engaging in illegal conduct, the Commission must, therefore, have proportionate sanctions at its disposal. The

administrative penalty represents an appropriate legislative recognition of the need to impose sanctions that are more than "the cost of doing business". In the current securities regulation and today's capital markets context, a \$1,000,000 administrative penalty is not prima facie penal.

[53] Nor am I persuaded that the AMPs imposed by the Commission on the appellants were at a level to bring them within the "true penal consequence" category. The constitution does not impose a defined limit on what is permissible by way of administrative monetary sanctions. The limit can only be determined by reference to the purpose of the penalty in relation to the regulatory mandate of the tribunal. In *Martineau*, the Supreme Court of Canada considered a penalty under s. 124 of the Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), which conferred a power to require a cash payment with no statutory maximum. The key question, as stated at para. 60, is whether the penalty "constitutes a fine that, by its magnitude, is imposed for the purpose of redressing a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness of customs requirements" (emphasis in original).

[54] In my view, the Commission did not err in concluding that magnitude of the AMP was geared to its regulatory mandate. The maximum AMP for one contravention is one fifth of the maximum penalty that can be imposed in a prosecution under the Act: see s. 122(1). The amount of an AMP is determined by regulatory considerations distinct from the principles of criminal liability and sentencing. No criminal record results. A further indication of the internal rather than criminal purpose of the AMPs is that the proceeds of the AMPs imposed were allocated by the Commission for the benefit of third parties pursuant to s. 3.4(2)(b) and not paid to the consolidated revenue fund: see *Wigglesworth*, at p. 561 S.C.R.

[55] Given the very large number of infractions involving over a billion dollars' worth of securities and over \$2 million dollars in commissions, fines totalling \$1,220,000 were within the constitutionally permissible range. [page509]

2. Did the Commission err and exceed its jurisdiction by taking conduct contrary to the public interest into

account when imposing an AMP against Rowan?

[56] As I have already noted, under s. 127(1)(9) of the Act, the Commission can only impose an AMP where there has been a breach of Ontario securities law. Rowan argues that the Commission wrongly took into account conduct that was found to be contrary to the public interest when assessing the amount to impose against him by way of an AMP. Particular importance was attached to para. 161 of the Commission's Sanctions reasons [2009 LNONOSC 941]:

Rowan failed to comply with Ontario securities law by: breaching section 107 of the Act by failing to file insider reports in respect of trades in Biovail securities that he executed in the Trust Accounts; engaging in conduct contrary to the public interest by failing to provide complete and accurate information to Biovail concerning the number of Biovail common shares held in the Trust Accounts over which he exercised or shared control or direction; and engaging in conduct contrary to the public interest by trading in Biovail securities in the Trust Accounts during Biovail's Blackout Periods. Further, the Hearing Panel found that Rowan's conduct was contrary to the public interest.

[57] As it was common ground before us, I accept without deciding that Rowan's only transgression that amounted to a breach of Ontario securities law was his failure to file insider reports. He submits that by listing the matters on which he was found to have acted contrary to the public interest as if those were also breaches of Ontario securities law, the Commission conflated the former with the latter. It follows, in his submission, that this passage demonstrates that the Commission improperly considered acts contrary to the public interest when fixing the amount of the AMP.

[58] I am not persuaded by counsel's characterization of the Commission's alleged error as amounting to a "jurisdictional error". I agree with the Divisional Court that on this issue the Commission's reasons are to be reviewed on a reasonableness standard. However, I will proceed on the assumption that if the Commission did impose the AMP on the basis of some irrelevant

TAB 51

In the Court of Appeal of Alberta**Citation: Lavallee v. Alberta (Securities Commission), 2010 ABCA 48****Date:** 20100211**Docket:** 0901-0051-AC**Registry:** Calgary**Between:****Lambert “Bert” Lavallee, Arbour Energy Inc. and Dennis Morice**

Appellants (Applicants)

- and -

Alberta Securities Commission

Respondent

-and-

The Attorney General of Alberta

Intervener

The Court:

**The Honourable Madam Justice Carole Conrad
The Honourable Madam Justice Constance Hunt
The Honourable Madam Justice Marina Paperny**

**Reasons for Judgment Reserved of The Honourable Madam Justice Paperny
Concurred in by The Honourable Madam Justice Conrad
Concurred in by The Honourable Madam Justice Hunt**

Appeal from the Decision by
The Honourable N. Wittmann, Associate Chief Justice
Dated the 9th day of January, 2009
Filed on the 11th day of February, 2009
(2009 ABQB 17, Docket: 0801-05159; 0801-05161)

Section 11

[20] The appellants argue that the Commission's proceedings have the potential to violate their right under s. 11(d) to be presumed innocent of an offence until proven guilty in a fair and public hearing. The chambers judge concluded that the appellants have not been charged with an "offence" within the meaning of s. 11 because the potential consequences that may arise under ss. 198 and 199 of the **Securities Act** are not penal in nature.

[21] The chambers judge referred to the decision of Wilson J. in **R. v. Wigglesworth**, [1987] 2 S.C.R. 541, 45 D.L.R. (4th) 235 ("**Wigglesworth**"), in which she described the kind of matters that typically are covered by s.11. She distinguished between public matters, "intended to promote public order and welfare within a public sphere of activity", and "private, domestic or disciplinary matters" which are "primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity": **Wigglesworth** at para. 23. The former matters, those of a public nature, include criminal offences and quasi-criminal offences under provincial statutes, and are the kind of offences to which s. 11 was intended to apply. The latter matters include administrative proceedings instituted for the protection of the public in accordance with the policy of a statute. Section 11 will typically not apply to such proceedings. Administrative hearings before securities commissions are generally held to fall into this latter category.

[22] As the chambers judge noted, Wilson J. in **Wigglesworth** went on to state that the protections provided by s. 11 may apply to private or regulatory matters if there is the imposition of "true penal consequences". She opined at para. 24 that true penal consequences might include a "fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity".

[23] The appellants rely on this last statement to argue that the potential penalties they face, for fines of up to \$1 million per contravention of securities law, amount to true penal consequences and that the protections guaranteed by s. 11 are therefore engaged. The chambers judge rejected that argument, emphasizing the need to consider the purpose of the sanction, and not just its magnitude, in assessing whether it amounts to a true penal consequence. Moreover, when considering the purpose of the sanction it is necessary to consider the overarching purposes of the **Securities Act**, which include the protection of investors and the public, the efficiency of the capital markets, and ensuring public confidence in the system. In the end, the chambers judge agreed with this Court's conclusion, at para. 54 of **Brost**, that the increase in the magnitude of administrative penalties reflects a legislative intent to ensure that the penalties are not simply considered another cost of doing business. He therefore concluded that no true penal consequences arise under ss. 198 and 199 of the **Securities Act** and that s. 11 of the **Charter** is, accordingly, not engaged here. I agree.

[24] The appellants point to a recent decision of the British Columbia Court of Appeal which considered the nature of administrative penalties similar in magnitude to those at issue here. In **Thow v. British Columbia (Securities Commission)**, 2009 BCCA 46, 266 B.C.A.C. 140 at para. 49, (“**Thow**”) (decided after the decision of the chambers judge in this case), the court concluded that the imposition of administrative penalties totalling \$6 million (\$1 million per contravention) was “punitive” and therefore the amendment to the British Columbia **Securities Act** which permitted such penalties could not be applied retrospectively. In the course of considering whether the presumption against retrospectivity should apply, the Court said that the penalty was “‘punitive’ in the broad sense of the word; it was designed to penalize Mr. Thow and to deter others from similar conduct”: *ibid.*

[25] The appellants urge us to apply this same reasoning to the question of whether the sanctions set out in ss. 198 and 199 of the **Securities Act** amount to “true penal consequences” for purposes of the s. 11 analysis. I prefer the reasoning of LeBel J. in **Cartaway Resources Corp.**, 2004 SCC 26, [2004] 1 S.C.R. 672 at para. 60, (“**Cartaway**”) where he found that general deterrence is “an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative”. He agreed with Ryan J.A., the dissenting judge in the appeal court in that case, when she wrote that “[t]he notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others”. As the Supreme Court concluded in **Cartaway**, general deterrence is a relevant factor when the Commission imposes sanctions designed to carry out the public protection purposes of securities regulation. To the extent that **Thow** reaches a different conclusion, I decline to follow it.

Section 7

[26] The appellants also argue that the Commission’s proceedings place in jeopardy their s. 7 right to security of the person, through the potential imposition of “crippling fines” without any income testing requirement in combination with “prohibitory orders that have the effect of preventing future engagement in income-generating activities”.

[27] As the chambers judge noted, s. 7 provides procedural protections, but only if the appellants can prove there has been a deprivation of a protected right, namely the right to life, liberty or security of the person: **Blencoe v. British Columbia (Human Rights Commission)**, 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 47 (“**Blencoe**”). The chambers judge recognized that a Commission panel has the power to severely impact the appellants’ choices regarding their economic lives. However, it is well established that s. 7 does not protect purely economic rights: see, for example, **Yin v. Lewin**, 2006 ABQB 402, 403 A.R. 79, aff’d 2007 ABCA 406, 422 A.R. 263. As the chambers judge noted, the Commission cannot preclude the appellants from obtaining employment or meeting their essential needs.

[28] The appellant Morice deposes that the allegations against him have affected him personally as well as professionally. He says he feels depressed, anxious and has become reclusive. In light of

TAB 52

**Committee for the Equal Treatment of
Asbestos Minority Shareholders** *Appellant*

v.

**Her Majesty in Right of Quebec, Ontario
Securities Commission and Société nationale
de l'amiante** *Respondents*

INDEXED AS: COMMITTEE FOR THE EQUAL TREATMENT OF
ASBESTOS MINORITY SHAREHOLDERS v. ONTARIO
(SECURITIES COMMISSION)

Neutral citation: 2001 SCC 37.

File No.: 27252.

2000: December 15; 2001: June 7.

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

ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

Securities — Ontario Securities Commission — Public interest jurisdiction — Nature and scope of Commission's public interest jurisdiction to intervene in activities related to Ontario capital markets — Whether Commission's decision not to exercise its public interest jurisdiction in this case reasonable — Securities Act, R.S.O. 1990, c. S.5, s. 127(1), para. 3.

Administrative law — Judicial review — Securities commissions — Standard of review — Standard of review for Ontario Securities Commission's decisions involving application of its public interest jurisdiction.

In 1977, the Quebec Government decided to take control of Asbestos Corp., a leading asbestos producer in the province. The common shares of Asbestos traded on the Toronto Stock Exchange and the Montreal Stock Exchange. Approximately 30 percent of the Asbestos common shares were held by minority shareholders resident in Ontario while GD Canada, a subsidiary of an American company, held the controlling interest. As a vehicle to take control of Asbestos, Quebec incorporated the Société nationale de l'amiante (SNA), a Crown

**Comité pour le traitement égal des
actionnaires minoritaires de la Société
Asbestos Ltée** *Appelant*

c.

**Sa Majesté du chef du Québec, la
Commission des valeurs mobilières de
l'Ontario et la Société nationale de
l'amiante** *Intimées*

RÉPERTORIÉ : COMITÉ POUR LE TRAITEMENT ÉGAL DES
ACTIONNAIRES MINORITAIRES DE LA SOCIÉTÉ ASBESTOS
LTÉE c. ONTARIO (COMMISSION DES VALEURS MOBILIÈRES)

Référence neutre : 2001 CSC 37.

Nº du greffe : 27252.

2000 : 15 décembre; 2001 : 7 juin.

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

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

Valeurs mobilières — Commission des valeurs mobilières de l'Ontario — Compétence relative à l'intérêt public — Nature et portée de la compétence de la Commission pour intervenir en matière d'intérêt public dans les activités liées aux marchés financiers en Ontario — La décision de la Commission de ne pas exercer en l'espèce sa compétence relative à l'intérêt public était-elle raisonnable? — Loi sur les valeurs mobilières, L.R.O. 1990, ch. S.5, art. 127(1), disposition 3.

Droit administratif — Contrôle judiciaire — Commissions des valeurs mobilières — Norme de contrôle — Norme de contrôle applicable aux décisions de la Commission des valeurs mobilières de l'Ontario portant sur l'exercice de sa compétence relative à l'intérêt public.

En 1977, le gouvernement du Québec a décidé de prendre le contrôle d'Asbestos, un chef de file de la production d'amiante dans la province. Les actions ordinaires d'Asbestos étaient négociées à la Bourse de Toronto et à la Bourse de Montréal. Environ 30 pour 100 des actions ordinaires d'Asbestos étaient détenues par des actionnaires minoritaires résidant en Ontario, alors que le contrôle appartenait à GD Canada, filiale d'une société américaine. Le Québec a constitué la Société nationale de l'amiante (« SNA »), société d'État

36 With respect to the fourth error noted by the Court of Appeal, Laskin J.A. held that the Divisional Court erred by focussing only on investor abuse and viewing s. 127(1), para. 3 as remedial. It was the opinion of the court that s. 127(1), para. 3 is not remedial (at p. 272):

The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets. The past conduct of offending market participants is relevant but only to assessing whether their future conduct is likely to harm the integrity of the capital markets.

37 Finally, Laskin J.A. commented on the Divisional Court order. He held that the Divisional Court had no jurisdiction to make the order in respect of future costs. However, he was of the view that the court did have the jurisdiction to include the other aspects of the order, but held that it ought not to have. Rather, it should have remitted the matter back to the OSC to determine what order should be made.

III. Issues on Appeal

38 There are three main issues in this appeal:

1. What is the nature and scope of s. 127 jurisdiction to intervene in the public interest?
2. What is the appropriate standard of review?
3. Did the OSC make a reviewable error?

IV. Analysis

1. *What Is the Nature and Scope of Section 127 Jurisdiction to Intervene in the Public Interest?*

39 Section 127(1) of the Act provides the OSC with the jurisdiction to intervene in activities related to the Ontario capital markets when it is in the public

Quant à la quatrième erreur relevée par la Cour d'appel, le juge Laskin a conclu que la Cour divisionnaire avait commis une erreur en se concentrant uniquement sur l'abus envers les investisseurs et en considérant la disposition 3 du par. 127(1) comme si elle avait un caractère réparateur. La Cour d'appel était d'avis que la disposition 3 du par. 127(1) n'a pas un caractère réparateur (à la p. 272) :

[TRADUCTION] La fin visée par la compétence relative à l'intérêt public de la Commission n'est ni réparatrice, ni punitive; elle est de nature protectrice et préventive et elle est destinée à être exercée pour prévenir le risque d'un éventuel préjudice aux marchés financiers en Ontario. La conduite passée d'intervenants fautifs dans le marché n'est pertinente qu'en ce qui a trait à l'évaluation de la probabilité que leur conduite future soit préjudiciable à l'intégrité des marchés financiers.

Le juge Laskin a en dernier lieu commenté l'ordonnance de la Cour divisionnaire. Il a conclu que la Cour divisionnaire n'avait pas compétence pour rendre une ordonnance visant les dépens à venir. Il était toutefois d'avis que la cour avait compétence pour inclure les autres aspects de l'ordonnance, mais qu'elle aurait dû s'en abstenir. Elle aurait plutôt dû renvoyer l'affaire devant la CVMO pour que celle-ci détermine quelle ordonnance devrait être rendue.

III. Les questions soulevées par le pourvoi

Le pourvoi soulève trois questions principales :

1. Quelle est la nature et la portée de la compétence pour intervenir en matière d'intérêt public conférée par l'art. 127?
2. Quelle est la norme de contrôle appropriée?
3. La CVMO a-t-elle commis une erreur donnant ouverture au contrôle judiciaire?

IV. Analyse

1. *Quelle est la nature et la portée de la compétence pour intervenir en matière d'intérêt public conférée par l'art. 127?*

Le paragraphe 127(1) de la Loi confère à la CVMO la compétence pour intervenir dans les activités liées aux marchés financiers en Ontario

interest to do so. The legislature clearly intended that the OSC have a very wide discretion in such matters. The permissive language of s. 127(1) expresses an intent to leave it for the OSC to determine whether and how to intervene in a particular case:

127. (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders [Emphasis added.]

The breadth of the OSC's discretion to act in the public interest is also evident in the range and potential seriousness of the sanctions it can impose under s. 127(1). Furthermore, pursuant to s. 127(2), the OSC has an unrestricted discretion to attach terms and conditions to any order made under s. 127(1):

(2) An order under this section may be subject to such terms and conditions as the Commission may impose.

However, the public interest jurisdiction of the OSC is not unlimited. Its precise nature and scope should be assessed by considering s. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard. First, it is important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act described in s. 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets". Therefore, in considering an order in the public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered.

lorsqu'il est dans l'intérêt public qu'elle le fasse. Le législateur a clairement voulu que la CVMO ait un très vaste pouvoir discrétionnaire en cette matière. Le libellé facultatif du par. 127(1) exprime l'intention de laisser à la CVMO le soin d'apprécier l'opportunité et la manière d'intervenir dans une affaire particulière :

127. (1) La Commission peut, si elle est d'avis qu'il est dans l'intérêt public de le faire, rendre une ou plusieurs des ordonnances suivantes [Je souligne.]

La portée du pouvoir discrétionnaire de la CVMO d'agir dans l'intérêt public ressort aussi de façon évidente de la gamme et de la gravité potentielle des sanctions qu'elle est habilitée à imposer en vertu du par. 127(1). De plus, en vertu du par. 127(2), la CVMO dispose sans restriction du pouvoir discrétionnaire d'adjoindre des conditions à toute ordonnance rendue en vertu du par. 127(1) :

(2) L'ordonnance rendue en vertu du présent article peut être assortie des conditions qu'impose la Commission.

La compétence relative à l'intérêt public de la CVMO n'est toutefois pas illimitée. Sa nature et sa portée précises doivent être appréciées par une analyse de l'art. 127 dans son contexte. Deux aspects de la compétence relative à l'intérêt public revêtent une importance particulière à cet égard. En premier lieu, il importe de se rappeler que la compétence relative à l'intérêt public de la CVMO est fondée en partie sur les deux objets de la Loi, décrits à l'art. 1.1, à savoir « protéger les investisseurs contre les pratiques déloyales, irrégulières ou frauduleuses » et « favoriser des marchés financiers justes et efficaces et la confiance en ceux-ci ». Par conséquent, lorsqu'il s'agit d'examiner une ordonnance rendue dans l'intérêt public, c'est commettre une erreur que de ne se concentrer que sur le traitement équitable des investisseurs. Il faut aussi prendre en considération l'incidence d'une intervention dans l'intérêt public sur l'efficacité des marchés financiers et sur la confiance du public en ces marchés financiers.

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Second, it is important to recognize that s. 127 is a regulatory provision. In this regard, I agree with Laskin J.A. that “[t]he purpose of the Commission’s public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario’s capital markets” (p. 272). This interpretation of s. 127 powers is consistent with the previous jurisprudence of the OSC in cases such as *Canadian Tire, supra*, aff’d (1987), 59 O.R. (2d) 79 (Div. Ct.); leave to appeal to C.A. denied (1987), 35 B.L.R. xx, in which it was held that no breach of the Act is required to trigger s. 127. It is also consistent with the objective of regulatory legislation in general. The focus of regulatory law is on the protection of societal interests, not punishment of an individual’s moral faults: see *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 219.

En deuxième lieu, il importe de reconnaître que l’art. 127 est une disposition de nature réglementaire. À cet égard, j’abonde dans le sens du juge Laskin lorsqu’il dit que [TRADUCTION] « [l]a fin visée par la compétence relative à l’intérêt public de la CVMO n’est ni réparatrice, ni punitive; elle est de nature protectrice et préventive et elle est destinée à être exercée pour prévenir le risque d’un éventuel préjudice aux marchés financiers en Ontario » (p. 272). Cette interprétation des pouvoirs conférés par l’art. 127 s’harmonise avec la jurisprudence de la CVMO dans des affaires comme *Canadian Tire*, précitée, conf. par (1987), 59 O.R. (2d) 79 (C. div.), autorisation d’interjeter appel à la C.A. refusée (1987), 35 B.L.R. xx, où les tribunaux ont reconnu qu’il n’est pas nécessaire qu’il y ait violation de la Loi pour que l’art. 127 s’applique. Elle s’accorde aussi à l’objet des lois de nature réglementaire en général. La visée d’une loi de nature réglementaire est la protection des intérêts de la société, et non la sanction des fautes morales d’une personne : voir l’arrêt *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154, p. 219.

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Furthermore, the above interpretation is consistent with the scheme of enforcement in the Act. The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as “Orders in the public interest”. Such orders are not punitive: *Re Albino* (1991), 14 O.S.C.B. 365. Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets: *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600. In contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively: see

De plus, cette interprétation est compatible avec les moyens retenus pour l’application de la Loi. Les techniques d’application de la Loi embrassent un large éventail allant des sanctions purement réglementaires ou administratives aux sanctions pénales graves. Les sanctions administratives sont celles qui servent le plus fréquemment et elles sont regroupées à l’art. 127 sous l’intertitre « Ordonnances rendues dans l’intérêt public ». Ces ordonnances ne sont pas de nature punitive : *Re Albino* (1991), 14 O.S.C.B. 365. L’objet d’une ordonnance rendue en vertu de l’art. 127 est plutôt de limiter la conduite future qui risque de porter atteinte à l’intérêt public dans le maintien de marchés financiers justes et efficaces. Le rôle de la CVMO en vertu de l’art. 127 consiste à protéger l’intérêt public en retirant des marchés financiers les personnes dont la conduite antérieure est à ce point abusive qu’elle justifie la crainte d’une conduite ultérieure susceptible de nuire à l’intégrité des marchés financiers : *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600. Par contraste, c’est aux cours de justice qu’il appartient de punir ou de

TAB 53

**Executive Director of the British Columbia
Securities Commission** *Appellant*

v.

**Robert Arthur Hartvikson and Blayne Barry
Johnson** *Respondents*

and

Ontario Securities Commission *Intervener*

INDEXED AS: CARTAWAY RESOURCES CORP. (RE)

Neutral citation: 2004 SCC 26.

File No.: 29472.

2003: November 7; 2004: April 22.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Administrative law — Judicial review — Standard of review — Securities Commission — Commission imposing maximum administrative penalty — Standard of review applicable to Commission's decision — Securities Act, R.S.B.C. 1996, c. 418.

Securities — Securities Commission — Enforcement — Administrative penalty — Principles Commission must consider in imposing administrative penalty in public interest — General deterrence — Commission imposing maximum administrative penalty against two securities brokers for breach of prospectus requirement — Whether general deterrence appropriate factor in assessing penalty in public interest — Whether Commission must consider settlement agreements entered into by its Executive Director with other brokers in assessing sanctions — Securities Act, R.S.B.C. 1996, c. 418, s. 162.

Securities — Securities Commission — Appeal of Commission decision — Commission imposing maximum

**Directeur général de la British Columbia
Securities Commission** *Appelant*

c.

**Robert Arthur Hartvikson et Blayne Barry
Johnson** *Intimés*

et

**Commission des valeurs mobilières de
l'Ontario** *Intervenante*

RÉPERTORIÉ : CARTAWAY RESOURCES CORP. (RE)

Référence neutre : 2004 CSC 26.

N° du greffe : 29472.

2003 : 7 novembre; 2004 : 22 avril.

Présents : La juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish.

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

Droit administratif — Contrôle judiciaire — Norme de contrôle — Commission des valeurs mobilières — Imposition de la sanction administrative maximale par la Commission — Norme de contrôle applicable à la décision de la Commission — Securities Act, R.S.B.C. 1996, ch. 418.

Valeurs mobilières — Commission des valeurs mobilières — Application de la loi — Sanction administrative — Principes à prendre en compte par la Commission pour l'imposition de sanctions administratives d'intérêt public — Dissuasion générale — Imposition par la Commission de la sanction administrative maximale à deux courtiers en valeurs mobilières pour ne pas avoir respecté l'obligation de prospectus — La dissuasion générale constitue-t-elle un facteur pertinent pour la détermination d'une pénalité qui est dans l'intérêt public? — Pour déterminer les sanctions, la Commission doit-elle tenir compte des règlements amiables conclus par son directeur général avec d'autres courtiers? — Securities Act, R.S.B.C. 1996, ch. 418, art. 162.

Valeurs mobilières — Commission des valeurs mobilières — Appel de la décision de la Commission —

harm to private parties or individuals: *Asbestos, supra*, at paras. 41-45. It should be observed that our Court was not considering the function of general deterrence in the exercise of the jurisdiction of a securities commission to impose fines and administrative penalties nor denying that general deterrence might play a role in this respect.

Braidwood J.A. understood *Asbestos, supra*, to foreclose the imposition of public interest penalties for the purpose of general deterrence. With respect, Braidwood J.A.'s interpretation was mistaken.

In my view, nothing inherent in the Commission's public interest jurisdiction, as it was considered by this Court in *Asbestos, supra*, prevents the Commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative. Ryan J.A. recognized this in her dissent: "The notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others" (para. 125).

The *Oxford English Dictionary* (2nd ed. 1989), vol. XII, defines "preventive" as "[t]hat anticipates in order to ward against; precautionary; that keeps from coming or taking place; that acts as a hindrance or obstacle". A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction under s. 162. The respective importance of general deterrence as

En raison de la nature réglementaire de l'art. 127, les sanctions prévues par cette disposition ne sont pas réparatrices ou punitives, mais plutôt de nature préventive et prospective. Par conséquent, notre Cour a conclu qu'une partie privée ou un particulier ne pouvait invoquer l'art. 127 pour réparer un acte d'inconduite qui lui aurait causé un préjudice : *Asbestos*, précité, par. 41-45. Il convient de noter que notre Cour n'examinait pas alors la fonction de dissuasion générale dans l'exercice de la compétence d'une commission des valeurs mobilières pour imposer des amendes et des sanctions administratives et reconnaissait que la dissuasion générale peut jouer un rôle à cet égard.

Selon le juge Braidwood, l'arrêt *Asbestos*, précité, interdit d'imposer des pénalités d'intérêt public aux fins de dissuasion générale. Avec égards, cette interprétation du juge Braidwood est erronée.

À mon avis, rien dans la compétence relative à l'intérêt public de la Commission que notre Cour a examinée dans *Asbestos*, précité, ne l'empêche de tenir compte de la dissuasion générale lorsqu'elle prononce une ordonnance. Au contraire, il est raisonnable de considérer qu'il s'agit d'un facteur pertinent, voire nécessaire, dans l'établissement d'ordonnances de nature à la fois protectrice et préventive. La juge Ryan l'a d'ailleurs reconnu dans sa dissidence : [TRADUCTION] « La notion de dissuasion générale n'est ni punitive ni réparatrice. Une pénalité qui se veut généralement dissuasive est celle qui vise à décourager ou à empêcher les autres de se livrer à de tels comportements » (par. 125).

Le *Nouveau Petit Robert* (2003) définit ainsi le mot « préventif » : « [q]ui tend à empêcher (une chose fâcheuse) de se produire ». Une pénalité qui se veut généralement dissuasive est celle qui vise à empêcher une chose de survenir; elle décourage les autres de se livrer à des actes fautifs semblables. En un mot, une mesure de dissuasion générale constitue une mesure préventive. On peut donc raisonnablement reconnaître la dissuasion générale comme un facteur pertinent, parmi d'autres, dans l'infliction d'une peine sous le régime de l'art. 162. L'importance respective du facteur de la dissuasion

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a factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act.

62 It may well be that the regulation of market behaviour only works effectively when securities commissions impose *ex post* sanctions that deter forward-looking market participants from engaging in similar wrongdoing. That is a matter that falls squarely within the expertise of securities commissions, which have a special responsibility in protecting the public from being defrauded and preserving confidence in our capital markets.

D. *The Commission's Order Was Reasonable*

63 Further, it was reasonable in all the circumstances for the Commission to conclude that general deterrence applies in respect of Hartvikson and Johnson's conduct. While a specific breach of the Act is required to trigger the application of s. 162, unlike s. 161, the penalty that the Commission ultimately imposes should take into account the entire context, as well as the preservation of the public interest. The public interest must be satisfied under both ss. 161 and 162, and is not restricted to situations where the Commission imposes a ban on market participation under s. 161. Where conduct could be addressed under the two sections, the Commission may use both provisions to craft the order that is most in the public interest.

64 The weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission. Protecting the public interest will require a different remedial emphasis according to the circumstances. Courts should review the order globally to determine whether it is reasonable. No one factor should be considered in isolation because to do so would skew the textured and nuanced evaluation conducted by the Commission in crafting an order in the public interest. Nevertheless, unreasonable weight given to a particular factor, including general deterrence, will

générale variera selon l'infraction à la Loi et la situation de la personne accusée de l'avoir commise.

Il se peut fort bien que la réglementation des comportements sur les marchés ne donne des résultats valables que si les commissions des valeurs mobilières infligent après coup des peines qui dissuadent les participants au marché prudents de se livrer à de tels actes fautifs. Une semblable question relève clairement du champ d'expertise des commissions des valeurs mobilières, dans leur responsabilité particulière de protéger le public contre la fraude et de maintenir la confiance dans nos marchés de capitaux.

D. *L'ordonnance de la Commission était raisonnable*

En outre, eu égard à l'ensemble des circonstances, la Commission pouvait raisonnablement conclure que la dissuasion générale s'applique à la conduite de MM. Hartvikson et Johnson. Même si, contrairement au cas de l'art. 161, une violation précise de la loi est nécessaire pour mettre en application l'art. 162, la Commission doit tenir compte du contexte global et de la protection de l'intérêt public pour déterminer en fin de compte la peine à infliger. L'intérêt public doit être pris en compte selon les art. 161 et 162, mais il ne se limite pas aux cas où la Commission prononce une interdiction de participer au marché sous le régime de l'art. 161. Lorsque la conduite en cause est visée par ces deux dispositions, la Commission peut s'appuyer sur les deux textes pour élaborer une ordonnance qui respecte le mieux possible l'intérêt public.

Le poids à donner à la dissuasion générale variera d'une affaire à l'autre et relève du pouvoir discrétionnaire de la Commission. La protection de l'intérêt public exige que l'on privilégie des mesures de réparation susceptibles de varier selon les circonstances. Les tribunaux doivent examiner l'ordonnance dans son ensemble pour vérifier son caractère raisonnable. Aucun facteur ne peut être pris en considération isolément. Une telle méthode fausserait l'évaluation détaillée et nuancée qui s'impose à la Commission pour concevoir une ordonnance qui soit dans l'intérêt public. Cependant, l'attribution d'un

TAB 54

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

**COMMISSIONER OF COMPETITION'S RESPONDING RECORD
TO THE RESPONDENT'S CONSTITUTIONAL CHALLENGE**

VOLUME 1 OF 2

July 4, 2025

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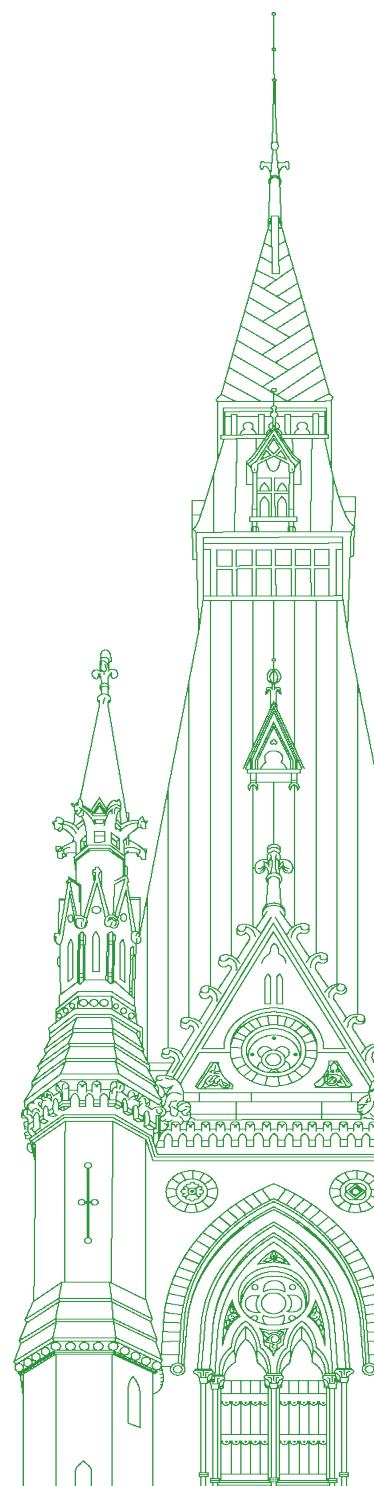
44th PARLIAMENT, 1st SESSION

House of Commons Debates

Official Report
(Hansard)

Volume 151 No. 223
Monday, September 25, 2023

Speaker: The Honourable Anthony Rota



*Government Orders**[Translation]*

I am very pleased to rise in the House today to speak to the affordable housing and groceries act. This new bill contains a number of necessary and timely amendments to the Competition Act. I am sure that my colleagues have heard many commentators say that the Competition Act is long overdue for a reform. This is exactly what we are doing today.

[English]

There is no doubt that Canadians are facing a very challenging increase to their cost of living at the moment. That is why, this morning, I summoned the large international food manufacturers to come to Ottawa. First, I expressed to them the frustration of millions of Canadians. I told them how difficult it is for colleagues and for Canadians from coast to coast to see the price of food. I can report to the chamber that the bottom line is that they have agreed to help the government stabilize prices and be part of the solution. We are going to continue to fight for Canadians every step of the way.

We have been working hard to advance solutions. Like I said, I not only met with the international food manufacturers, but I also met last week with the five largest grocery retailers in this country. I told them in very simple terms that we want to see actions. I am very pleased to see that they have also agreed to work with the Government of Canada and with parliamentarians to stabilize the price of food here in Canada.

We are also committed to advancing long-term structural solutions to drive affordability, and the best way to do this is to promote competition across the Canadian marketplace. The reason I am here today is to talk about the bold and decisive actions we intend to take in order to have a landmark reform of competition in this country.

• (1615)

[Translation]

A more effective competition system would generate positive spinoffs for Canadian consumers by stimulating innovation, which in turn could lower prices and encourage better product quality and selection for people across the country. It would allow the country to reap the many benefits of more dynamic markets. I can tell the House that, this morning, people reported other situations in other countries where competition had increased supply and lowered prices. These benefits are not just theoretical. They are extensively documented in the economic literature and proven in markets across the world. I would also argue that we all intuitively understand that less consolidation and more competition leads to lower prices. All Canadians know it.

[English]

The Competition Act is intended to promote greater competition and a fair marketplace by addressing various forms of harmful corporate conduct. These include anti-competitive practices, such as price fixing and mergers that lessen competition, to name just a couple. The act is administered and enforced by the Competition Bureau, an independent law enforcement agency.

[Translation]

I would like to provide a bit of context. Although the COVID-19 pandemic and the rising cost of living have reinforced this trend, Canadians have long been uncomfortable with corporate concentration and the seemingly unbalanced distribution of economic power in the country. Our government understands these concerns and has taken a series of concrete measures to address them over the past few years.

[English]

In 2021, we reinvigorated the Competition Bureau, whose budget had been stagnant for way too long in this country. The government provided a much-needed injection of funding to help the agency renew its personnel and the tools at its disposal to take on the challenges of a fast-changing world. Next, we introduced a number of amendments in the 2022 budget legislation that addressed some pressing issues in the law. These included making sure that wage fixing agreements between employers—

[Translation]

The Assistant Deputy Speaker (Mrs. Alexandra Mendès): I must interrupt the hon. minister to remind him not to make too much noise with his papers because that is interfering with the microphone and bothering the interpreters.

The hon. minister.

[English]

Hon. François-Philippe Champagne: Madam Speaker, as a member who has been sitting in the House for many years, I should know that. My apologies to the interpreters and to all those who felt the inconvenience.

As I was saying, we have provided additional funding to the Competition Bureau. In 2022, in the budget legislation, we included additional amendments to make sure that wage fixing agreements between employers would be illegal, and there would be an increase in maximum penalties so unfair practices could no longer be absorbed by the largest firms as simply a cost of doing business.

[Translation]

Before introducing these amendments, we undertook a formal review of the act and its enforcement regime through an extensive consultation process in order to get feedback from Canadians on possible fundamental reforms.

In keeping with that promise, in November 2022, I launched the consultation on the future of competition policy in Canada. As part of this process, we received more than 130 submissions from stakeholders and more than 400 submissions from members of the general public, whom I would like to thank.

TAB 55

CT-2024-010

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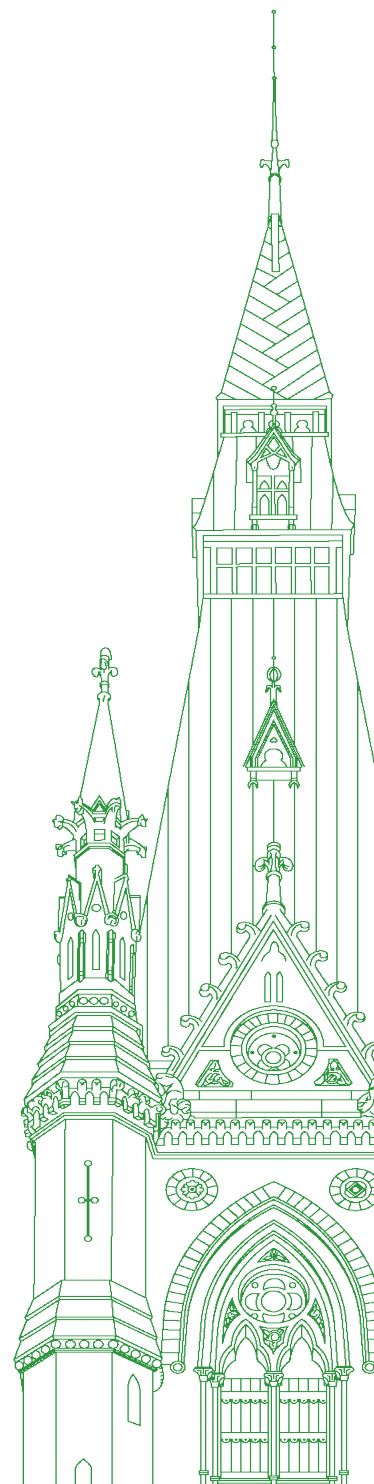
44th PARLIAMENT, 1st SESSION

House of Commons Debates

Official Report
(Hansard)

Volume 151 No. 254
Thursday, November 23, 2023

Speaker: The Honourable Greg Fergus



Not only are they muzzling us at this stage, they are also muzzling us at the committee stage. No one with an iota of intelligence in the world of economics, finance or competition would think that two evening committee meetings are enough for a bill with such potentially deep and long-term effects on our competition system.

What would I have done? I might have done a better job of negotiating.

• (1655)

[English]

Mr. Jeremy Patzer (Cypress Hills—Grasslands, CPC): Madam Speaker, maybe there are other measures the member would like to see the government take on that would be beneficial to his constituents in Quebec. Does he want to speak a bit more about what could be done to further enhance competition rather than just simply having a lazy government stealing other parties' bills?

[Translation]

Mr. Jean-Denis Garon: Madam Speaker, I get the same kinds of questions from both Liberals and Conservatives. We support the bill. We think its underlying principle is good and its main features will be useful. We do not think these solutions will fix everything, and especially not when it comes to housing, but there are good solutions here for competition issues.

What I think we should do is take a little more time to hear from witnesses so that stakeholders can share their views and we can suggest amendments and work toward improving the bill. If things do come to a standstill at some point, we will discuss all that, but I think that holding a gun to the committee's head and making it work as fast as possible will rob us of a tool that is of vital importance to parliamentary democracy and the legislative process. I find that deeply disappointing.

Mr. Simon-Pierre Savard-Tremblay (Saint-Hyacinthe—Bagot, BQ): Madam Speaker, I will no doubt pick up roughly where my colleague from Mirabel left off. He painted a good picture of the political context. He concluded by speaking to the bill. I will go a bit deeper into the bill.

The government proposal grants the Standing Committee on Finance the power to expand the scope of the bill by incorporating three substantial changes.

First, there is the amendment seeking to increase the penalty amounts. This increase is right out of Bill C-352, introduced by the leader of the NDP. The amendment changes the Competition Act and will render several of its elements obsolete once Bill C-56 is passed. The two other amendments, which deal with abuse of a dominant position and the Competition Bureau's powers of inquiry when conducting market studies, although subject to the wording of amendments to come, appear to have limited scope. Their inclusion seems to be rather intended to give the New Democrats a symbolic victory in order to paper over a major concession on their part. Let us review these three amendments.

The first aims to increase penalties for abuse of a dominant position to \$25 million for a first offence and \$35 million for subsequent offences. This is taken directly from Bill C-352, introduced by the leader of the NDP. Currently, the maximum penalty that can

Government Orders

be levied by the bureau and the tribunal is \$5 million for an offending company, along with prison sentences of 14 years for directors who breach the act. This proposed revision is therefore significant, dispelling the idea that penalties are just an inherent cost of doing business. They could now have a deterrent effect comparable to that of European or American legislation. Again, as my colleague asked, if it is already in force elsewhere, why has it taken so long for Canada to wake up? I believe the explanations in the last speech were very powerful.

The second amendment, which gives the Competition Bureau the option of conducting market study inquiries at the direction of the minister or on the recommendation of the commissioner of competition, while requiring prior consultation between these two officials, is quite significant. Currently, the bureau has strict investigative powers, but only if there is a clearly defined infringement. This adopts a quasi-criminal approach. The amendment proposed seeks to address this shortcoming when market studies are conducted in order to ensure greater effectiveness in assessing the dynamics of competition.

The third amendment, which reviews the legal grounds prohibiting abuse of dominance, aims to prevent anti-competitive practices that impede or significantly decrease competition in a relevant market. Even though the current legislation prohibits various restrictive practices, it does not address predatory pricing by businesses in a dominant market position. The NDP's Bill C-352 sought to fill this gap by specifically prohibiting the imposition of excessive prices. Despite the provision's obvious value, the government still seems resistant to passing it, offering instead a procedural amendment to the existing legislation through Bill C-56, without really reinforcing consumers' defences against such practices.

Although it makes positive changes to the Competition Act, Bill C-56 hardly seems an appropriate response to the housing crisis and soaring food prices. An in-depth review of the national housing strategy remains essential, as does redefining abuse of dominance to prevent price increases resulting from a lack of competition. These critical areas persist, independently of whether Bill C-56 is passed.

The Bloc Québécois will vote in favour of the motion and the bill, recognizing certain positive measures and the absence of any downright harmful elements. However, we should point out that it is only a drop in the bucket in terms of current needs. With respect to housing, there is no reason to believe that Bill C-56 will help reduce rental costs.

• (1700)

At the briefing offered to members on September 21, officials were specifically asked to provide the studies on which the Minister of Finance based her claim that Bill C-56 would impact rents. To give credit where credit is due, the question was asked by my colleague from Joliette. Their response to my colleague's question was evasive, suggesting they did not have these studies. That suggests an uncertain future as to the supposed effectiveness of the measures.

TAB 56

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

**COMMISSIONER OF COMPETITION'S RESPONDING RECORD
TO THE RESPONDENT'S CONSTITUTIONAL CHALLENGE**

VOLUME 1 OF 2

July 4, 2025

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

Alexander M. Gay

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HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

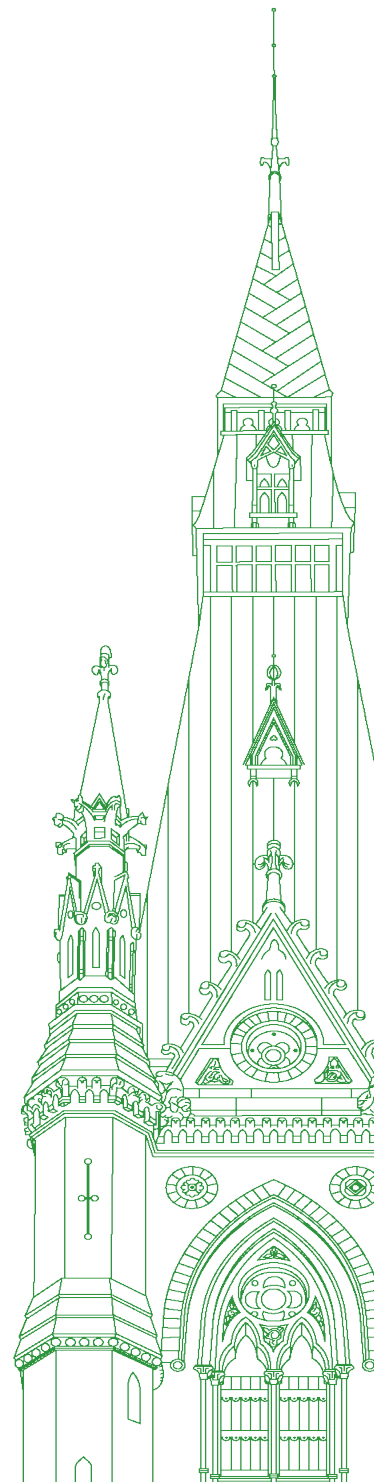
44th PARLIAMENT, 1st SESSION

House of Commons Debates

Official Report
(Hansard)

Volume 151 No. 262
Tuesday, December 5, 2023

Speaker: The Honourable Greg Fergus



Government Orders

Unfortunately, our programs are not designed for regional realities. Fixing the labour shortage means fixing it in the regions and dealing with the public land use issue. More often than not, federal programs focus on impressive stats, but when they fall short of their targets because there is no new housing in the regions, what is the point of the targets? This is simple math, and it may seem simplistic, but it reflects the importance of adapting programs to suit projects in remote regions, including Canada Mortgage and Housing Corporation programs.

Our region has been experiencing a housing shortage for the past 15 years. Since 2005, Abitibi—Témiscamingue has reached a healthy balance, a 3% vacancy rate, only once. The vacancy rate has been below 1% seven times. In the last three years, the average price of a two-bedroom apartment has risen from \$681 in October 2019 to \$845 in October 2022. That is a 25% increase. On top of that, the average price of a two-bedroom built since the early 2000s is \$1,250. Without a doubt, this reflects the higher construction costs in the regions.

It is even worse with the construction that is going on right now. When I look at the government's current measures, I do not see anything that will reverse this trend, other than an empty promise for something that could happen down the road under the next government. It definitely will not happen before 2025. I do like the parenthetical interest in co-operative housing. However, those measures are also being put off until later.

It is also important to remember that, in the regions, particularly in Abitibi—Témiscamingue, the majority of our buildings were constructed between 1960 and 1980. This means that affordable housing, including the units owned by co-operatives, needs to be renovated. Adapting programs would also help provide our regions, including mine, with the tools they need to become economic drivers. It also means addressing concerns about housing, particularly in terms of upgrading. In that regard, I am still waiting for help and for tools from the government.

Part 2 of Bill C-56 deals with amendments to the Competition Act.

The government could have gone even further and used this as an opportunity to consider modernizing the Competition Act, a crucial subject that was addressed in exceptional circumstances. The committee's recent study took place in an unfortunate context marked by the adoption of a super closure motion in the House the week before, as stipulated in Government Business No. 30. The government deprived itself of the opportunity to consider recommendations from the Standing Committee on Industry and Technology, comments gathered in the competition commissioner's consultations and from his excellent brief. This is really unfortunate. The Bloc Québécois has been calling for a comprehensive reform of the Competition Act for years, if not a decade.

• (1250)

It is essential to note the challenges that the Standing Committee on Finance has faced. A single meeting with witnesses was held on the evening of November 27 and lasted until 10 p.m. Members were required to present their amendments, translated and certified by legal clerks, by noon the next day. That tight schedule hampered us from conducting a serious study and properly taking into account

the witnesses' observations. Unfortunately, the substitution of Parliament for backroom discussions in the negotiations on closure between the government and the NDP contributed to this situation. Democracy did not benefit from all this.

Despite these challenges, the committee managed to adopt a few important amendments, including some that are worth mentioning. First, we chose to considerably increase the monetary value of fines for serious offences under the Competition Act. The cap is \$25 million for a first offence, with harsher penalties for repeat offenders. The purpose is to deter reprehensible behaviour. The existing fines were often perceived as the cost of doing business and did not really have a deterrent effect.

Second, we adjusted the legal threshold required to find a major player guilty of abusing a dominant position to reduce competition. At present, there is a dual burden of proof: It has to be shown that an illegal act was committed and also that this act effectively reduced competition. However, proving that something reduced competition is often difficult, rendering the Competition Act rather ineffective. Our amendment to the bill makes it possible to go after questionable conglomerates and simplifies the law and the prosecution process by making this component more effective.

Third, we gave the commissioner of competition the power to independently undertake a market study. Although the existing act gave the commissioner extensive powers during such studies, he could only carry them out at the request of the Minister of Industry. As we know, the minister is a very busy man, so it is just as well to enable the commissioner to do this himself. Going forward, he will be able to carry out studies more independently, strengthening his ability to proactively monitor and regulate the market.

Lastly, the Bloc Québécois introduced an important amendment that targets the adverse effect that a lack of competition can have on consumers. It is crucial that major players be prohibited from taking advantage of their dominant position or quasi-monopoly over a market, so we can prevent consumers from being exploited through predatory pricing. At present, the Competition Act targets the source of the lack of competition without directly tackling its harmful effects on consumers. Abuses committed over the years, enabled by a lack of regulation and a law that was clearly biased toward industry concentration, left the government indifferent. In committee, this crucial Bloc Québécois amendment aimed to fix this flaw and was adopted unanimously.

This also applies to housing. Unfortunately, for too long, there has been little to no oversight. We have seen very shady conglomerates take over affordable housing that may have been in need of renovation and turn it into unaffordable housing. There have been examples of this in my region and in big cities. That is what helped kill affordable housing, especially in the rental market. It is just as well that the bill tackles this.



HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

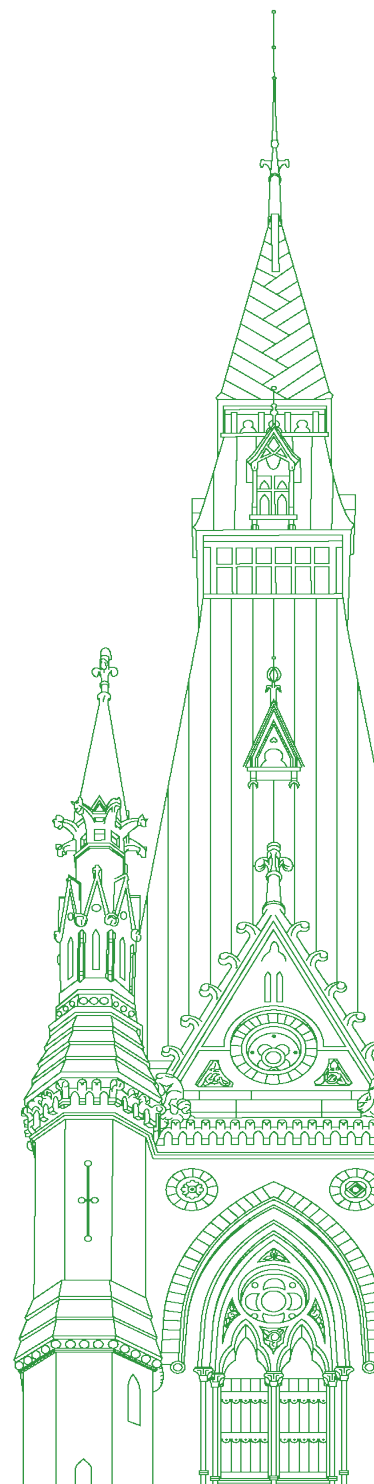
44th PARLIAMENT, 1st SESSION

House of Commons Debates

Official Report
(Hansard)

Volume 151 No. 265
Monday, December 11, 2023

Speaker: The Honourable Greg Fergus



Government Orders

In order to effectively address increasing prices, we need to enhance more than just the bureau's ability to conduct market studies. It is also important that the law be able to hold today's well-resourced and sophisticated businesses to account. In particular, we need to better address large players who, many believe, abuse their market power to shut out competition, especially given the clear concerns raised throughout our consultation about protecting competition in and contestability of these markets.

There are all different kinds of competition. We could talk about the fact that the big grocery chains have been recording record profits. One would think that if companies are posting record profits, they would be in a position to lower prices in order to attract more market share, but we did not see that, which suggests that something in the free market system is not working as we would normally expect it to work. There are other forms of potential anti-competitive behaviour. The ability to get shelf space in a major grocery store is a real competition, and the grocery stores have the hammer, to use a curling term, to find out who gets the market space. More and more, in my own personal observations when I go into grocery stores, I see the in-store brands taking more and more shelf space, with the other brands effectively being crowded out.

We believe there has been an unnecessarily high burden to prove behaviours clearly damaging to the public interest. This is out of line with our international partners, by the way, including the United States, the European Union and Australia. These jurisdictions better allocate the burden of proof and allow the agencies to act more easily where harm is apparent. This can include by requiring proof of intent or effects, but not necessarily both. The government's update to Bill C-56 would allow abuse of dominance to be established on the basis of either intent or effects, following the actions of a dominant firm. This would allow for more effective enforcement of the act where there is harmful conduct by large players. It would accomplish what the act is meant to do: stop big businesses from abusing their position to the detriment of competition. The detriment of competition is a detriment to the citizens of Canada.

• (1205)

As I noted before, the purpose of remedial orders is to protect competition in the market, not to punish its actors. Recognizing the lower burden involved in securing a remedial order that this change would bring about, the law would limit the remedy in these cases to a prohibition order. More serious remedies, such as monetary penalties and divestiture orders, would continue to require that both anti-competitive intent and effect be proven. This two-tiered approach would help guard against chilling, aggressive competition on the merits.

The government already took an important first step to address this concern by positioning penalties to serve as more effective compliance measures against abuse of dominance. We did this through the 2022 amendments to the Competition Act that removed an ineffective and outdated cap on monetary penalties. We introduced a more principled approach that could better accommodate larger volumes of commerce. Firms engaged in anti-competitive conduct can now face a penalty set at up to three times the benefit obtained for their anti-competitive conduct, to ensure that it is not profitable to them. While this was an important update to move

away from the outdated and ineffective fixed penalty system, the old fixed amounts of \$10 million, or \$15 million for a second order, still remain in the law. This is in the event that they are still higher than the new proportionate maximum. However, it is possible that these fallback numbers could still be too low to act as a deterrent in certain cases where abuse by a big business is significant but caught early, and thus benefit derived from it is still modest.

As everyone here knows, competition is a driving force behind innovation and efficiency in our economy. It ensures a healthy, fair and vibrant marketplace. This is what the free market system is supposed to nurture and protect. Of course, competition is instrumental in bringing down prices. The fact that we have not seen prices fall in spite of the dominant profits being recorded by big grocery and some of the producers but that we see things like shrinkflation and skimpflation creeping in, where we are paying more for a smaller or inferior product, means that something is not working. When something is not working between what the market price is and what Canadians value, then we think it is the job of government to come in and close that gap.

For Canadians, the updates to Bill C-56 would mean more choice and better affordability. When someone needs to pay their bills, the exact motivations or mechanisms behind anti-competitive conduct do not matter. The effect of paying higher prices remains the same. What does matter is that businesses can be held to account. It matters that the law can impose meaningful penalties to ensure compliance. It matters that the Competition Bureau has the information it needs to study problems in the market.

The updates to Bill C-56 have been prioritized because they are the most directly related to addressing the issues identified in the grocery retail sectors. In fact, if we look at the whole landscape, particularly the concerns about inflation, the two big players to this point, at least in the retail market, have been gas, oil and diesel, and grocery. We have seen the market handle gas and oil, because the prices have been dropping at the pumps, which is a welcome sign for most Canadians, and probably one of the main reasons inflation in Canada has dropped to well less than half of what it was about a year ago. However, the thing to remember is that the provisions in Bill C-56 now, and what is coming, would apply to all sectors of the economy. As such, they would have a broad and, we hope, positive impact.

Government Orders

When the Conservatives were in government, young people could buy and build a home. Today, in the Liberal era, it is impossible to even rent a home. Imagine that. These are the facts and this is reality. My family has lived it. This is what every Canadian family is experiencing today.

• (1250)

[English]

Hon. Ed Fast (Abbotsford, CPC): Madam Speaker, the Liberals in the House have been crowing about removing the GST on housing construction. I find it ironic, and would ask my colleague to comment on this, that they talk about making life more affordable by removing GST on housing yet the government has refused to remove the carbon tax on groceries, on everything we produce in this country and on gasoline.

I would ask my colleague to comment on the apparent contradiction between the Liberal government's intent to make life more affordable by removing the GST on housing and the fact that it will not axe the tax.

[Translation]

Mr. Jacques Gourde: Madam Speaker, my colleague is absolutely right. The carbon tax is a totally hypocritical tax for all Canadians. It increases the price of everything, everything that is transported. All of our goods and services are transported all over Canada several times, and everyone keeps a cut. That is how we end up with two-by-fours going from \$3 each to \$12 each, and fruits and vegetables going from maybe 35¢ a pound to \$1.50 a pound.

This is never going to end. We need to get rid of the carbon tax, because that will lower the cost of everything.

Mr. René Villemure (Trois-Rivières, BQ): Madam Speaker, I wish to inform you that I will be sharing my time with the hon. member for Lac-Saint-Jean.

The Assistant Deputy Speaker (Mrs. Carol Hughes): One second, I need to seek unanimous consent.

Is it agreed?

Some hon. members: Agreed.

Mr. René Villemure: Madam Speaker, this is the first time in two years that I have gotten the unanimous consent of the House, and I am proud of it. Before beginning my speech, I would like to make one thing clear. This is not a case of the Bloc, the NDP and the Liberal Party standing together. It is the Conservatives that stand alone. That is not the same thing.

Today we will be discussing Bill C-56, an act to amend the Excise Tax Act and the Competition Act. I will be talking mostly about that last part of the bill, in terms of both its technical points and its rationale. Before we begin, though, we always need to establish what we are talking about. What is competition? It means coming together and converging on the same point. That is what competition is. It is not necessarily a bad thing. However, what is the motivation for coming together? What is the purpose? Is it good or bad? As members of Parliament, our objective must be commendable, because we obviously have the public interest at heart.

In one amendment, the bill would increase the maximum monetary penalty for abuse of a dominant position to \$25 million for the first offence and \$35 million for subsequent offences. The aim is to give the law teeth, to make sure that it will not be taken lightly, that people will not think that they can get away with a slap on the wrist. This provision also makes Canadian law more comparable to U.S. law, of course.

The second important amendment in the part on competition would allow the Competition Bureau to conduct market study inquiries if the minister responsible for the act or the commissioner of competition so recommends, and would require the minister to consult the commissioner before doing so.

The Competition Bureau already has significant powers, but it cannot demand certain things from the people it is investigating. It cannot request a search unless there is a clear offence. It cannot request a search just to look around. It cannot make assumptions. All of us here know that groceries are expensive and that we pay the highest cellphone fees in the OECD. It does not take a genius to realize that the commissioner might want to investigate these things.

When it conducts a study, the bureau will have to determine whether there is adequate competition in a market or industry. Right now, it does not have that power in every industry. What the Competition Bureau can do at present is all right, but it is not necessarily the best thing right now. It may have been sufficient at the time, but now it needs to be enhanced.

In its report on the state of competition in the grocery sector, published in June, the bureau noted that the grocery chains did not really co-operate with its study. I like that euphemism: "did not really co-operate". They said no, which is not the same thing, and the Competition Bureau, with its current powers, could not make them say yes. They refused to provide the documents the bureau asked for, and they refused to answer certain questions. My colleagues will no doubt agree that there are many shades of meaning between "did not really co-operate" and "refused to answer". The aim of Bill C-56 is to solve this problem by granting the Competition Bureau the power to conduct inquiries where applicable.

Lastly, the bill would revise the legal test for abuse of a dominant position prohibition order to be sufficiently met if the tribunal finds that a dominant player has engaged in either a practice of anti-competitive acts or conduct that is having or is likely to have the effect of preventing competition. That is the technical part of the bill. However, when someone drafts a bill, they need to think about why they are doing it, what they are trying to accomplish.

The purpose of the Competition Act is to ensure that Quebec and Canadian consumers have freedom of choice. We sometimes talk about monopolies. What is a monopoly? It is an exclusive right. What does "exclusive" mean? It means doing everything possible to keep others out. It means restricting, refusing, blocking, rejecting. Exclusivity means limiting access. It is almost like a secret agreement.

TAB 57

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

REVISED SUPPLEMENTARY MOTION RECORD

VOL 10 of 11

Exhibit 3 to the Cross-Examination of Laura Pearce

List of fines imposed upon Google from 2017 to present and reported in media

Amount	Authority	General Nature of Offence/Violation	Source Article(s)
1) 2.42 billion euros (\$3.6 billion CDN)	European Commission	Antitrust: abuse of dominance	June 27, 2017, CBC: EU fines Google billions for breaching antitrust rules November 10, 2021, Reuters, upheld on appeal to the European General Court: Google loses challenge against EU antitrust ruling, \$2.8-bltn fine September 10, 2024, Reuters, upheld on appeal to European Court of Justice: Google loses fight against \$2.7 billion EU antitrust fine
2) 4.34 billion euros (\$6.7 billion CDN)	European Commission	Antitrust: abuse of dominance	July 18, 2018, CBC: Google hit with record \$6.7B Cdn antitrust fine by EU regulators September 14, 2022, Reuters, European General Court upheld the fine, but reduced amount from 4.34 billion euros to 4.125 billion euros: EU court backs EU antitrust decision against Google, trims fine Google subsequently appealed the General Court's affirmation of the EC decision with the European Court of Justice, which remains pending.
3) 50 million euros	French CNIL	Data privacy	January 21, 2019, Reuters: France fines Google \$57 million for European privacy rule breach
4) 1.68 billion USD	European Commission	Antitrust: abuse of dominance	March 20, 2019, CBC: EU regulators fine Google \$1.68B US for abusing online ads market September 18, 2024, Reuters, European General Court annulled the fine: Google wins EU antitrust fine fight but setback for Qualcomm The European Commission has appealed the General Court's decision to the European Court of Justice, which remains pending.

5) 150 million euros (\$167 million)	French Competition Authority	Antitrust: anti-competitive behaviour	December 20, 2019, Reuters: Google fined 150 million euros by France April 7, 2022, Reuters, French court of appeals upholds fine on appeal: French court upholds 150 mln euro fine against Google for opaque ad rules
6) 98.35 million lira (\$16.26 million)	Turkish Competition Authority	Antitrust: abuse of dominant position	February 14, 2020, Reuters: Turkish competition board fines Google \$16.3mln
7) 196.7 million lira (\$26 million)	Turkish Competition Authority	Antitrust: abuse of dominance	November 13, 2020, Reuters: Turkey fines Google \$26 million for abusing market position: competition board
8) 100 million euros (\$121 million)	French CNIL	Data privacy	December 10, 2020, Reuters: French watchdog fines Google, Amazon for breaching cookie rules
9) 296 million lira (\$36.65 million)	Turkish Competition Authority	Antitrust: abuse of dominance	April 14, 2021, Reuters: Turkey fines Google for abusing dominant position
10) 102 million euros (\$123 million)	Italian Competition Authority	Antitrust: abuse of dominance	May 13, 2021, Reuters: Italy fines Google for excluding Enel e-car app from Android Auto Google has appealed the decision, which remains pending.
11) 220 million euros (\$268 million)	French Competition Authority	Antitrust: abuse of dominance	June 7, 2021, Reuters: Google to change global advertising practices in landmark antitrust deal
12) 500 million euros (\$593 million)	French Competition Authority	Copyright: failure to comply with Court order	July 13, 2021, Reuters: France fines Google 500 mln euros over copyright row
13) 207 billion won (\$176.64 million)	Korea Fair Trade Commission	Antitrust: abuse of dominance	September 14, 2021, Reuters: S. Korea fines Google \$177 mln for blocking Android customisation
14) 10 million euros (\$11.2 million)	Italian Competition Authority	Antitrust: consumer code violations	November 29, 2021, Reuters: Italy's antitrust regulator fines Google, Apple over data use November 18, 2022, Reuters, appeal denied: Italy court rejects Google's appeal against watchdog fine, accepts Apple's one
15) 150 million euros (\$169 million)	French CNIL	Data privacy	January 6, 2022, Reuters: Google hit with 150 mln euro French fine for cookie breaches

16) 2 billion roubles (\$34.2 million)	Federal Antimonopoly Service (Russia)	Antitrust: abuse of dominance	July 26, 2022, Reuters: Russia fines Google \$34 million for breaching competition rules
17) 13.38 billion Indian rupees (\$161.95 million)	Competition Commission of India	Antitrust: abuse of dominance	October 20, 2022, Reuters: Google fined \$162 mln by India antitrust watchdog for abuse of Android platform
18) \$113 million	Competition Commission of India	Antitrust: abuse of dominance	October 26, 2022, Reuters: India orders Google to allow third party payments, slaps on another fine In or around March, 2025, the National Company Law Appellate Tribunal upheld the fine, but reduced the amount from \$113 million to \$26 million
19) 42.1 billion won (\$31.88 million)	Korean Fair Trade Commission	Antitrust: abuse of dominance	April 11, 2023, Reuters: South Korea fines Google \$32 mln for blocking games on competing platform
20) 4 billion roubles (\$47 million)	Federal Antimonopoly Service (FAS)	Antitrust: Failure to pay fine in 16) above	June 27, 2023, Reuters: Russian court fines Google an additional \$47 million
21) 250 million euros (\$271.73 million)	French Competition Authority	Intellectual Property	March 20, 2024, Reuters: French Competition watchdog hits Google with 250 million euro fine
22) 482 million lira (\$14.85 million)	Turkish Competition Authority	Antitrust: failure to comply with precautionary recommendations	June 10, 2024, Reuters: Turkey competition board fines Google 482 million Lira over hotel searches
23) 8 billion roubles (\$77.9 million)	Chertanovo District Court, Moscow, Russia	Failure to comply with previous penalty orders	January 14, 2025, Reuters: Russian Court fines Google \$78 million for ignoring previous penalties
24) 355 million lira (\$8.87 million)	Turkish Competition Authority	Antitrust: failing to comply with regulatory obligations from a previous investigation	July 10, 2025, Reuters: Turkey's competition board imposes \$8.9 million fine to Google
Total:	23 Fines		
Total Antitrust:	17 Fines		

TAB 58

CITATION: Canada (Competition Bureau) v. Chatr Wireless Inc., 2013 ONSC 5315
COURT FILE NO.: CV-10-8993-00 CL
DATE: 20130819

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE COMMISSIONER OF
COMPETITION

Applicant

– and –

CHATR WIRELESS INC. AND ROGERS
COMMUNICATIONS INC.

Respondents

J. Thomas Curry, Jaan Lilles,
Paul-Erik Veel, for the Applicant

Kent E. Thomson, Anita Banicevic,
James D. Bunting, Sean R. Campbell,
Nicholas Van Exan, Andrew Carlson, for the
Respondents

HEARD: November 21, 22, 23, 24, 25, 28,
29, 2011 August 7, 8, 9, 10, 13, 14, 15, 16,
17, 20, 21, 22, 24, 27, 28, 29, 30, 2012
March 20, 21, 22, 25, 26, 27, 28, April 2, 3,
4, 5, 8, 9, 10, 11, 12, 15, 16, 17 May 13, 14,
15 & 16, 2013

MARROCCO J.

consumers, competitive firms and competition from the harmful effects of false or misleading performance claims outweighs the deleterious effects of preventing a true claim that cannot be tested in advance from entering the marketplace.

[545] Accordingly, I am satisfied by the evidence that s. 74.01(1)(b) of the *Competition Act* is a demonstrably justified reasonable limit prescribed by law, to which the fundamental freedom described in paragraph 2(b) of the *Charter* is subject.

Does the \$10 million administrative monetary penalty provided for in the *Competition Act* engage s. 11 of the *Charter*?

[546] Section 11 of the *Charter* provides certain enumerated rights for any person “charged with an offence.” The respondents have not received the benefit of all of these rights. Accordingly the question is whether the respondents are “charged with an offence”.

[547] In *Regina v. Wigglesworth* [1987] 2 S.C.R. 541, at pp. 558-559, the Supreme Court of Canada decided that matters which fell within the ambit of s. 11 were “criminal and penal matters.” The court also stated more specifically that “criminal and penal matters” meant proceedings that were by their very nature criminal, or when a conviction in respect of the matter could lead to a “true penal consequence.” In that same decision, the court stated in part at p. 561, that a “true penal consequence” attracting protection under s. 11 of the *Charter* could be a fine that, “by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.”

[548] This Application does not carry with it the possibility that the respondents would be imprisoned. It was commenced as an Application pursuant to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in the Province of Ontario. These proceedings were regulatory in nature. This Application was initiated to further and encourage public confidence in advertising in the context of the *Competition Act*’s purpose, as set out in s. 1.1 of the Act.

[549] The *Competition Act* has repeatedly been described as a regulatory statute: see *R. v. Wholesale Travel Group*, [1991] 3 S.C.R. 154, at pp. 222-223. The legislative history of s. 74.01 makes it clear that the 1999 amendments to the *Competition Act*, which created the provisions in issue, were designed to remove the regulation of deceptive marketing practices from the realm of criminal law.

[550] When I consider the objectives of the *Competition Act* and the deceptive marketing practices provisions, the provisions of s. 74.1(4) of the *Competition Act* describing the purpose of the administrative monetary penalties with which this Application is concerned and the civil Application process leading to the imposition in

appropriate cases of administrative monetary penalties, I am satisfied that these proceedings are not by their nature “criminal.”

[551] This Application does carry with it the possibility of an administrative monetary penalty of \$10 million on a first finding of reviewable conduct, and \$15 million on subsequent findings.

[552] Accordingly, the question is whether such an administrative monetary penalty is a fine “which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.”

[553] Professor Corts offered the opinion that an administrative monetary penalty has to be large enough to offset the anticipated gains from making the false, misleading or unsubstantiated representations. Professor Corts was of the view that higher administrative monetary penalties are necessary when dealing with a larger market because a shift in consumer demand in a larger market leads to larger increases in profits.

[554] Professor Corts also considered that part of the incremental profit from false, misleading or unsubstantiated representations is that they induce competing firms to exit the market. This means that the firm making the representations will be more profitable in the long run. Professor Corts offered the opinion that this has to be considered when assessing the appropriate administrative monetary penalty. Professor Corts testified that this was especially true if the competitor firms had undertaken huge investments and were beginning to enter the market; such firms would be trying to pay back some of the capital that they had raised, develop a loyal customer base and establish their brand name. Dr. Corts testified that if demand was inappropriately diverted from them at such a time, they would find it much more difficult to become viable competitors of the offending firm.

[555] Finally, Professor Corts pointed out that firms with more resources will find monetary penalties less deterring because they can withstand the penalty. In this regard, the evidence established that at the time of the Advanced Wireless Spectrum auction, the wireless sector of the Canadian telecommunications industry generated approximately \$12.7 billion. At that time, Rogers, Bell Canada and TELUS dominated the wireless market with 94 per cent of the subscribers and 95 per cent of the revenues.

[556] The *Competition Act* is quite specific concerning the purpose of the administrative monetary penalty. Section 74.1(4) provides that the terms of any order made against a person under paragraph (1)(b), (c) or (d) shall be determined with a view to promoting conduct by that person that is in conformity with the Deceptive Marketing Practices Part of the Act, and not with a view to punishment. This section of the *Competition Act* clearly informs any Application of the principle of proportionality at

the penalty-fixing stage of proceedings under s. 74.01(1)(b). Section 74.1(4) also overrides statements made when this Application was launched which suggested that the quantum of the administrative monetary penalty should reflect the “egregious activity” engaged in by the respondents.

[557] A consideration of these factors and the balance of the evidence satisfies me that the administrative monetary penalties provided for in s. 74.1(1)(c) are not “true penal consequences.”

[558] Accordingly, I am satisfied that the \$10 million administrative monetary penalty provided for in s. 74.1(1)(c) does not engage s. 11 of the *Charter*.

Final Conclusions

[559] I am satisfied that it is dangerous, based on the evidence in this Application, to place significant weight on switch generated dropped call rates when determining whether the Chatr fewer dropped calls comparative performance claim was false or misleading.

[560] Because the applicant’s assertion that the fewer dropped calls claim is false is based to a significant degree upon switch generated data, I am not satisfied that the applicant has proven on a balance of probabilities that the respondents’ fewer dropped calls claim was false in Ottawa with respect to Wind Mobile from July 28, 2010, to November 30, 2010. I would have come to a similar conclusion concerning Videotron in Montréal but for the fact that I have concluded elsewhere in these reasons that a credulous and technically inexperienced consumer in the Province of Québec would not have considered Videotron a new wireless carrier.

[561] I am not satisfied due to the applicant’s reliance on switch generated data that the applicant has proven on a balance of probabilities that the respondents’ fewer dropped calls claim was misleading in Calgary, Edmonton and Toronto with respect to Wind Mobile from July 28, 2010, to November 30, 2010.

[562] I am satisfied that had Mobilicity produced the data requested by the applicant, it would have demonstrated that the respondents’ network dropped fewer calls than Mobilicity’s network from July 28, 2010, to November 30, 2010.

[563] I am satisfied that a credulous and technically inexperienced consumer expected that dropped calls would be fewer on the Chatr network, and that he or she would have “no worries about dropped calls” on the Chatr network. I am not satisfied that a credulous and technically inexperienced consumer viewing the Chatr ads expected that the difference between the dropped call experience on the respondents’ network and the dropped call experience on the Wind Mobile or Public Mobile networks would be so pronounced that it would be discernible.

TAB 59

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

**MOTION RECORD
VOLUME 5 OF 29**

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

(Mark One)

☒

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2024

OR

☐

TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from _____ to _____.

Commission file number: 001-37580

Alphabet Inc.

(Exact name of registrant as specified in its charter)

Delaware

(State or other jurisdiction of incorporation or organization)

61-1767919

(I.R.S. Employer Identification No.)

1600 Amphitheatre Parkway
Mountain View, CA 94043

(Address of principal executive offices, including zip code)

(650) 253-0000

(Registrant's telephone number, including area code)

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Class A Common Stock, \$0.001 par value	GOOGL	Nasdaq Stock Market LLC (Nasdaq Global Select Market)
Class C Capital Stock, \$0.001 par value	GOOG	Nasdaq Stock Market LLC (Nasdaq Global Select Market)

Securities registered pursuant to Section 12(g) of the Act:

Title of each class
None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☒ No ☐

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit such files). Yes ☒ No ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company," and "emerging growth company" in Rule 12b-2 of the Exchange Act.

Financial Results

Revenues

The following table presents revenues by type (in millions):

	Year Ended December 31,	
	2023	2024
Google Search & other	\$ 175,033	\$ 198,084
YouTube ads	31,510	36,147
Google Network	31,312	30,359
Google advertising	237,855	264,590
Google subscriptions, platforms, and devices	34,688	40,340
Google Services total	272,543	304,930
Google Cloud	33,088	43,229
Other Bets	1,527	1,648
Hedging gains (losses)	236	211
Total revenues	\$ 307,394	\$ 350,018

Google Services

Google advertising revenues

Google Search & other

Google Search & other revenues increased \$23.1 billion from 2023 to 2024. The overall growth was driven by interrelated factors including increases in search queries resulting from growth in user adoption and usage on mobile devices; growth in advertiser spending; and improvements we have made in ad formats and delivery.

YouTube ads

YouTube ads revenues increased \$4.6 billion from 2023 to 2024. The growth was driven by our brand advertising products followed by our direct response advertising products, both of which benefited from increased spending by our advertisers.

Google Network

Google Network revenues decreased \$953 million from 2023 to 2024, primarily driven by a decrease in Google Ad Manager and AdMob revenues. Additionally, Google Network revenues were adversely affected by changes in foreign currency exchange rates.

Monetization Metrics

The following table presents changes in monetization metrics for Google Search & other revenues (paid clicks and cost-per-click) and Google Network revenues (impressions and cost-per-impression), expressed as a percentage, from 2023 to 2024:

Google Search & other	
Paid clicks change	5 %
Cost-per-click change	7 %
Google Network	
Impressions change	(11)%
Cost-per-impression change	10 %

Changes in paid clicks and impressions are driven by a number of interrelated factors, including changes in advertiser spending; ongoing product and policy changes; and, as it relates to paid clicks, fluctuations in search queries resulting from changes in user adoption and usage, primarily on mobile devices.

Changes in cost-per-click and cost-per-impression are driven by a number of interrelated factors including changes in device mix, geographic mix, advertiser spending, ongoing product and policy changes, product mix, property mix, and changes in foreign currency exchange rates.

Alphabet Inc.
CONSOLIDATED STATEMENTS OF INCOME
(in millions, except per share amounts)

	Year Ended December 31,		
	2022	2023	2024
Revenues	\$ 282,836	\$ 307,394	\$ 350,018
Costs and expenses:			
Cost of revenues	126,203	133,332	146,306
Research and development	39,500	45,427	49,326
Sales and marketing	26,567	27,917	27,808
General and administrative	15,724	16,425	14,188
Total costs and expenses	207,994	223,101	237,628
Income from operations	74,842	84,293	112,390
Other income (expense), net	(3,514)	1,424	7,425
Income before income taxes	71,328	85,717	119,815
Provision for income taxes	11,356	11,922	19,697
Net income	\$ 59,972	\$ 73,795	\$ 100,118
Basic net income per share (Note 12)	\$ 4.59	\$ 5.84	\$ 8.13
Diluted net income per share (Note 12)	\$ 4.56	\$ 5.80	\$ 8.04

See accompanying notes.

TAB 60

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

**COMMISSIONER OF COMPETITION'S RESPONDING RECORD
TO THE RESPONDENT'S CONSTITUTIONAL CHALLENGE**

VOLUME 1 OF 2

July 4, 2025

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

Alexander M. Gay

Email: Alexander.Gay@cb-bc.gc.ca

Tel: 613-296-4470

Expert Report of Steven Tadelis^{*}

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

July 4, 2025

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

School” style models that are part of the internalization approach. The penalty caps provided in Section 79(3.1.b) are consistent with the deterrence approach.

12. The deterrence approach has significant advantages over the internalization approach. The deterrence approach establishes penalties that deter monopolization. The internalization approach seeks to calculate the penalty that would allow for an efficient level of monopolization, not deterrence. The terms “punitive purpose” and “inefficient overdeterrence” are only relevant if one is trying to calculate the price that a monopoly would pay to maintain the monopoly. The deterrence approach does not do this. Furthermore, the internalization approach is much more difficult to measure and requires knowledge about persons and entities not before the court.
13. Professor Hylton acknowledges that if the monopolization at issue does not result in greater efficiencies or innovation than competition, both approaches are essentially the same. Professor Hylton provides no evidence that Google’s monopoly power resulted in efficiencies or innovations. Furthermore, Professor Hylton provides no economic evidence that monopoly results in more efficiencies or innovation than competition. Hence the only real issue is whether the probability of detection and successful prosecution of monopolization is greater than one third.
14. Economic evidence suggests that the probability that a monopolist will be discovered, prosecuted, and result in a court finding of liability under the competition laws, is quite small.
15. Professor Hylton’s internalization model also presents an indefensibly limited picture of the harm society faces from monopolization. In Professor Hylton’s theoretical analysis, the only injury consists of higher consumer prices. In practice, however, the social harm from monopolization is much broader.
16. Section 79(3.1.b) also contains an alternative penalty cap in the event the penalty cap defined as three times the benefit from the anticompetitive conduct cannot be calculated. The alternative penalty cap is calculated as 3% of a firm’s worldwide revenue. Professor Hylton wrongly assumes that 3% of worldwide revenue is the actual penalty rather than functioning as an alternative penalty cap.

2 Professor Hylton’s Reliance on the Internalization Approach is Misguided

17. The economic rationale for imposing antitrust penalties is to deter anticompetitive behavior. There are two economic approaches to establishing an economically informed antitrust penalty. In a prior publication, Professor Hylton also agrees that “there are two general approaches a punishment authority can take under an optimal punishment regime. One is to *internalize consumer harm*. The other is to *deter completely by eliminating the*

expected profits from anticompetitive conduct.”⁶ This second approach, the *deterrence approach*, is omitted from Professor Hylton’s expert report in which he only considers *the internalization approach*.

18. The *Competition Act* is consistent with the deterrence approach.⁷ The *Act* states that the goal of levying penalties on someone who violates the *Act* is “to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.”⁸ To achieve deterrence, a penalty should exceed the sum of the benefits that a firm, here Google, received from its alleged monopolization divided by the probability that it will actually pay a penalty (i.e., its anticompetitive conduct is detected, enforcement action is taken and the firm is required to pay a penalty).⁹
19. The *Competition Act* follows the logic of the deterrence approach in that the *Act* sets the potential penalty cap at “three times the value of the benefit derived from the anti-competitive practice.” The assumption is that the probability of paying the penalty is one third or larger.¹⁰ I will discuss the disagreements that I have with Professor Hylton concerning the probability of a court imposing a penalty in a monopolization case in Section 4 of this report.
20. The other economic approach to determining a penalty amount is referred to as the internalization approach. Professor Hylton states in his report that he “examined” the issue of the *Competition Act*’s penalty caps “through the lens of two models of antitrust enforcement: ‘The Chicago School Antitrust Enforcement Model’ (the Chicago School) and the ‘Dynamic Competition Model’ (the Dynamic Model).”¹¹ However, these two Chicago School approaches both belong to the more general internalization approach.¹²

⁶ Keith N. Hylton, *Antitrust Enforcement Regimes: Fundamental Differences*, in The Oxford Handbook of International Antitrust Economics (Roger D. Blair & D. Daniel Sokol eds., 2015) [hereinafter Hylton (2015)], p. 3. (“Thus, there are two general approaches a punishment authority can take under an optimal punishment regime. One is to internalize consumer harm. The other is to deter completely by eliminating the expected profits from anticompetitive conduct.”).

⁷ Canadian Competition Act, Section 79 (3.1.b), *Administrative monetary penalty*, (“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.”).

⁸ Canadian Competition Act, Section 79 (3.3), *Purpose of order*.

⁹ That is, if the expected gain from the alleged monopolization is denoted by $G > 0$, the penalty is denoted by $F > 0$, and the likelihood of enforcement is $0 < p < 1$, then the expected gain must be outweighed by the expected loss, which occurs if and only if $p \times F > G$, or $F > \frac{G}{p}$.

¹⁰ If the probability of deterrence is less than one third then this penalty may not be enough to deter harmful monopolization conduct, but it guarantees that the penalty is not excessive.

¹¹ Hylton Report, ¶ 24.

¹² Hylton Report, ¶ 28. (“In my Report, I analyze whether the financial penalties sought by the Commissioner against Google result in inefficient overdeterrence within each analytical framework (Chicago School and Dynamic Model)... As explained below, an efficient penalty in antitrust economics is a penalty that causes the firm at issue to internalize the total harm caused to consumers by its conduct.”); Hylton (2015), p. 5. (“Thus, there are two general approaches a punishment authority can take under an optimal punishment regime. One is to internalize consumer harm.”).

TAB 61

Normand Martineau *Appellant*

v.

Minister of National Revenue *Respondent*

and

Attorney General of Ontario and Attorney General of Quebec *Interveners***INDEXED AS: MARTINEAU v. M.N.R.****Neutral citation: 2004 SCC 81.**

File No.: 29794.

Hearing and judgment: October 14, 2004.

Reasons delivered: December 16, 2004.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Self-incrimination — Customs — Notice of ascertained forfeiture — Examination for discovery — Minister of National Revenue upholding decision of customs officer to serve notice of ascertained forfeiture on alleged offender — Offender contesting Minister's decision by way of action pursuant to s. 135 of Customs Act — Motion by Minister to examine offender for discovery allowed — Whether offender may rely on protection against self-incrimination guaranteed by s. 11(c) of Canadian Charter of Rights and Freedoms — Whether offender “person charged with an offence” within meaning of that section — Whether ascertained forfeiture penal in nature — Canadian Charter of Rights and Freedoms, s. 11(c) — Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), ss. 124(1), 135 — Federal Court Rules, 1998, SOR/98-106, r. 236(2).

A customs officer demanded, pursuant to s. 124 of the *Customs Act*, that the appellant pay more than \$315,000, that is, the deemed value of goods he allegedly attempted to export by making false statements. The respondent upheld the notice of ascertained forfeiture and the appellant appealed this decision by way of an action

Normand Martineau *Appelant*

c.

Ministre du Revenu national *Intimé*

et

Procureur général de l'Ontario et procureur général du Québec *Intervenants***RÉPERTORIÉ : MARTINEAU c. M.R.N.****Référence neutre : 2004 CSC 81.**

N° du greffe : 29794.

Audition et jugement : 14 octobre 2004.

Motifs déposés : 16 décembre 2004.

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Auto-incrimination — Douanes — Avis de confiscation compensatoire — Interrogatoire préalable — Ministre du Revenu national confirmant la décision d'un agent de douane de signifier à un présumé contrevenant un avis de confiscation compensatoire — Contrevenant contestant la décision du ministre par voie d'action conformément à l'art. 135 de la Loi sur les douanes — Requête du ministre en vue d'interroger le contrevenant au préalable accordée — Le contrevenant peut-il invoquer la protection contre l'auto-incrimination garantie par l'art. 11(c) de la Charte canadienne des droits et libertés? — Le contrevenant est-il un « inculpé » au sens de cet article? — La confiscation compensatoire est-elle une mesure de nature pénale? — Charte canadienne des droits et libertés, art. 11(c) — Loi sur les douanes, L.R.C. 1985, ch. 1 (2^e suppl.), art. 124(1), 135 — Règles de la Cour fédérale (1998), DORS/98-106, règle 236(2).

Un agent des douanes réclame à l'appelant, en vertu de l'art. 124 de la *Loi sur les douanes*, plus de 315 000 \$, soit la valeur présumée des marchandises qu'il aurait tenté d'exporter au moyen de fausses déclarations. L'intimé confirme l'avis de confiscation compensatoire et l'appelant fait appel de cette décision par voie d'action

imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity”. In her view, in the rare cases where the two tests conflict, the “by nature” test must give way to the “true penal consequence” test (*Wigglesworth, supra*, at p. 561).

Wigglesworth is one example of this sort of unusual situation. In that case, the Court held that proceedings before the Royal Canadian Mounted Police Service Court failed the “by nature” test. However, since the accused was liable to imprisonment for a term of one year, he faced a true penal consequence.

In the case at bar, the appellant, unlike Mr. *Wigglesworth*, does not face imprisonment should he be found to have contravened the *CA*.

It remains to be determined whether the payment of \$315,458 demanded pursuant to s. 124 of the *CA* constitutes a fine that, by its magnitude, is imposed for the purpose of redressing a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness of customs requirements.

(i) *Magnitude of the Fine*

The appellant’s main argument in this regard is based on the magnitude of the amount claimed. He contends that \$315,458 is six times greater than the maximum fine that could be imposed on him upon summary conviction under s. 160(a) of the *CA* and that it accordingly constitutes a true penal consequence.

This argument is based on a false premise. There can be no doubt that the amount of \$315,458 demanded from the appellant is greater than the sanction he would face in a summary conviction prosecution. However, if the appellant had been proceeded against by way of indictment, the maximum fine would have been \$500,000 (s. 160(b) of the *CA*). In either case, moreover, the fine does not

la *Charte*] est l’emprisonnement ou une amende qui par son importance semblerait imposée dans le but de réparer le tort causé à la société en général plutôt que pour maintenir la discipline à l’intérieur d’une sphère d’activité limitée ». Selon la juge Wilson, dans les rares cas où il y a un conflit entre les deux critères, le critère de la « nature même » doit céder le pas à celui de la « véritable conséquence pénale » (*Wigglesworth*, précité, p. 561-562).

L’arrêt *Wigglesworth* nous fournit un exemple de ce type de situation inusitée. En effet, dans cette affaire, la Cour a jugé que les procédures engagées devant le tribunal du service de la Gendarmerie royale du Canada ne satisfaisaient pas au critère de la « nature même ». Néanmoins, vu qu’il était possible d’un an d’emprisonnement, l’accusé était tout de même exposé à une véritable conséquence pénale.

Dans le cas présent, contrairement à celui de M. *Wigglesworth*, l’appellant ne risque pas d’être emprisonné s’il s’avère qu’il a effectivement contrevenu à la *LD*.

Reste donc la question de savoir si le paiement de 315 458 \$ exigé en vertu de l’art. 124 de la *LD* constitue une amende qui, par son importance, est infligée dans le but de réparer le tort causé à la société en général plutôt que dans celui de maintenir l’efficacité des exigences douanières.

(i) *L’importance de l’amende*

L’argument principal de l’appellant à cet égard est fondé sur l’importance du montant réclamé. En effet, il soutient que la somme de 315 458 \$ est six fois plus élevée que l’amende maximale qui pourrait lui être infligée à l’issue d’une poursuite sommaire fondée sur l’al. 160a) de la *LD*. Il s’agirait donc d’une véritable conséquence pénale.

Cet argument repose sur une fausse prémisse. Il est certes vrai que la somme de 315 458 \$ réclamée à l’appellant est supérieure à la sanction à laquelle l’exposerait une poursuite par voie sommaire. Toutefois, si l’appellant était poursuivi par voie de mise en accusation, l’amende maximale serait de 500 000 \$ (al. 160b) de la *LD*). Qui plus est, dans un cas comme dans l’autre, l’amende ne remplace pas la

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replace the ascertained forfeiture. These are two distinct consequences that are completely independent of each other. One of them, the fine, is clearly penal in nature and thus takes into account the relevant factors and principles governing sentencing; the other, being civil in nature and purely economic, is instead arrived at by a simple mathematical calculation.

confiscation compensatoire : il s'agit de deux conséquences distinctes dont l'une ne dépend aucunement de l'autre. L'une, l'amende, est manifestement pénale et tient donc compte des facteurs et des principes pertinents en matière de détermination de la peine; l'autre, de nature civile et purement économique, est plutôt déterminée par un simple calcul mathématique.

63 In addition, forfeiture is an *in rem* proceeding in which the subject is the thing itself. In such a proceeding, the guilt or innocence of the owner of the forfeited property is irrelevant. The notice of ascertained forfeiture, the amount of which is established based on the estimated value of the property, is the necessary counterpart of this *in rem* proceeding. If the property is subsequently seized, the notice will be immediately cancelled (s. 125 of the *CA*).

En outre, la confiscation est une procédure *in rem* qui vise la « chose elle-même ». Une telle procédure n'a rien à voir avec la culpabilité ou l'innocence du propriétaire des biens confisqués. L'avis de confiscation compensatoire, dont le montant est établi en fonction de la valeur estimée de ces biens, est le pendant nécessaire de cette procédure *in rem*. De plus, si les biens sont par la suite saisis, l'avis sera dès lors annulé (art. 125 de la *LD*).

(ii) *Redressing a Wrong Done to Society*

(ii) *La réparation d'un tort causé à la société*

64 Unlike a criminal conviction, the demand by written notice stigmatizes no one.

Contrairement à une condamnation criminelle, la réclamation par avis écrit ne stigmatise personne.

65 As has just been seen, the principles of criminal liability and sentencing are totally irrelevant when fixing the amount to be demanded. Such a notice does not result in a criminal record for either the offender or the owner of the property. Its purpose is neither to punish the offender nor to elicit societal condemnation. In short, the notice of ascertained forfeiture has neither the appearance nor the distinctive characteristics of a sanction intended to “redress a wrong done to society”.

Comme nous venons de le voir, les principes de responsabilité pénale et de détermination de la peine n'entrent nullement en jeu pour fixer le montant réclamé. Un tel avis ne crée aucun casier judiciaire ni pour le contrevenant, ni pour le propriétaire des biens. Il n'a pas pour but de punir le contrevenant ou de susciter la réprobation sociale. Bref, l'avis de confiscation compensatoire n'a ni l'apparence ni les caractéristiques distinctives de la « réparation d'un tort causé à la société ».

66 To sum up, the notice of ascertained forfeiture does not lead to true penal consequences for the appellant. He cannot be characterized as a “person charged with an offence” within the meaning of s. 11(c) of the *Charter* and therefore cannot benefit from its protection in this case.

Somme toute, l'avis de confiscation compensatoire n'entraîne pas de véritables conséquences pénales pour l'appelant. Ce dernier ne peut pas être qualifié d'« inculpé » au sens de l'al. 11c) de la *Charte* et ne peut donc pas bénéficier de la protection en l'espèce.

B. *Is the Appellant Compelled to Be a Witness in Proceedings Against Him in Respect of an Offence With Which He Is Charged, Contrary to Section 11(c) of the Charter?*

B. *L'appellant est-il contraint de témoigner contre lui-même dans une poursuite intentée contre lui pour une infraction qu'on lui reproche, en contravention de l'al. 11c) de la Charte?*

67 As the appellant is not a “person charged with an offence” within the meaning of s. 11 of the *Charter*, there is in principle no need to consider the scope of

L'appelant n'étant pas un « inculpé » au sens de l'art. 11 de la *Charte*, il ne serait pas nécessaire, en principe, de se pencher sur la portée de l'al. 11c). Il

TAB 62

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

**MOTION RECORD
VOLUME 6 OF 29**

Expert Report of Professor Keith N. Hylton*

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

May 6, 2025

* William Fairfield Warren Distinguished Professor, Boston University and Professor of Law, Boston University School of Law.

PART I – SCOPE OF THIS REPORT AND SUMMARY OF OPINION

1. I have been retained by Davies Ward Phillips & Vineberg LLP (“**Davies**”), counsel for Google Canada and Google LLC (together, “**Google**”), as an independent economics expert specializing in optimal penalties in antitrust matters.

2. I understand that the antitrust regulator in Canada, the Commissioner of Competition (the “**Commissioner**”), has alleged that Google abused a dominant position in connection with the supply of online advertising technology services in Canada. I also understand that the Commissioner is pursuing a financial penalty against Google under subsection 79(3.1) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “**Competition Act**”), in the amount of: (i) three times the value of the benefit he claims was derived from a series of allegedly anticompetitive practices, or (ii) if that amount cannot be reasonably determined, three percent of Google’s annual worldwide gross revenues, over an undetermined period. I also understand that the anticompetitive practices alleged by the Commissioner date back as far as 2008.

3. Counsel to Google have asked me to conduct an analysis of the two financial penalties described above and to provide my opinion concerning whether the study of antitrust economics, including the economic theory of optimal penalties, can provide insight into the purpose and effect of those financial penalties, including as they are applied to Google in this proceeding.¹

4. The study of optimal penalties consists largely of economic analyses that aim to determine the levels of penalties that maximize society’s welfare—or, put another way, minimize the social costs of offensive activity. Under the optimal penalties framework, the objective of an antitrust regulator that does not seek to punish a firm should regulate by levying financial penalties that minimize the sum of the: (i) costs of harms to consumers arising from an antitrust violation; (ii) costs of avoiding harms to consumers; and (iii) administrative or enforcement costs of antitrust law. Imposing financial penalties that exceed the sum of these three factors, which are together

¹ I do not purport to address these matters from a legal perspective, and I do not intend to provide an opinion on questions of Canadian law. Moreover, I do not express an opinion on whether Google has or has not monopolized any product or geographic market alleged by the Commissioner. Instead, I simply assume for the purposes of the analysis in this Report that Google has engaged in the alleged monopolizing conduct. Finally, I do not purport to opine upon what the precise quantum of the optimal penalty would be in this proceeding, or how such a financial penalty would be precisely calculated, if the Commissioner does establish that Google has engaged in the alleged monopolizing conduct.

referred to as “internalizing consumer harm”, serves no socially valuable purpose; it would serve only to punish the alleged dominant firm because the penalty would deter the dominant firm from engaging in activity that its rivals would be free to engage in.

5. Specifically, I have been asked to assess whether: (i) a financial penalty of three times the value of the benefit derived from the anticompetitive practices alleged by the Commissioner would result in “inefficient overdeterrence”, and could therefore be regarded as having a “punitive” purpose from the perspective of antitrust economics; and (ii) a financial penalty of three percent of Google’s annual worldwide gross revenues, including for the period of time at issue in this case which I understand to date back to 2008, would result in “inefficient overdeterrence” and might also therefore be regarded as having a “punitive” purpose from the perspective of antitrust economics.

6. In conducting my analysis, I have primarily relied on the following articles and book chapters: Chapter 3 of Hylton (2003), Becker (1968), Williamson (1968), Landes (1983), Hylton (2005), and Hylton and Lin (2014).² A list of the various materials referred to in my Report is attached as **Appendix “B”**.

7. I have also reviewed the Affidavit of Ron Zember of Google LLC sworn May 3, 2025. Based on my review of that Affidavit, I understand that the financial penalty the Commissioner is seeking to impose on Google in the amount of three percent of Google’s annual worldwide gross revenues dating back as far as 2008 could be measured in the billions—or even tens of billions—of dollars.

8. As set out in greater detail below, it is my opinion that:

- (a) a financial penalty equal to three times the value of the benefit derived from monopolizing conduct would result in inefficient overdeterrence and therefore can

² Hylton, K.N. (2003). *Antitrust Law: Economic Theory and Common Law Evolution*. Cambridge University Press; Becker, G.S. (1968). Crime and Punishment: An Economic Approach. *Journal of Political Economy*, 76(2), 169-217; Williamson, O.E. (1968). Economies as an Antitrust Defense: the Welfare Tradeoffs. *The American Economic Review*, 58(1), 18-36; Landes, W.M. (1983). Optimal Sanctions for Antitrust Violations. *University of Chicago Law Review*, 50(2), 652-678; Hylton, K.N. (2005). The Theory of Penalties and the Economics of Criminal Law. *Review of Law and Economics*, 1(2), 175-202; Hylton, K.N. & Lin, H. (2014). Innovation and Optimal Punishment, with Antitrust Applications. *Journal of Competition Law & Economics*, 10(1), 1-25.

fairly be regarded from an antitrust economics perspective as having a punitive purpose. Such a financial penalty would include a confiscatory tax. The term “confiscatory tax” typically refers to a financial penalty imposed by the state for the purpose and with the effect of stripping wealth from a targeted entity or individual. From the perspective of antitrust economics, a confiscatory tax serves no purpose other than to confiscate wealth, and punish the party subject to the tax; and

- (b) a financial penalty equal to three percent of worldwide gross revenues, in the case of Google and in the case of other firms that share a revenue structure similar to Google, would result in inefficient overdeterrence and can fairly be regarded as punitive in nature from an antitrust economics perspective. Such a financial penalty, in this case, would include a confiscatory transfer tax. I use the term “transfer tax” in this case to mean a tax that transfers resources from divisions or businesses affiliated with the targeted entity or individual. A confiscatory transfer tax confiscates wealth from the party subject to the tax *and also* transfers and confiscates wealth from divisions and businesses that may have had little to no relationship with the targeted entity that engaged in the anticompetitive practices at issue. The effect of a confiscatory transfer tax is usually punitive in nature and is punitive in nature in this case.

9. I am aware that as an independent expert, it is my duty to: (i) provide opinion evidence that is fair, objective and non-partisan; (ii) provide opinion evidence that is related only to matters that are within my area of expertise; and (iii) provide such additional assistance as the Competition Tribunal may reasonably require to determine a matter in issue. I understand that this duty prevails over any obligation I might owe to Google, its counsel or to any other party, and that I am bound by and will comply with the Competition Tribunal’s code of conduct for Expert Witnesses.

10. I am being compensated for my involvement in this matter at my typical hourly rate. My compensation is in no way contingent on the contents of this Report or the outcome of this proceeding.

Education, former chair of the Law and Economics section of the American Association of Law Schools, and a current member of the American Law Institute.

23. My *curriculum vitae* is attached as **Appendix “D”**.

PART III – TWO MODELS OF ANTITRUST ENFORCEMENT

24. In this Report, I have examined the question of whether the financial penalties sought give rise to inefficient overdeterrence through the lens of two models of antitrust enforcement: the “Chicago School Antitrust Enforcement Model” (the “**Chicago School**”) and the “Dynamic Competition Model” (the “**Dynamic Model**”).⁶ Under either model, “inefficient overdeterrence” is a result where the penalty imposed for conduct in the marketplace is so severe that it dissuades firms from otherwise engaging in conduct that might be innovative or beneficial to the marketplace and/or competition as a whole.

25. The Chicago School first gained prominence in the 1960s and 1970s. The Chicago School seeks to regulate antitrust matters by incorporating economic analyses of the social costs and benefits of allegedly anticompetitive conduct, including potential efficiency concerns arising from discouraging the conduct sought to be regulated.⁷ The Chicago School is a model of antitrust analysis that takes “static efficiency” into account in evaluating the social desirability of antitrust enforcement.⁸ Static efficiency refers to efficiencies that can be derived within an existing market – such as lowering supply costs or increasing value to consumers. The Chicago School is a byproduct of the Chicago School of Antitrust Analysis. U.S. courts have adopted the Chicago School of Antitrust Analysis in their application of antitrust policy by introducing economic analysis of the social costs and benefits of allegedly anticompetitive conduct in several areas of

⁶ Evans, D.S. & Hylton, K.N. (2008). The Lawful Acquisition and Exercise of Monopoly Power and Its Implications for the Objectives of Antitrust. *Competition Policy International*, 4(2), 203-241; Hylton, K.N. & Lin, H. (2014). Innovation and Optimal Punishment, with Antitrust Applications. *Journal of Competition Law & Economics*, 10(1), 1-25; Hylton, K.N. & Zhang, M. (2017). Optimal Remedies for Patent Infringement. *International Review of Law and Economics*, 44, 1-35.

⁷ See, e.g., Becker, G.S. (1968). Crime and Punishment: An Economic Approach. *Journal of Political Economy*, 76(2), 169-217.

⁸ Landes, W.M. (1983). Optimal Sanctions for Antitrust Violations. *University of Chicago Law Review*, 50(2), 652-678; Hylton, K.N. & Lin, H. (2014). Innovation and Optimal Punishment, with Antitrust Applications. *Journal of Competition Law & Economics*, 10(1), 1-25.

antitrust law (e.g., exclusive dealing, resale price maintenance, monopolization, and vertical restraints).⁹

26. The Chicago School differs from the traditional model of antitrust regulation¹⁰ in that the Chicago School places a focus on promoting efficiencies in the marketplace rather than a focus on eliminating market participants' market power, even in the absence of harm to the competitive process or an efficiency rationale. The incorporation of static efficiencies in an analysis under the Chicago School was an important innovation on the traditional model of antitrust regulation that stressed the objective of eliminating the potential profits from unlawful activity, regardless of the ancillary consequences.¹¹ Today, the traditional model of antitrust regulation is viewed by most antitrust policy professionals and economists in the U.S., including by me, as outdated. As a result, in my Report, I do not propose to conduct an analysis of the financial penalties sought against Google through the lens of the traditional model of antitrust regulation.

27. The Dynamic Model is built upon the foundations of the Chicago School, and adds to the Chicago School a consideration of innovation effects.¹² The primary aim of regulation under the Dynamic Model is to reduce adverse effects on innovation arising from regulation while recognizing that innovation by firms may be undertaken with the aim of acquiring market power. In other words, the Dynamic Model of antitrust regulation is concerned not only with promoting overall efficiency in the marketplace, it is also concerned with ensuring that regulation does not discourage firms from innovating.

⁹ Director, A. & Levi, E.H. (1956). Law and the Future: Trade Regulation. *Northwestern University Law Review*, 51, 281-296; Posner, R.A. (1978). The Chicago School of Antitrust Analysis. *University of Pennsylvania Law Review*, 127, 925-948; Stigler, G. (1968). The Organization of Industry. *Richard D. Darwin, Inc.* (Original work published 1911).

¹⁰ See, e.g., Bentham, J. (1988). *The Principles of Morals and Legislation*. Prometheus Books (Original work published 1789).

¹¹ Jeremy Bentham (1988). *The Principles of Morals and Legislation*. Prometheus Books (Original work published 1789).

¹² Evans, D.S. & Hylton, K.N. (2008). The Lawful Acquisition and Exercise of Monopoly Power and Its Implications for the Objectives of Antitrust. *Competition Policy International*, 4(2), 203-241; Sidak, J.G., & Teece, D.F. (2009). Dynamic Competition in Antitrust Law. *Journal of Competition Law & Economics*, 5(4), 581-631; Hylton, K.N. & Lin, H. (2014). Innovation and Optimal Punishment, with Antitrust Applications. *Journal of Competition Law & Economics*, 10(1), 1-25.

28. In my Report, I analyze whether the financial penalties sought by the Commissioner against Google result in inefficient overdeterrence within each analytical framework (Chicago School and Dynamic Model) based on assumed scenarios pertaining to the likelihood of antitrust enforcement action. As explained below, an efficient penalty in antitrust economics is a penalty that causes the firm at issue to internalize the total harm caused to consumers by its conduct. The calculation of the quantum of this penalty depends, in part, upon the likelihood that the conduct of the firm at issue will be detected. Consequently, assumptions concerning the likelihood of antitrust enforcement action are an important input into the opinions expressed in this Report. In my Report, I have performed a sensitivity analysis based on the likelihood of antitrust enforcement based on assumed scenarios where antitrust enforcement is close to 100 percent and where antitrust enforcement is less than 100 percent.

29. As a general matter, the probability of antitrust enforcement can be ascribed to two factors: the probability of detection and the probability of enforcement conditional on detection. In cases involving allegations of monopolization (or abuse of dominance), such as in the present proceeding, the likelihood of antitrust detection and enforcement is high, and usually close to 100 percent, because the general ways in which the monopolizing firm seeks to preserve or enhance its market power are known to and scrutinized by market participants (particularly competitors) as a result of the importance of that firm dominance in the specific market.¹³ Even if the exact action that a monopolizing firm takes to preserve or enhance its market power is unknown, the general impacts of that action by the monopolizing firm are usually detectable by market participants

¹³ The most applicable study of antitrust enforcement probabilities for this report is that of Coate, M.B., Higgins, R.S. & McChesney, F. (1990). Bureaucracy and Politics in FTC Merger Challenges. *Journal of Law and Economics*, 33(2), 463-482. Coate et al. examine merger enforcement decisions within the FTC. However, the FTC's merger enforcement decisions are not fundamentally different from other enforcement decisions within the antitrust agency. Coate et al. find that when the Bureau of Competition lawyers and the Bureau of Economics economists agree on their enforcement recommendations to the Commission, the likelihood of enforcement is 97 percent. This is a perfect example of a setting where the allegedly anticompetitive conduct occurs in plain view (100 percent detection), and the only question is whether an antitrust enforcement agency will act. As Coate et al. note, lawyers within the enforcement agencies tend to view blockbuster enforcement actions as valuable for career advancement. A global firm such as Google can assume that lawyers within enforcement agencies will not be reticent about pursuing it when there is evidence of anticompetitive conduct. See also Hylton, K. N.(2009). Remedies, Antitrust Law, and Microsoft: Comment on Shapiro. *Antitrust Law Journal*, 75(3), p. 785; Hylton, K.N. and Lin, H. (2010). Optimal Antitrust Enforcement, Dynamic Competition, and Changing Economic Conditions. *Antitrust Law Journal*, 77(1), p. 253; Hylton, K.N. (2003). *Antitrust Law: Economic Theory and Common Law Evolution*. Cambridge University Press, pp. 46-52.

(especially by competitors) and traceable back to the monopolizing firm as a result of the firm's dominance in the specific market. Additionally, at least in the U.S., antitrust regulators can uncover otherwise unknown actions taken by a dominant firm to preserve or enhance market power through their investigative powers. By way of example only, in an analysis of decisions taken by the Federal Trade Commission¹⁴ to challenge horizontal mergers, it has been found that the probability of an enforcement action (in this example, a merger challenge) may be as high as 97 percent in circumstances where factors including market concentration and entry barriers are high.¹⁵

PART IV – MONOPOLIZATION AND INEFFICIENT OVERDETERRENCE

A. Overview of “Monopolization” and “Inefficient Overdeterrence”

30. As stated above, an antitrust regulator that does not seek to punish a firm should regulate by levying financial penalties that minimize the sum of the: (i) costs of harms to consumers arising from an antitrust violation; (ii) costs of avoiding harms to consumers; and (iii) administrative or enforcement costs of antitrust law.

31. The costs of avoiding harms to consumers, in the antitrust setting, consist chiefly of the efficiency losses incurred by society caused by antitrust deterrence that prevents a firm from engaging in otherwise efficiency-enhancing activity. In the absence of market efficiencies generated by the monopolization at issue arising from the conduct at issue, the optimal penalties framework would provide that a financial penalty should be set at a level that removes any benefit the firm at issue earned from the prohibited conduct. Such “benefit eliminating” financial penalties have the effect of completely deterring the prohibited conduct.

32. However, where the conduct at issue generates efficiencies (such as reducing input costs or delivering increased value to consumers), “benefit eliminating” financial penalties are not optimal. That is so because a financial penalty that completely eliminates the benefit a firm that engages in market efficiency enhancing conduct received results in inefficient deterrence. To promote activity in the marketplace that promotes efficiency, the optimal penalties framework

¹⁴ The Federal Trade Commission is one of two primary antitrust regulators in the U.S. The other is the U.S. Department of Justice.

¹⁵ Coate, M.B., Higgins, R.S. & McChesney, F. (1990). Bureaucracy and Politics in FTC Merger Challenges. *Journal of Law and Economics*, 33(2), 463-482.

would provide that financial penalties must be moderated to levels that will not result in overdeterrence of those activities. I have written extensively on the issue of optimal penalties.¹⁶

33. For the purposes of this Report, it is also important to understand why “inefficient overdeterrence” of actions taken by a firm that possesses monopoly power may at times be undesirable for consumers and the market.

34. In this Report, my use of the term “monopolization” refers to actions taken by a firm that possesses monopoly power that serve a legitimate business purpose and make the firm more competitive, including, for example, the bringing to market of innovative products or services even though such actions may also make competitors less competitive. Monopolization thus incorporates mixed motives and effects. In addition, in my Report, I do not express any opinion on whether Google has or has not monopolized the product and geographic markets alleged by the Commissioner in this proceeding. Rather, I simply assess what the nature of the financial penalty sought by the Commissioner is from the perspective of antitrust economics in the event Google is found to have monopolized any of the product and geographic markets at issue in the proceeding.

35. There are many examples of monopolization that serve a legitimate business purpose and that increase efficiencies in a market. An exclusive dealing arrangement, for example, which may reduce supply costs and thereby generate substantial efficiencies, may also exclude rivals and reduce rivals’ competitiveness. In some cases, the efficiencies from an allegedly monopolizing act, such as an exclusive dealing arrangement, will substantially outweigh potential anticompetitive effects. In such cases, from an antitrust economics standpoint, society would be unambiguously worse off if the firm in question were completely deterred from engaging in the allegedly monopolizing act.

36. In the context of conduct that generates efficiency gains (such as supply cost reductions) a financial penalty is “efficient” or “optimal” where it does not discourage a firm from pursuing

¹⁶ Hylton, K.N. (1996). Optimal Law Enforcement and Victim Precaution. *The RAND Journal of Economics*, 27(1), 196-206; Hylton, K.N. (2005). The Theory of Penalties and the Economics of Criminal Law. *Review of Law and Economics*, 1(2), 175-202; Hylton, K.N. (2003). *Antitrust Law: Economic Theory and Common Law Evolution*. Cambridge University Press at Chapter 3; Hylton, K.N. & Zhang, M. (2017). Optimal Remedies for Patent Infringement. *International Review of Law and Economics*, 44, 1-35; Hylton, K.N. & Lin, H. (2014). Innovation and Optimal Punishment, with Antitrust Applications. *Journal of Competition Law & Economics*, 10(1), 1-25.

actions that are net efficient (that is, where the gains from the efficiencies created are greater than the harms caused to competitors), and where it does discourage conduct that is net inefficient. If the financial penalty goes beyond this level, then it results in overdeterrence and can be properly viewed as “punitive” from the perspective of antitrust economics. The financial penalty is punitive because it serves no socially valuable purpose when it goes beyond the level that secures optimal deterrence. A financial penalty can be raised further still to a level that “completely deters” the underlying conduct. When the firm’s conduct generates efficiencies, complete deterrence is a socially undesirable policy,¹⁷ and such a penalty is *a fortiori* punitive.

37. Thus, in the antitrust context, one may distinguish the following four types of financial penalties. An antitrust regulator that seeks to efficiently regulate rather than to punish a firm should seek to calculate and impose a financial penalty in the green box. The financial penalties flagged in red boxes above go beyond the amount that is optimal for deterrence and are both examples of “punitive” penalties from the perspective of antitrust economics.

(1) A penalty that inefficiently underdeters.	(2) A penalty that efficiently deters.
(3) A penalty that inefficiently overdeters.	(4) A penalty that inefficiently completely deters.

38. Efficiencies are beneficial to the economy and often provide long-term gains to future generations of consumers. A financial penalty that inefficiently “overdeters” discourages firms from adopting efficient methods of supply (Williamson, 1968).¹⁸ By discouraging efficient methods of supply, such penalties reduce the capacity of the market, and that of the overall economy for growth (Sidak and Teece, 2009).¹⁹ Efficiencies that are created and exploited provide

¹⁷ Becker, G.S. (1968). Crime and Punishment: An Economic Approach. *Journal of Political Economy*, 76(2), 169-217; Hylton, K.N. (2005). The Theory of Penalties and the Economics of Criminal Law. *Review of Law and Economics*, 1(2), 175-202.

¹⁸ Williamson, O.E. (1968). Economies as an Antitrust Defense: the Welfare Tradeoffs. *The American Economic Review*, 58(1), 18-36.

¹⁹ Sidak, J.G., & Teece, D.F. (2009). Dynamic Competition in Antitrust Law. *Journal of Competition Law & Economics*, 5(4), 581-631.

a platform for competition in the future that benefits all consumers, most often by leading to more variety in the marketplace and lower prices.

B. Analysis under the Chicago School Antitrust Enforcement Model

39. Using the Chicago School, my analysis below demonstrates that: (i) a financial penalty equal to three times the benefit derived from the alleged anticompetitive practice(s) of Google results in inefficient overdeterrence; and (ii) a financial penalty equal to three percent of Google's annual worldwide gross revenues, where the global revenues of Google far exceed the revenues of Google in Canada, results in inefficient overdeterrence. These conclusions hold provided that the likelihood of antitrust enforcement in respect of the first and second penalties is at least 1/3 and 60 percent, respectively.

40. Under the Chicago School framework, the optimal penalty is equal to the total consumer harm arising from the impugned conduct. The total consumer harm consists of two components: (i) the transfer of surplus from consumers to the seller (the total surcharge on actual consumers); and (ii) the forfeited surplus from sales that do not occur because the price is at an anticompetitively high level (deadweight loss). By "internalizing" the total consumer harm, the Chicago School ensures that a firm will only seek to monopolize a market when the efficiency gain from monopolization is greater than the deadweight loss.²⁰

(i) Analysis of Financial Penalty Equal to Three Times Benefit Derived From an Anticompetitive Practice Using the Chicago School

41. In this section, I consider the implications of the Chicago School on my analysis of a financial penalty equal to three times the value of the benefit derived from an anticompetitive practice. In short, using the Chicago School, a penalty set equal to three times the value of the benefit derived from the anticompetitive practice results in inefficient overdeterrence (and, indeed, inefficient *complete* deterrence) and is punitive from the perspective of antitrust economics.

²⁰ Becker, 1968 introduces the internalization principle as an alternative to the traditional approach reflected in Bentham, 1789. The internalization principle can lead to complex penalty recommendations in certain settings, such as, for example, where victim precaution is an important factor (Hylton, 1996).

(a) **Analysis Where Probability of Detection and Enforcement is Close to 100 Percent**

42. I will begin my analysis with the simplest scenario, *i.e.*, where the probability of antitrust detection and enforcement is close to 100 percent. In my Report, I variously refer to this likelihood of enforcement as “certain” or “100 percent”. I acknowledge that the likelihood of antitrust enforcement in practice can never be 100 percent. When I refer to a likelihood of enforcement in these terms, what I intend to convey is a scenario where the likelihood of antitrust enforcement is high.

43. Where the likelihood of antitrust enforcement is high, a financial penalty equal to the benefit derived from the monopolizing action removes any incentive to take such a monopolizing action. Put another way, if there is no benefit derived by the firm after the penalty is imposed, no rational firm will undertake the action. This would result in complete deterrence of the monopolizing conduct at issue and would be undesirable from the perspective of antitrust economics given that not all actions taken by a firm with monopoly power are harmful to the market.²¹ Some actions taken by a monopolizing firm to advance its own interests also enhance market efficiency and, in turn, benefits society generally.

44. For example, many exclusive dealing arrangements have the effect of making it more difficult for rivals to compete (thereby imposing a harm), but they can also reduce supply costs substantially (thereby generating efficiencies). Because the efficiencies from exclusive dealing arrangements can be substantial, it would be socially undesirable to completely deter such activity.²² Society would be made worse off by a law that had the effect of completely deterring all exclusive dealing arrangements by a firm with monopoly power.

45. Tying arrangements are another example of potentially undesirable consequences arising from complete deterrence of monopolization. Product tying can sometimes make it more difficult

²¹ On the theory of complete deterrence, as compared to optimal deterrence, see Hylton, K.N. (2005). The Theory of Penalties and the Economics of Criminal Law. *Review of Law and Economics*, 1(2), 175-202.

²² For articles discussing the efficiencies from exclusive dealing, see, e.g., Bernheim, B.D. and Whinston, M.D. (1998) Exclusive Dealing. *Journal of Political Economy*, 106(1), 64-103; Marvel, H.P. (1982). Exclusive Dealing. *Journal of Law & Economics*, 25(1), 1-25. The efficiencies from exclusive dealing arrangements were recognized by the U.S. Supreme Court in *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949).

for rivals of the tying firm to compete, but it can also reduce consumer search costs and enhance consumer utility.²³ Hence, it would be socially undesirable to completely deter product tying by a firm with monopoly power.

46. By way of example as well, consider the practice of destroying the production facilities of rivals. Such an activity has an anticompetitive effect without any offsetting efficiencies. Thus, the activity of destroying the production facilities of rivals should be completely deterred. For purely destructive acts, penalties should be set to completely eliminate any prospect of gain from the activity.

47. Where efficiencies are at play, however, the optimal penalty is one that internalizes to the impugned dominant firm the harm its conduct causes to consumers without imposing additional financial or other penalties beyond that threshold. The harm to consumers is equal to the sum of the transfer of consumer surplus and the deadweight loss from monopolization. Additional penalties beyond the internalization of consumer harm serve no socially valuable purpose; they serve only to punish the alleged dominant firm because the penalty would deter the dominant firm from engaging in activity that its rivals would be free to engage in.

48. Moreover, it is important to understand that the benefit derived from a monopolizing firm is not equivalent to the harm caused by the monopolizing conduct to consumers. In many cases, the harm caused to consumers from the monopolizing conduct is smaller than the benefit derived from the monopolizing conduct.

49. By way of example, suppose the allegedly anticompetitive conduct results in a price surcharge of \$1 imposed on 1,000 consumers each. Suppose also that the price surcharge causes 100 potential consumers to forgo purchasing the product, when they would have purchased the product if there were no surcharge. In this scenario, the total consumer harm is equal to the sum of the total surcharge (\$1,000) on actual consumers plus the value of the consumer surplus forgone by the decisions of 100 potential consumers to forgo purchasing the product. If the product's value

²³ On the efficiency of tying arrangements, see, e.g., Hylton, K.N. and Salinger, M. (2001). Tying Law and Policy: A Decision-Theoretic Approach. *Antitrust Law Journal*, 69(2), 469-526; Klein, B. and Saft, L.F. (1985). The Law and Economics of Franchise Tying Contracts. *Journal of Law and Economics*, 28(2), 345-361.

to each of the 100 potential consumers declines linearly over that set of individuals, then the value of the forgone consumer surplus amounts to $(1/2) \times \$1 \times 100 = \50 .

50. In this example, the total consumer harm, which is equivalent to the optimal penalty under the Chicago School, would be equal to $\$1,000 + \$50 = \$1,050$.

51. Now, assume that the firm at issue enjoys a \$1 per unit cost savings from its alleged monopolizing conduct. The benefit the firm derives from the monopolizing conduct would be equal to the surcharge (\$1,000) plus the cost savings (\$1,000), which equals \$2,000 total. A financial penalty equal to three times the benefit derived in this scenario would equal \$6,000. That amount is far larger than the optimal financial penalty of \$1,050. The difference, i.e., \$4,950, which constitutes more than 82 percent of the total \$6,000 penalty, represents the proportion of inefficient overdeterrence, or punitive component of the financial penalty, from the perspective of antitrust economics. That is so because the amount of \$4,950 serves no socially valuable purpose or effect other than to overdeter otherwise efficiency enhancing conduct.

52. In my view, the first financial penalty sought by the Commissioner in this proceeding (namely, three times the benefit allegedly derived by Google from the anti-competitive practices alleged by the Commissioner) is punitive. As the example above demonstrates, that penalty consists of two components: (i) a basic component equal to the optimal fine based on the Chicago School; and (ii) an additional punitive or confiscatory component.

53. Where the financial penalty is equal to three times the benefit derived from the alleged anticompetitive practice, the punitive (or confiscatory) component would be equal to twice the profit of the monopolist plus the value of the net social gain from monopolization. The net social gain from monopolization is equal to the difference between the value of the efficiency gain and the value of the forgone consumer surplus. Using the example discussed above, recall that the benefit derived by the dominant firm of the monopolizing conduct is equal to \$2,000. Recall also that the cost savings (or efficiency gain) was \$1,000 and that the forgone consumer surplus was \$50. Thus, in that example, a penalty equal to three times the benefit derived generates a punitive portion equal to the sum of $2 \times (\$2,000 + (\$1,000 - \$50)) = \$4,950$, which is the same punitive component calculated earlier by subtracting the optimal penalty under the Chicago School from the “three times benefit derived” financial penalty.

54. The financial penalty sought by the Commissioner taxes the firm, over and above the optimal penalty, by an amount that takes away twice its profits plus the value of the social gain bestowed by its action. This is analogous to making the seller of a high-priced beneficial heart drug pay a penalty equal to the total value of the price surcharge on consumers (the surcharge multiplied by the number of actual consumers), plus the forgone value to demurring consumers, plus twice its profits, plus the net value of lives saved. Such a penalty would cause the firm to cease engaging in that line of business, depriving consumers of the benefits of its products.

(b) Analysis Where Probability of Detection and Enforcement is Less Than 100 Percent

55. In circumstances where the probability of antitrust detection and enforcement is uncertain (*i.e.*, less than 100 percent), the analysis outlined above continues to apply, with slight modification.

56. If the probability of antitrust detection and enforcement is close to 100 percent, which is a plausible assumption in many cases of monopolization given that the potentially unlawful acts are generally not concealed, the analysis outlined above continues to hold. This is because none of the conclusions stated earlier depend on the probability of enforcement being precisely equal to 100 percent. If the probability of enforcement is high, the conclusions described above remain valid.

57. Where the probability of enforcement is less than 100 percent, the amount of harm caused to consumers must be divided by the probability of enforcement to determine what the optimal penalty under the Chicago School would be. In the Technical Appendix of this Report, I show that for any probability of detection followed by enforcement greater than one-third ($1/3$), a financial penalty equal to three times the benefit derived necessarily results in inefficient overdeterrence and can fairly be regarded as punitive in nature from the perspective of antitrust economics.

58. Consequently, provided that the probability of detection of Google's alleged conduct in this case was at least $1/3$, my opinion in this Report remains the same regardless of the percentage of detection and enforcement that actually prevailed. In my view, it is highly likely that the probability of detecting the alleged monopolizing conduct of Google at issue in this proceeding was greater than $1/3$. That is so because, as explained above, if the conduct at issue was monopolizing, then it is well known in the study of antitrust economics that there is a high

63. Consider a situation where detection and enforcement is certain, and the global revenues of the firm far exceed the local revenue of the firm in which the monopolizing conduct is alleged to have taken place. This might be the case where, as I understand is the case with respect to Google in this proceeding, the firm is a multi-national entity that carries on business in multiple jurisdictions throughout the world, and where its global business activities extend well beyond the particular line of business placed at issue by an antitrust regulator in one jurisdiction.

64. In this scenario, a financial penalty equal to three percent of global revenues is highly likely to inefficiently overdeter alleged monopolizing conduct, and thus be punitive from the perspective of antitrust economics. The likelihood that a financial penalty of three percent of global revenues constitutes a punitive penalty based on the magnitude of difference between the global revenues of the firm at issue and the local revenues of the firm at issue. **Where global revenues greatly exceed local revenues, it is highly likely that a financial penalty of three percent of global revenues will be punitive. Where global revenues are nearly equal to local revenues, it becomes less certain that a financial penalty of three percent of global revenues will be punitive.**

(b) Analysis Where Probability of Detection and Enforcement is Less Than 100 Percent and Global Revenue is Greater Than Local Revenue

65. Where the likelihood of detection and enforcement is not 100 percent and the global revenues of the firm at issue far exceed the local revenues of the firm, a financial penalty equal to three percent of global revenue is highly likely to inefficiently overdeter alleged monopolizing conduct, and therefore be punitive from the perspective of antitrust economics. The same reasoning explained in Part IV(b)(i)(b) applies here. In the Technical Appendix to this Report, I show that the overdeterrence outcome, and the existence of a punitive component within a penalty of three percent of global revenues, is guaranteed if the probability of detection and enforcement is greater than 60 percent. Sixty percent is a probability threshold that is likely to be surpassed in most monopolization cases involving dominant firms. Hence, the very likely result of imposing a penalty equal to three percent of global revenues on a multinational firm that derives only a portion of its revenues from the local market in which monopolizing conduct is alleged is inefficient overdeterrence.

PART V – CONCLUSION

84. In this Report, I examined the economic implications of the financial penalties sought by the Commissioner against Google in this proceeding—specifically financial penalties equal to three times the value of the benefit derived from allegedly anticompetitive conduct and three percent of Google’s annual worldwide gross revenues. My analysis, based on an assessment of the issues through both the Chicago School and the Dynamic Model frameworks, demonstrates that both financial penalties are highly likely to result in inefficient overdeterrence, particularly in cases where the probability of detection and enforcement of the monopolizing conduct is high and where Google’s global revenues exceed its revenues in Canada.

85. In short, the financial penalties sought by the Commissioner not only exceed the optimal penalties from the perspective of antitrust economics, but also impose a punitive, confiscatory component that can discourage efficiency-enhancing conduct and stifle innovation from the perspective of antitrust economics. My views, as set out in this Report, are that the financial penalties sought by the Commissioner are not consistent with the principles of optimal deterrence in antitrust economics and risk undermining efficiency and innovation in the marketplace.

TAB 63

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1

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

--- This is the Cross-Examination of
KEITH N. HYLTON upon affidavit sworn July 23, 2025,
conducted virtually by Veritext Legal Solutions,
with all participants attending virtually, on
August 5, 2025.

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8

1 A. Yes.

2 19 Q. And it's a compilation --

3 A. Right.

4 20 Q. Pardon me?

5 A. Yes.

6 21 Q. Okay. And it's a compilation of
7 all the authorities and journal articles and so
8 forth that appear in the footnotes of that report;
9 correct?

10 A. Yes.

11 22 Q. And my understanding is that in
12 preparing your Reply Report, you also reviewed the
13 Commissioner's Amended Notice of Application; is
14 that right?

15 A. Yes.

16 23 Q. And did you review it in full, or
17 did you review just certain parts of it?

18 A. I probably looked, skimmed over
19 all of it in full, but there's certain parts of it
20 that I focused on.

21 24 Q. Okay. What parts did you focus
22 on?

23 A. The amended portion dealing with
24 the penalty that the Commissioner would request.

25 25 Q. Okay. Is it fair to say that was

PUBLIC

9

1 the primary focus of your review?

2 A. Yes.

3 26 Q. And you skimmed the balance?

4 A. I think so.

5 27 Q. You're not sure about that?

6 A. Well, I would have to remember

7 exactly how I went through the document, and I

8 think that is how I went through the document.

9 28 Q. All right. And you also reviewed
10 Professor Tadelis's expert report in preparing the
11 Reply; correct?

12 A. I did. I did, yes.

13 29 Q. Okay. So taking all of that
14 together, the materials listed in Appendix B of
15 your Initial Report, Appendix A of your Reply
16 Report, the affidavits of Ron Zember, Steve
17 Tadelis, and the Amended Application, these are all
18 the materials that you reviewed in preparing your
19 Initial and Reply Reports; correct?

20 A. Yes.

21 30 Q. All right. So you didn't review
22 the Competition Act generally or Section 78 or 79
23 of the Competition Act in particular; correct?

24 A. No, I did not review those
25 portions in detail. I have some vague familiarity

PUBLIC

10

1 with them.

2 31 Q. Okay. And you didn't review the
3 Competition Bureau's Abuse of Dominance Guidelines;
4 correct?

5 A. Actually I did review the
6 competition guidelines.

7 32 Q. Okay. Well, you didn't mention
8 that when I asked you if that was everything that
9 you'd reviewed. Is there anything --

10 A. I'm sorry, I'm working on the
11 basis of what I remember doing, and I have -- let
12 me correct myself. Okay. So in the course of
13 preparing these reports, I did not review the
14 competition guidelines. It's only after writing
15 these reports that I've gotten a chance to review
16 the competition guidelines.

17 So I need to apologize. So if I gave
18 you the impression that I've reviewed the
19 competition guidelines in the course of writing
20 that report, no, I did not review the competition
21 guidelines before writing this report, only after
22 having finished the report. So I think that's
23 consistent with what I said before.

24 33 Q. Okay. Well, you're saying that --
25 you referred to "this report." I understand when

PUBLIC

11

1 you say "this report," you're referring to both
2 your Initial Report and your Reply Report; correct?

3 A. Precisely. Precisely.

4 34 Q. In other words, you looked at the
5 Enforcement Guidelines after you prepared those
6 reports; correct?

7 A. Precisely. Precisely. And I
8 apologize. It's not easy to remember exactly what
9 you read at what time, so...

10 35 Q. No, that's fine. There's no need
11 to apologize.

12 Did you look at the Bureau's Merger
13 Enforcement Guidelines in preparing your reports or
14 after?

15 A. No, I did not.

16 36 Q. Okay. Did you look at the
17 Bureau's Competitor Collaboration Guidelines in
18 preparing your reports or after?

19 A. No, I don't recall looking at the
20 Bureau's -- at those guidelines.

21 37 Q. And I'll ask, Mallory, if you can
22 turn up Tab 14, please. I'm not sure -- oh, here
23 we go.

24 So are you familiar with this paper by
25 Wouter Wils, Professor Hylton?

PUBLIC

24

1 A. Thank you.

2 85 Q. Okay. It's my pleasure.

3 So the first fact is a firm engages in
4 abusive conduct within the meaning of Section 79 of
5 the Competition Act in respect of a product. Just
6 make that assumption.

7 A. Okay.

8 86 Q. And that conduct results in 75
9 consumers paying \$1 extra each for the good in
10 issue. Now, to keep things simple, let's assume,
11 at least for the moment, that there are no
12 efficiencies associated with this abuse of conduct,
13 and let's also assume, to keep things simple, that
14 demand is perfectly inelastic, so we can take
15 deadweight loss out of the equation. So in that
16 example, do you have those facts?

17 A. I have those facts.

18 87 Q. Okay. So in that example,
19 consumer harm would be \$75; correct?

20 A. Correct.

21 88 Q. \$1 times 75 units?

22 A. Correct.

23 89 Q. Okay. Now, let's see if we can
24 agree on how the chances of detection and
25 enforcement would operate in this scenario.

PUBLIC

25

1 A. Okay.

2 90 Q. So can we agree that if the
3 chances of detection and enforcement were
4 100 percent, then the appropriate penalty would be
5 \$75, whether the penalty is calculated using the
6 internalization approach or the deterrence
7 approach?

8 A. Yes, we can agree.

9 91 Q. Okay. In other words, the
10 consumer harm of \$75 would be multiplied by a
11 factor of 1 to arrive at that penalty; correct?

12 A. That's correct.

13 92 Q. And can we also agree that if the
14 chances of detection and enforcement are
15 50 percent, then the appropriate penalty would be
16 \$150, which is 2 times the 75; correct?

17 A. That's correct.

18 93 Q. And that's true whether or not the
19 calculation is made pursuant to the internalization
20 approach or the deterrence approach; correct?

21 A. That's correct.

22 94 Q. All right. In other words, the
23 harm would be multiplied by a factor of 2 to arrive
24 at the penalty; correct?

25 A. Correct.

PUBLIC

26

1 95 Q. And the reason we use a factor of
2 1 in the first scenario is because there is a
3 100 percent chance of detection and enforcement;
4 correct?

5 A. Correct.

6 96 Q. And the reason we use a factor of
7 2 in the second scenario is because there's only a
8 50 percent chance of detection and that
9 enforcement; correct?

10 A. Correct.

11 97 Q. Okay. And now, in the second
12 scenario where the chance of detection and
13 enforcement is 50 percent, if we multiply the harm
14 by a factor of 1 instead of by a factor of 2, the
15 penalty would be inadequate; correct?

16 A. It would be inadequate to
17 internalize the harm under the internalization
18 approach and inadequate to eliminate the gain under
19 the complete deterrence approach. That's the
20 expectation of gain.

21 98 Q. Right. In other words, it would
22 be inadequate to deter the company from engaging in
23 that conduct under --

24 A. I want to be careful about -- I
25 want to be careful because we have two different --

PUBLIC

27

1 we have different approaches. The deterrence
2 approach says let's deter the conduct. The
3 internalization approach says let's internalize.

4 99 Q. Okay.

5 A. So if you're talking about the
6 deterrence approach, yes, that's correct, it would
7 be inadequate to deter the conduct. And if we're
8 talking about the internalization approach, it
9 would also be inadequate to internalize the harm.

10 100 Q. All right. Thank you. Now, let's
11 add efficiencies to the mix.

12 A. Sure.

13 101 Q. And maybe we can look at
14 paragraph 36 of your Initial Report, and I'm
15 looking at the first sentence there. I'll let you
16 get that in front of you.

17 A. Here it is. It's cut off. So
18 there's one sentence --

19 102 Q. Right.

20 A. -- one line. Okay.

21 103 Q. That's right. Take your time.
22 I'm just going to refer you to the first sentence
23 there where it says:

24 "In the context of conduct that
25 generates efficiency gains (such as

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1 supply cost reductions) a financial
2 penalty is 'efficient' or 'optimal'
3 where it does not discourage a firm
4 from pursuing actions that are net
5 efficient (that is, where the gains
6 from the efficiencies created are
7 greater than the harms caused to
8 competitors), and where it does
9 discourage conduct that is net
10 inefficient."

11 Do you see that?

12 A. I see that. I see that.

13 104 Q. And that's your testimony;
14 correct?

15 A. Yes, it is.

16 105 Q. Okay. Let's go to the example set
17 out in paragraphs 49 to 51 of your Initial Report.

18 A. Okay.

19 106 Q. And I'm going to summarize kind of
20 in a bulleted list here. I'm going to set out what
21 I understand to be the facts of your example, and
22 I'm just going to read them into the record for
23 you.

24 A. Okay.

25 107 Q. Again, same drill as before: If

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29

1 I'm going too fast, if I get something wrong,
2 you're going to stop me and let me know. And by
3 all means, if you want to make notes as you're
4 going, that's absolutely fine.

5 A. Thank you.

6 108 Q. So the base facts of the example
7 are as follows: A firm is engaging in abusive
8 conduct -- I'm using "abusive." You use the word
9 "monopolization." I'm just subbing in the Canadian
10 word.

11 A. Sure.

12 109 Q. Okay. That conduct results in a
13 price surcharge of \$1 imposed on 1,000 consumers
14 each. Demand is somewhat inelastic, and, as a
15 consequence of the price surcharge, 100 potential
16 consumers forego purchasing the product. Total
17 consumer harm is equal to the sum of the total
18 surcharge on actual consumers plus the value of the
19 consumer surplus foregone by the decisions of 100
20 potential consumers. Have I got it right so far?

21 A. Yes, you --

22 110 Q. Okay.

23 A. -- have it right. You've included
24 one term that I -- it was not in the paragraph, but
25 fine, let's keep going.

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30

1 111 Q. Okay. The product's value to each
2 of those 100 potential consumers declines linearly
3 over the set of individuals so the value of the
4 foregone consumer surplus or -- I'm adding words
5 here -- or deadweight loss. Are you --

6 A. Yes.

7 112 Q. -- comfortable with that?

8 A. I'm comfortable.

9 113 Q. Okay. Is one-half -- there's an
10 equation. I'll read it in so that the court
11 reporter gets it.

12 A. Okay.

13 114 Q. $(1/2)$ times \$1 times 100, which
14 equals \$50.

15 A. That's correct.

16 115 Q. Right. So we've got a deadweight
17 loss of \$50.

18 Your evidence is, in your Initial
19 Report, that the total consumer harm in this
20 scenario is \$1,050; correct?

21 A. That's correct.

22 116 Q. Okay. And that's the \$1,000
23 surcharge paid by those 100 consumers who purchased
24 the product at an elevated price plus the \$50
25 deadweight loss; correct?

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31

1 A. Correct. Correct.

2 117 Q. Okay. If we pause there for a
3 moment, before we introduce efficiencies, can we
4 agree that assuming a 100 percent chance of
5 detection and enforcement, the appropriate penalty
6 by the internalization approach would be \$1,050?

7 A. That's correct.

8 118 Q. And that's because that penalty
9 would force the firm engaged in the abusive conduct
10 to internalize all of the consumer harm; is that
11 correct?

12 A. That's correct.

13 119 Q. All right. The appropriate
14 penalty under the deterrence approach in that
15 circumstance, again, assuming a 100 percent chance
16 of detection, would \$1,000; correct?

17 A. That's correct.

18 120 Q. All right. Let's look at
19 efficiencies and sort of draw them into the
20 scenario, continuing with that same set of facts.
21 Again, these are your facts. Assume the firm at
22 issue enjoys a \$1 per unit cost savings from its
23 alleged abusive conduct. The benefit that the firm
24 derives from the conduct would be the sum of the
25 surcharge, \$1,000, plus the cost savings generated

PUBLIC

32

1 by the efficiencies, an additional \$1,000, for a
2 total of \$2,000; correct?

3 A. Correct.

4 121 Q. Okay. And then assuming still
5 that the chances of detection and enforcement are
6 100 percent the optimal penalty under the
7 internalization approach, would remain \$1,050?

8 A. That's correct.

9 122 Q. And that's notwithstanding the
10 efficiencies; correct?

11 A. That's in spite of it. Yes,
12 that's correct, yes.

13 123 Q. Okay.

14 A. That's correct.

15 124 Q. That's fine. The penalty under
16 the deterrence approach in that circumstance would
17 be, again, assuming a 100 percent chance of
18 detection and enforcement would be \$2,000; correct?

19 A. Correct.

20 125 Q. All right. In other words, the
21 penalty under the deterrence approach would be \$950
22 greater than the penalty under the internalization
23 approach; right?

24 A. Yes, that's correct because you
25 get 2,000 and 1,050 on the other side.

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1 126 Q. Right. And you would say -- let's
2 assume there aren't divisions of this company.
3 Let's say there's just one division to keep things
4 simple again. You'll understand why I'm saying
5 that in a moment. You may already anticipate it.

6 A. Okay.

7 127 Q. You would say that \$950 extra
8 under the deterrence approach would represent a
9 confiscation tax; correct?

10 A. Yes.

11 128 Q. All right. And I understand your
12 evidence to be that a confiscation tax refers to a
13 financial penalty imposed by the state for the
14 purpose and with the effect of stripping wealth
15 from a targeted entity or individual. If you want
16 to reference, it's paragraph 8(a) of your Initial
17 Report. Does that sound right?

18 A. That sounds correct.

19 129 Q. All right. I mean, you're free to
20 turn it up if you want.

21 A. No, sounds correct.

22 130 Q. All right. It's your evidence
23 that where a firm derives efficiencies from
24 conduct, abuse of conduct, such as in the example,
25 the optimal penalty is one that internalizes to the

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34

1 impugned firm, the harm it causes, which is the
2 1,050 to consumers, without imposing additional or
3 other financial penalties beyond that threshold;
4 correct?

5 A. I think 1,050 was the term that
6 we --

7 131 Q. Right.

8 A. Okay. That's correct.

9 132 Q. But do you agree with the
10 proposition I put to you?

11 A. That's correct.

12 133 Q. Okay. And it's your evidence, I
13 understand, that additional penalties beyond the
14 internalization of the consumer harm serve no
15 socially valuable purpose. These are only to
16 punish the alleged dominant firm because the
17 penalty would deter the dominant firm from engaging
18 in activity that its rivals would be free to engage
19 in. The pinpoint reference for that is Initial
20 Report para. 47 if you want to turn it up, but does
21 that sound right?

22 A. That sounds correct. On the other
23 hand, by -- let's see. Okay. Sure, that's what
24 I -- first of all, that's what I say in the report.
25 That's correct. The -- if I try to summarize --

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35

1 134 Q. Well, we don't need to --

2 A. -- the meaning here --

3 135 Q. We don't need you to summarize. I
4 haven't asked you to summarize.

5 A. Sure, that's what you said.

6 136 Q. I just asked, is that your
7 evidence, sir?

8 A. That's in the report, yes.

9 137 Q. Yeah. Is it your evidence?

10 A. It is my evidence. It's in the
11 report, yes.

12 138 Q. Yeah. So going back to the
13 example, under the internalization approach, the
14 firm in question would absorb 100 percent of the
15 consumer harm, or 1,050, but no more; correct?

16 A. 1,050 I think was the --

17 139 Q. Yeah, yeah, 1,050. Yeah, I
18 misspoke. I apologize.

19 A. Okay.

20 140 Q. You would say that if you impose
21 something \$1 more than 1,050, at that point it
22 would be inefficient overdeterrence; is that fair?

23 A. That's fair.

24 141 Q. Okay. And you define inefficient
25 deterrence -- and the reference is the Initial

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1 Report para. 24 -- as a situation where the penalty
2 imposed for conduct in the marketplace is so severe
3 that it dissuades firms from otherwise engaging in
4 conduct that might be innovative or beneficial to
5 the marketplace and/or competition as a whole;
6 correct?

7 A. That's correct. That's correct.

8 142 Q. So in the scenario we've gone
9 through, the firm in question, under the
10 internalization approach, would not be deterred by
11 the \$1,050 penalty from continuing its conduct and
12 would be able to continue to realize the \$1,000 in
13 efficiencies that that conduct generated; correct?

14 A. That's correct.

15 143 Q. Under the Chicago School, what you
16 would -- the rationale for that is that society is
17 better off by allowing them to continue to reap the
18 benefits of that \$1,000 efficiency gain; in other
19 words, net total social welfare is increased by
20 that. Is that the rationale behind that sort of
21 approach?

22 A. That's correct.

23 144 Q. All right. Now, I know you said
24 you -- I think you said you hadn't had an
25 opportunity to review the Competition Act, or

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1 refresh my memory, if you would. I'm not sure if
2 you said you didn't have a chance to review it
3 before you did your reports. Can you just refresh
4 my memory on that, please.

5 A. Before I did the reports, I did
6 not have a chance to review the entire Competition
7 Act. I am familiar with the provisions I was asked
8 to examine in my report.

9 145 Q. So you're familiar with
10 Section 79, you're saying?

11 A. Not the entire Section 79. The
12 provisions that I was asked to consider for my
13 report. I think the provision -- the entire
14 Section 79 is more than just the provisions that I
15 discuss in my report.

16 146 Q. So maybe you can indicate which
17 provision you looked at. I think --

18 A. Well, I think it says so in my
19 report. Let's take a look at -- let's see.
20 79(3.1).

21 147 Q. Right.

22 A. 79(3.1) is the provision that I
23 examined for my report.

24 148 Q. Okay.

25 A. I assume there are other portions.

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1 186 Q. And do you understand, sir, that
2 if a company like Google puts forward a credible
3 business justification or is able to establish that
4 its conduct was intended to be
5 efficiency-enhancing, then that can be sufficient
6 to negative the otherwise anti-competitive intent
7 that would be inferred from conduct that might look
8 at first blush like it was intended to be
9 anti-competitive?

10 A. Yes, I do understand.

11 187 Q. All right. And do you understand
12 also that if Google were able to persuade a
13 Tribunal that, in fact, it had credible business
14 explanations and efficiency-enhancing explanations
15 in respect of some or all of the anti-competitive
16 practices referred to in the Notice of Application
17 that we just looked at, that at the liability stage
18 of the proceeding, those things could, in a sense,
19 fall off the table in the sense that there wouldn't
20 be a finding in respect of those?

21 A. I do understand that.

22 188 Q. Okay. So if that were the case,
23 assuming there was a finding in respect of one or
24 more practices that it was anti-competitive -- an
25 anti-competitive practice, pardon me, only those

PUBLIC

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1 parts would slip through to and be considered in
2 the context of a remedy proceeding; correct?

3 A. I understand that.

4 189 Q. Okay. And only those practices
5 would be considered in the context of determining
6 whether or not a financial penalty was appropriate,
7 and if so, in what amount; correct?

8 A. I understand.

9 190 Q. Okay. Pardon me, just give me a
10 moment. Just trying to decide if I want to pursue
11 one thing.

12 Maybe we can turn to paragraph 34 and
13 35 of your Initial Report.

14 A. Okay.

15 191 Q. I just want to make sure --

16 A. I've got page 13.

17 192 Q. Okay. Super. So I just want to
18 understand what you're saying here, and let's -- I
19 think it's really -- I'm referring you to 35 -- 34
20 and 35 just for completeness, but I really want to
21 focus in on the definition -- your definition of
22 monopolization in paragraph 34.

23 A. Okay.

24 193 Q. Okay. And you say there:

25 "In this Report, my use of the

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1 an analysis of monopolization that is general
2 because it takes into account both good and bad
3 types of monopolization. Mixed effects from
4 monopolization. I'm not limiting my analysis to
5 just cases in which monopolization has only good
6 effects, if that's -- if that's what you mean. I
7 mean, I think it's clear through the report.

8 200 Q. Let's turn to paragraph 12 of your
9 reply.

10 A. Sure.

11 201 Q. You have that?

12 A. Yes.

13 202 Q. You say there that the -- you say:

14 "I would also note that the
15 study of optimal penalties
16 constitutes a recognized
17 sub-specialty within the broader
18 field of antitrust economics."

19 See that?

20 A. Yes, I see it.

21 203 Q. Are you a member of the American
22 Economic Association, sir?

23 A. Yes, I am.

24 204 Q. All right. Are you aware of the
25 American Economic Association's SEL Classification

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1 System for papers?

2 A. Yes, I am.

3 205 Q. All right. And is that considered
4 the authoritative classification system by
5 economists?

6 A. I think so.

7 206 Q. All right. Let's turn that up.
8 It is at -- do you want a tab reference, Mallory?

9 MS. KELLY: Yes, please.

10 MR. SYME: Okay. Just give me a
11 second.

12 BY MR. SYME:

13 207 Q. Pardon me, I said SEL. I think
14 it's JEL.

15 A. JEL.

16 208 Q. It's at Tab 15.

17 A. JEL for Journal of Economic
18 Literature.

19 209 Q. Right. Right. I'm not as
20 familiar with it as I'm sure you are.

21 I take it the papers that you write are
22 classified under this system --

23 A. They are.

24 210 Q. -- is that fair?

25 A. They are.

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1 211 Q. All right. I'm just going to get
2 my paper copy in front of me.

3 So what we see here is -- we're on the
4 first page of that -- "JEL Classification
5 System/EconLit Subject Descriptors"?

6 A. Yes.

7 212 Q. Now, if I understand, this is --
8 and we'll look at this in more detail in a moment,
9 but if I understand, this is basically a
10 classification system decided upon by the -- you
11 call it the AES -- AEA, pardon me.

12 A. American Economic Association.

13 213 Q. Yeah, the American -- by the
14 association to classify papers by, well, anyone who
15 writes them, whether they be academics or other
16 people. They would --

17 A. That's right.

18 214 Q. Okay. All right.

19 A. That's correct.

20 215 Q. And if we scroll down, the pages,
21 I think, are not numbered, but if you go to --
22 there are a huge number of categories here. I was
23 amazed by this.

24 A. Yes.

25 216 Q. The legal profession should kind

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1 of get on the ball with this because we don't have
2 anything like it.

3 But if we go down to Category L, long
4 way down, "Industrial Organization," you're
5 familiar with this --

6 A. Right.

7 217 Q. You're familiar with this section,
8 sir?

9 A. Yes.

10 218 Q. Okay. And you can see, if we
11 scroll down, and maybe Mallory can slowly scroll
12 down, there are a number of subcategories within
13 industrial organization?

14 A. That's right.

15 219 Q. Maybe before we do that, can I get
16 you to confirm for me my understanding. Basically
17 industrial organization refers to antitrust; is
18 that fair?

19 A. I have to hesitate because
20 antitrust would fall under industrial organization.
21 It would also fall under law of economics, which is
22 a separate heading in the JEL system.

23 220 Q. Okay. All right. So we can maybe
24 take a look at that after.

25 So if we scroll down there through --

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1 you know, look at L1, Market Structure, Firm
2 Strategy, and Market Performance, there are a
3 number of different things mentioned: General,
4 production, pricing, monopoly, oligopoly,
5 transactional relationships, et cetera, et cetera.

6 And then if we go down to L2, Firm
7 Objectives and Behaviour; then under L3, Non-Profit
8 Organizations; L4, Antitrust Issues and Policies.
9 I see L41, Monopolization, Horizontal
10 Anticompetitive Practices, would this -- would
11 monopolization fall within that category, sir?

12 A. Sure, monopolization would fall
13 under L4. That's correct.

14 221 Q. Okay. So section -- matters,
15 papers dealing with Section 2 of the Sherman Act
16 would fall in there?

17 A. Sure, they would fall in other
18 areas of JEL code too, but certainly they would
19 fall there.

20 222 Q. Okay. And then Regulation and
21 Industrial Policy, do you see that, L5?

22 A. Yes, I see it.

23 223 Q. The economics of regulation?

24 A. Yes.

25 224 Q. Now, we can scroll right through

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1 to the end --

2 A. Okay.

3 225 Q. -- if you like, but what I was
4 looking for when I looked at this was a category
5 for papers about optimal penalties.

6 A. Okay.

7 226 Q. And I didn't see -- I didn't see
8 it here. Am I missing it?

9 A. Let's go to Category K.

10 227 Q. Sure.

11 A. That's law of economics.

12 228 Q. Right.

13 A. Okay. So you have property law,
14 contract law, tort law, criminal law, civil law,
15 common law, election law, other. Now, certainly
16 there's been so much work on optimal penalties that
17 some of it fits under "other," but then we go
18 further, K2, Regulation and Business Law; K21,
19 Antitrust Law.

20 Certainly some of the work in optimal
21 penalty is under K21. At least some of my work
22 that I've done I think I've put it under this code,
23 K21.

24 229 Q. Right.

25 A. Let's take a look, Other

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1 Substantive Areas of Law, General, Labor Law,
2 International Law. Let's keep going. Legal
3 procedure. K42, Illegal Behavior and the
4 Enforcement of Law. Now, there are quite a number
5 of papers on optimal penalties under K42. K40,
6 General, would include that as well.

7 So the literature on optimal penalties
8 in antitrust, well, a lot of it because I've used
9 these codes myself in my own papers, would fall
10 under the Ks.

11 230 Q. Would fall under the Ks, but
12 there's no category for optimal penalties, no
13 separate breakout category for optimal penalties;
14 correct?

15 A. That's correct.

16 231 Q. And there's no category for --
17 even for remedies, correct, generally remedies;
18 correct?

19 A. Let's take a look. Illegal
20 behavior, litigation process. No, there's no
21 separate category for remedies when I look. That's
22 correct.

23 232 Q. So your papers go into the legal
24 procedure, K40, General; K42, Illegal Behavior and
25 the Enforcement of Law. Was there one other

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1 category you mentioned?

2 A. Yeah, I suppose the general
3 category such as K40 also would fit with this.

4 233 Q. Right, right, right. All right.
5 And you're aware that the American Bar Association
6 has an antitrust section?

7 A. Yes, I am aware.

8 234 Q. Are you a member of that?

9 A. Yes, I am and -- the short answer
10 is yes, I am.

11 235 Q. Are you a member of the Economic
12 Committee of the ABA?

13 A. Not now. I was in this section
14 leadership for the antitrust section until recently
15 when I voluntarily decided to step down during
16 COVID.

17 236 Q. Okay. And is there a subgroup
18 within the ABA or the Economic Committee that looks
19 exclusively at optimal penalties?

20 A. I'm not aware of that. I was -- I
21 was very active with the antitrust law section, and
22 the Antitrust Law Journal certainly publishes
23 papers in that vein, though they may be considered
24 too technical for the Antitrust Law Journal. But
25 certainly I've published a paper in the Antitrust

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1 Law Journal that discusses optimal penalties.

2 237 Q. Okay. Are there any economic
3 journals devoted to the study of optimal penalties?

4 A. Well, there's a journal on
5 antitrust law enforcement, and that's just
6 dedicated to studying enforcement issues, and I'm
7 not aware -- I've read only a few papers in that
8 journal. I'm not aware if they've published
9 anything on optimal penalties in that journal.

10 There -- and the Antitrust Law Journal
11 has published some papers on optimal penalties.
12 The Journal of Law and Economics has published work
13 on optimal penalties. The Journal of Competition
14 Law and Economics has published work on optimal
15 penalties --

16 238 Q. Right.

17 A. -- in the antitrust setting.

18 239 Q. For example, your paper:

19 "Optimal Antitrust Enforcement
20 Dynamic Competition and Changing
21 Economic Conditions,"

22 I'm looking right now, in fairness to
23 you, at Appendix B to your Initial Report.

24 A. Right.

25 240 Q. That paper was published in the

PUBLIC

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1 Antitrust Law Journal; correct?

2 A. That's correct. That's correct.

3 241 Q. And your paper:

4 "Innovation and Optimal

5 Punishment with Antitrust

6 Applications,"

7 was published in the Journal of

8 Competition Law and Economics; correct?

9 A. That's correct.

10 MR. SYME: All right. Give me a
11 moment. This would be a good time. I don't think
12 I have that much more, truthfully. And I'm
13 wondering if this would be a time to -- I wouldn't
14 mind having a short break. We've got lots of time
15 allocated, so how about we can do a 15-minute break
16 or a 20-minute break. Does that work for you?

17 MS. CSEH: Sure, that's fine from our
18 perspective.

19 MR. SYME: I've got it at 11:10 right
20 now, so we'll come back at 11:30.

21 MS. CSEH: Sure, that works.

22 MR. SYME: Okay. And you know,
23 Professor Hylton -- I'm sure your counsel's told
24 you -- that you can't discuss your evidence, your
25 testimony with her.

TAB 64

FILED / PRODUIT

Date: July 23, 2025

CT- 2024-010

Sarah Sharp-Smith for / pour
REGISTRAR / REGISTRAIRE

CT-2024-010

OTTAWA, ONT.

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THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant/Responding Party

and

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents/Moving Parties

REPLY RECORD

Reply Expert Report of Professor Keith N.
Hylton^{1*}

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

July 23, 2025

^{1*} William Fairfield Warren Distinguished Professor, Boston University and Professor of Law, Boston University School of Law.

analysis in this Report that Google has engaged in the alleged monopolizing conduct. Finally, I do not purport to opine upon what the precise quantum of the optimal penalty ultimately determined by the Competition Tribunal would be in this proceeding if liability were to be found, or how such a financial penalty would precisely be calculated.

B. Duties as an Independent Expert

7. As with my First Report, I am aware that as an independent expert, it is my duty to: (i) provide opinion evidence that is fair, objective and non-partisan; (ii) provide opinion evidence that is related only to matters that are within my area of expertise; and (iii) provide such additional assistance as the Competition Tribunal may reasonably require to determine a matter in issue. I understand that this duty prevails over any obligation I might owe to Google, its counsel or to any other party, and that I am bound by and will comply with the Competition Tribunal's Code of Conduct for Expert Witnesses.

8. My Acknowledgment of Expert Witness is appended to my First Report as Appendix "C."

9. As I stated in my First Report, I am being compensated for my involvement in this matter at my typical hourly rate. My compensation is in no way contingent on the contents of my First Report, this Report, or the outcome of this proceeding.

C. Overview of Reply Report and Summary of Opinions

10. I have carefully reviewed the Tadelis Report, as well as the Commissioner's Amended Notice of Application. Nothing in the Tadelis Report or the Amended Notice of Application causes me to change the substance of the opinions and conclusions I provided in my First Report. It remains my opinion that:

- a) a financial penalty equal to three times the value of the benefit derived from monopolizing conduct would result in inefficient overdeterrence and therefore can fairly be regarded from an antitrust economics perspective as having a punitive purpose; and
- a) a financial penalty equal to three percent of annual worldwide gross revenues, in the case of Google would result in inefficient overdeterrence and can fairly be

regarded as punitive in nature from an antitrust economics perspective. Moreover, having regard to the extraordinary amounts that I understand are at issue here, I reach the same conclusion even if the Tribunal were ultimately to impose a financial penalty smaller than (or even equal to a fraction of) the statutory maximum.

11. As a preliminary matter, I note that throughout his Report,² Professor Tadelis offers opinions regarding the interpretation and purpose of the *Competition Act* and the broader objectives of competition law. In my view, such opinions concern matters of law. My First Report is an analysis of the financial penalties available under subsection 79(3.1) of the *Competition Act* from an economics perspective and does not offer opinions on Canadian law. Accordingly, I have not responded to Professor Tadelis's legal opinions and have limited my reply to economic matters raised in the Tadelis Report.

12. I would also note that the study of optimal penalties constitutes a recognized sub-specialty within the broader field of antitrust economics. In this context, I am not aware of any contributions by Professor Tadelis to the literature or practice relating to optimal penalties. To the best of my knowledge, Professor Tadelis has not published any work, whether in peer-reviewed journals or otherwise, addressing the theory or application of optimal penalties in antitrust economics.

13. As detailed below, the analysis in Professor Tadelis's Report is flawed and does not impact the substance of my opinions for several reasons:

- a) Professor Tadelis asserts that the deterrence approach is more appropriate for assessing antitrust penalties. However, as I explain below, this assertion is inconsistent with established antitrust economic theory. As a starting point, this approach comes from the traditional approach to antitrust regulation that I explained in my First Report was outdated.³ Further, the economic literature distinguishes between the concepts of "general deterrence" and "specific

² See Tadelis Report, at paras. 18, 19, 22, 25, 54, 55 and 58.

³ The traditional approach I refer to is based on the traditional approach to punishment reflected in Bentham, J. (1988). *The Principles of Morals and Legislation*. Prometheus Books (Original work published 1789). For a discussion of the internalization approach, as contrasted with the deterrence approach, see Becker G.S. (1968), "Crime and Punishment: An Economic Approach", *Journal of Political Economy*, 76(2), at pp. 169-217.

26. Similarly, with respect to the difficulties associated with measuring efficiencies, economists can also, with sufficient data, obtain reasonable estimates. I provided an example of such a calculation in my First Report, paragraphs 49-51. The easiest case in which to measure the efficiency gain is where it consists of a reduction in unit costs of an estimable magnitude. This is the example I consider in my First Report. Indeed, efficiencies are commonly evaluated by antitrust economists and enforcement agencies.

27. For these reasons, Professor Tadelis's conclusion that my reliance on the internalization approach is "misguided" is itself misguided.

B. Professor Tadelis is Incorrect that I Did Not Address the Deterrence Approach in my First Report

28. Professor Tadelis asserts that, in my First Report, I did not discuss the deterrence approach to evaluating optimal penalties and instead only considered the internalization approach.¹⁹ Professor Tadelis is mistaken. In my First Report I considered both approaches—the general deterrence approach under the traditional approach to antitrust regulation and the internalization approach—and explained why, in the context of antitrust economics, the traditional approach is outdated and the internalization approach, which is consistent with specific deterrence, is superior.

29. By way of example only,²⁰ at paragraph 26 of my First Report, I explained that the traditional general deterrence model of antitrust is viewed by most antitrust economists in the U.S., including me, as outdated and that, as a result, I did not propose to conduct an analysis of the financial penalties sought against Google through the lens of the traditional model of antitrust regulation.

30. However, I also explained in paragraphs 31 and 32 of my First Report that in the absence of market efficiencies generated by the monopolization at issue arising from the conduct in question, the optimal penalties framework would provide that a financial penalty should be set at a level that removes any benefit the firm at issue earned from the prohibited conduct. Such "benefit eliminating" financial penalties have the effect of completely deterring the prohibited conduct.

¹⁹ Tadelis Report, at para. 17.

²⁰ See also First Report, at paras. 36-37.

31. However, as I discuss in greater detail above, where the conduct at issue generates efficiencies (such as reducing input costs or delivering increased value to consumers), “benefit eliminating” (*i.e.*, complete deterrence) financial penalties are not optimal and are therefore punitive in nature. A financial penalty that eliminates the benefit(s) received by a firm engaging in market efficiency-enhancing conduct results in inefficient deterrence. A financial penalty that requires not only the disgorgement of the benefit derived from the conduct in question, but multiples of that benefit, is in my view clearly punitive from the perspective of antitrust economics. To promote activity in the marketplace that promotes efficiency, the optimal penalties framework would provide that financial penalties must be moderated to levels that would not result in overdeterrence of those activities (*i.e.*, using an internalization approach).

C. The Internalization Approach is Not Premised on Monopolies Spurring Innovation and Efficiency

(i) Professor Tadelis Misunderstands the Internalization Approach and the Impact of Efficiencies on the Analysis in my First Report

32. Professor Tadelis opines in paragraph 25 of his Report that the internalization approach “rests on the mistaken premise that monopolies spur innovation and efficiency—a claim that runs counter to the weight of the economics literature”.²¹ This characterization of the internalization approach is not consistent with my understanding as an expert in the area of optimal penalties. Nor is this characterization consistent with the prevailing view in antitrust economics.²²

33. The internalization approach is designed to account for a range of scenarios. This includes cases where monopoly leads to efficiency gains, situations in which the prospect of monopoly incentivizes innovation, as well as circumstances where neither efficiency nor innovation is realized. As Becker observed almost six decades ago in his 1968 article, when the harm caused by offensive conduct exceeds the gains to the offender, the internalization approach is sufficient to achieve complete deterrence.²³ Becker’s analysis and conclusions have been accepted and endorsed by numerous antitrust economists in the lengthy period since his article was first

²¹ Tadelis Report, at para. 25.

²² Becker, 1968, at pp. 169-217; Landes, 1983, at pp. 652-678; Hylton, 2003.

²³ Becker, 1968, at pp. 169-217.

published.²⁴ Antitrust economists have generally accepted that the internalization approach is optimal for efficient specific deterrence, regardless of whether actual efficiencies are realized. In this respect, the internalization approach I employed in my First Report is broader than the deterrence approach advocated by Professor Tadelis. My framework subsumes his as a special case—namely, where monopolization does not produce any efficiency or innovation benefits.

34. In paragraph 26 of his Report, Professor Tadelis cites a paper that I authored in 2015 to support his view that “in the absence of efficiencies from the monopolization, the deterrence approach and the internalization approach are essentially the same. When monopolization does not create efficiencies, the monopolist’s benefit corresponds to the wealth transfer from consumers, and this benefit is equal to the consumers’ harm”.²⁵ While Professor Tadelis accurately summarizes this aspect of my paper,²⁶ I disagree with how he applies this concept in his analysis and with the conclusions he ultimately draws from it.

35. As a preliminary matter, dominance and the pursuit of monopoly is not harmful from an economics perspective and there is a general understanding that monopoly not infrequently entails efficiencies and social benefits.²⁷ This prevailing view is reflected in the statutory frameworks of both the US and Canada. As noted above in the *Competition Act*, it is the *abuse* of a position of dominance that violates the *Act*. Similarly, under the *Sherman Act* in the U.S., it is wrongful monopolization that violates the *Sherman Act*, not the existence of a monopoly.

36. I understand from my review of Google’s Response submitted in connection with this proceeding that Google is an innovative firm and there are numerous efficiencies associated with its conduct in respect of its provision of advertising technology tools and services.²⁸ Indeed, it appears that the product features that the Commissioner complains of in this case were innovations that had a number of benefits for Google’s customers. By way of example only, the Response

²⁴ Stigler, 1970, at pp. 526-536; Landes, 1983, at pp. 652-678; Kaplow, L. (2011), “An Economic Approach to Price Fixing”, *Antitrust Law Journal*, 77(2), at pp. 343-449; Hylton & Lin, 2014, at pp. 1-26.

²⁵ Hylton, K.N. (2015), “Antitrust Enforcement Regimes: Fundamental Differences”, in Blair, R.D. & Sokol, D.D. (Eds.), *The Oxford Handbook of International Antitrust Economics* (Oxford University Press), at pp. 17-32.

²⁶ First Report, at para. 32.

²⁷ Hylton & Evans, 2008, at pp. 1-47; Schumpeter, 1942; Gilbert, R.J. (2006), “Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?”, in Jaffe, A.B., Lerner, J., & Stern, S. (Eds.), *Innovation Policy and the Economy* (Vol. 6) (The MIT Press), at pp. 159-215; Hylton & Lin, 2014, at pp. 1-26.

²⁸ See, for example, Google’s Response, at paras. 250-257.

describes that “[i]ntegrating AdX and DFP allows publishers that use both products to access the benefits of realtime bidding while ensuring that Google can offer publishers and advertisers an acceptably fast speed of service, a better assurance of safety, a higher quality of advertising inventory and lower prices”.²⁹ Moreover, Google’s Response explains that Project Bernanke was an innovation that “optimize[d] advertiser bids through Google Ads by dynamically adjusting the revenue share of Google Ads (both upwards and downwards).”³⁰

37. Moreover, in paragraph 26 of his Report, Professor Tadelis presents another scenario. He asserts that if the monopoly does not create efficiencies then a penalty of “three times the benefit is too small.”³¹ In my view, this conclusion is incorrect and is not supported by my 2015 paper, which Professor Tadelis relies upon in his attempt to advance this argument.

38. Even if we make the unlikely assumption that a particular monopoly does not result in any efficiency gains, it does not necessarily follow that a penalty equal to three times the benefit derived from that monopoly is too low. That is because the threshold at which a penalty becomes a punitive penalty depends on the probability of detection and enforcement. If the likelihood of enforcement is high (for example, close to 100 percent), then an optimal penalty need only be set at a level equal to the total consumer harm. In such cases, a penalty set at three times the benefit is very likely to be greater than the total consumer harm such that the penalty inefficiently deters, is not optimal and, instead, is punitive in nature.³²

(ii) Evidence of Greater Efficiencies and Innovation by a Monopolist Compared to Competition is Not Necessary

39. In paragraph 27 of his Report, Professor Tadelis criticizes my First Report for allegedly failing to provide evidence that “monopolies always create efficiencies that are greater than the competitive alternative”. He further asserts that my First Report fails to demonstrate that Google’s alleged monopolization in advertising technology has resulted in efficiencies, citing the U.S. District Court’s opinion in *United States v. Google LLC* to support his position.

²⁹ Google’s Response, at para. 255(a).

³⁰ Google’s Response, at para. 265.

³¹ Tadelis Report, at para. 26.

³² See Hylton, 2003.

40. Professor Tadelis further opines in paragraph 30 of his Report that “Professor Hylton begins his analysis of innovation by stating that monopoly is necessary for innovation or that firms only have incentives to innovate if they have prospects of gaining monopoly power. This statement conflicts with the economic literature. There is a significant economic literature showing that many factors can protect the appropriability of the benefits of innovation besides monopoly.” Professor Tadelis then goes on to opine in paragraph 31 of his Report that “Professor Hylton assumes that monopolization is expected to increase innovation, but competition is not expected to result in new technologies and know-how. Professor Hylton’s assumption is false.”

41. Professor Tadelis’s critiques and characterizations of the opinions in my First Report are flawed for the following reasons.

42. First, My First Report does not make assumptions about the relative degree of efficiencies or innovation under monopoly versus competition. Rather, the analysis in my First Report is based on the uncontroversial economic principle that the prospect of profit—whether through monopoly, the use of intellectual property rights or other means—serves as an incentive for innovation.³³ As Joseph Schumpeter, one of the most influential economists of the 20th century, notably observed, the possibility of temporary monopoly profits can motivate firms to innovate.³⁴

43. I readily acknowledge that competition can also stimulate innovation and efficiencies and nothing in my First Report suggests otherwise. Competition often leads to the development of new technologies, production methods or business processes, which may in turn provide firms with a temporary competitive advantage or even a short-term monopoly.³⁵ However, the fact that competition can drive innovation and efficiencies does not mean that a monopoly cannot also foster innovation and efficiencies.³⁶

³³ Schumpeter, 1942. See also Shapiro, 2012, at pp. 361-404; Cass, R.A. (2013), *Laws of Creation: Property Rights in the World of Ideas* (Harvard University Press); Cohen, W.M., Nelson, R.R., & Walsh, J.P. (2000), “Protecting Their Intellectual Assets: Appropriability Conditions and Why U.S. Manufacturing Firms Patent (or Not)”, *National Bureau of Economic Research*, Working Paper 7552.

³⁴ Schumpeter, 1942, at ch. 7-8; Mason, E. (1951), “Schumpeter on Monopoly and the Large Firm”, *The Review of Economics and Statistics*, 33(2), at pp. 139-144.

³⁵ Shapiro, 2012, at pp. 361-404.

³⁶ Hylton & Evans, 2008, at pp. 1-47.

44. Second, in the highly unlikely event that Google has failed to innovate or create efficiency gains, the analysis in my First Report would remain valid. My First Report offers a general analysis of the financial penalties available under subsection 79(3.1) of the *Competition Act* and the optimal approach to antitrust penalties. This approach and analysis are not dependent on the specific facts of any one case. The conclusions and substance of my analysis remain valid even if, in some cases, the facts and circumstances to which the analysis are applied are altered (for example, some variables in my analysis, such as the measure of the efficiency gain, are set at zero instead of being assumed to be positive). In any event, it is not necessary for me to show that monopolies “always create efficiencies greater than the competitive alternative” because the analysis in my First Report encompasses instances in which efficiencies are both significant and insignificant. So long as it is possible that a firm such as Google *could* generate innovation or efficiency gains, the appropriate approach to penalization remains the internalization approach that I explained in my First Report. This is because the internalization approach is optimal, for specific deterrence purposes, whether or not efficiencies actually result from the business activities in question.

45. Third, Professor Tadelis’s assertion that Google has generated no plausible efficiencies is highly unlikely to be true. As explained above in paragraph 36, Google is highly innovative, including with respect to the development and implementation of its advertising technology tools and services. Successful companies almost always innovate or create efficiency gains to some degree. If Google were not innovative and did not create any efficiency gains, it is highly unlikely that it would have been a successful company.

46. In paragraph 29 of his Report, Professor Tadelis comments on the use of the Dynamic Model in my First Report, opining that the “Dynamic Model further lowers the optimal penalty by incorporating a subsidy for the monopolist, intended to incentivize innovation. Again, if the monopolist is not engaged in meaningful innovation, or the innovations from competition exceed the innovations by the monopolist, Professor Hylton’s model collapses to an approximation of the deterrence approach.” I disagree with this assessment.

47. Professor Tadelis’s analysis rests on the flawed premise that a monopolist is “not engaged in meaningful innovation.” If one assumes that monopolists *never* engage in meaningful innovation, then the Dynamic Model—which presupposes that the monopolist is, in fact,

innovating—would have no relevance and would not be used as a method of analysis. The Dynamic Model is specifically designed for situations in which a monopolist undertakes meaningful, substantial or market-creating innovation, sometimes characterized as dynamic efficiencies. The Dynamic Model is widely accepted in antitrust economics as a meaningful methodology to determine optimal penalties that ensure that regulation does not discourage firms from innovating.³⁷

48. Moreover, as discussed above, Professor Tadelis’s assertion that monopolists never engage in meaningful innovation is both extreme and empirically unsupported.³⁸ Even if, for the sake of argument, this assumption was true in a particular case, the deterrence approach Professor Tadelis recommends would still be suboptimal. Specifically, the financial penalties provided for in subsection 79(3.1) of the *Competition Act* would remain excessively punitive, resulting in over-deterrence, because they would eliminate the prospect of gains created from operational efficiencies. In contrast, the internalization approach would continue to be preferable, even under this extreme assumption, because it accounts for potential operational efficiencies that may arise from monopoly. This alone justifies the superiority of the internalization approach, even where dynamic efficiencies are not present.

PART III – PROFESSOR TADELIS'S INCORRECT ASSERTIONS CONCERNING THE PROBABILITY OF DETECTION AND ENFORCEMENT

A. The Assumption in my First Report Concerning Probability of Detection is Not Based on a Single Study

49. In paragraphs 39 to 40 of his Report, Professor Tadelis asserts that “Professor Hylton’s basis for his assumption of near-certain detection and enforcement is a single study” and further opines that he does not find this “evidence instructive nor helpful for evaluating monopolization enforcement” given that: (i) the FTC study concerned mergers (not monopolization); (ii) certain

³⁷ Sidak, J.G., & Teece, D.J. (2009), “Dynamic Competition in Antitrust Law”, *Journal of Competition Law & Economics*, 5(4), at pp. 581-631; Teece, D.J. (2012), “Next Generation Competition: New Concepts for Understanding How Innovation Shapes Competition and Policy in the Digital Economy”, *Journal of Law, Economics and Policy*, 9(1), at pp. 328-352; Hylton & Lin, 2014, at pp. 1-26; Spulber, D.F. (2023), “Antitrust and Innovation Competition”, *Journal of Antitrust Enforcement*, 11(1), pp. 5-50; Petit, N., Schrepel, T., & Heiden, B. (2024), “Situating The Dynamic Competition Approach”, *Dynamic Competition Initiative (DCI)*, Working Paper 1-2024.

³⁸ Even the scholarly articles that appear to be sympathetic to this assertion do not support it. See, for example, Aghion, P., Bloom, N., Blundell, R., Griffith, R., & Howitt, P. (2005), “Competition and Innovation: an Inverted-U Relationship”, *Quarterly Journal of Economics*, 120(2), pp. 701-728; Shapiro, 2012, at pp. 361-404.

PART V – PROFESSOR TADELIS'S OPINION THAT THE FINANCIAL PENALTY IS A CAP IS NOT RELEVANT

82. In paragraph 57 of his Report, Professor Tadelis claims that I assume the penalty the Competition Tribunal will actually impose in this case, and in other cases, will always be equal to the maximum financial penalties provided for in subsection 79(3.1) of the *Competition Act*. This assertion is incorrect and, in any event, irrelevant. To be clear, I have made no such assumption.

83. The analysis in my First Report is based on the penalties provided for in subsection 79(3.1) of the *Competition Act*, which are the only clear guideposts available to firms in planning their conduct. Whether the Competition Tribunal imposes the maximum penalties in a given case, it is rational for a firm like Google to treat the statutory financial penalties as the relevant benchmarks for compliance purposes. Professor Tadelis does not identify any alternative, predictable standard firms could use in place of the financial penalties provided for by statute.

84. Furthermore, Professor Tadelis's unsupported assertion that the Competition Tribunal will always weigh all relevant evidence and set a financial penalty no larger than necessary is not a sufficient answer to the concern about overdeterrence. My analysis and opinions do not turn on the Tribunal imposing against Google the maximum financial penalties provided for in section 79(3.1) of the Act. Indeed, having regard to the amounts at issue in this case, some penalties that are smaller than (or a fraction of) the statutory maximum would still in my view as an antitrust economist constitute a punitive penalty.

85. Professor Tadelis does not claim to be able to predict whether a financial penalty determined for a firm such as Google would be less than the amounts provided for in subsection 79(3.1) of the *Competition Act*, or by how much. Indeed, Professor Tadelis cannot even credibly opine to know whether financial penalties calculated using the factors set out in the Competition Act will be optimal or suboptimal (either from the perspective of the deterrence approach or the internalization approach), with the result that firms that become Respondents in abuse of dominance proceedings commenced by the Commissioner may be subject to an overdeterrent and punitive penalty.

86. Moreover, the financial penalties set out in the *Competition Act* themselves, by their magnitude and structure, create a credible threat of punitive sanctions, particularly for large firms.

The mere possibility that the Tribunal *might* impose a lower penalty in *some* cases does not eliminate the overdeterrent effect of the financial penalties set out in the *Competition Act*. And the lower penalties themselves may be punitive in nature.

87. In paragraph 58 of his Report, Professor Tadelis suggests that to use the internalization approach, there must be sufficient information to calculate an optimal penalty, including the monopolist's benefit from the alleged anticompetitive conduct. He asserts that, as a result, the alternative statutory financial penalty available in the *Competition Act* of three percent of annual worldwide gross revenues is not applicable. However, this is an oversimplification, and appears to ignore the clear structure, wording and purpose of the provision in question. In practice, the determination of the benefit may be contested or uncertain, and the Tribunal may choose to proceed with the financial penalty of up to three percent of the annual worldwide gross revenues of the Respondent to abuse of dominance proceedings even when some information about the benefit derived by the Respondent from the anti-competitive practices at issue is available. Firms must therefore consider the possibility that some variant of the higher financial penalty will be imposed, regardless of the availability of benefit related information.

88. Finally, even if the benefit derived from the anticompetitive practice is known and the financial penalty is set at three times the benefit derived from the anticompetitive practice, this multiplier is not justified by the internalization standard and risks being punitive, as I have explained in my First Report. Professor Tadelis does not address this point in his Report.

89. In summary, Professor Tadelis's criticisms of my First Report do not impact the substance of my opinions for the following primary reasons:

- a) Professor Tadelis's assertion that the deterrence approach is more appropriate for assessing antitrust penalties is inconsistent with established antitrust economic theory. The prevailing view in antitrust economics is that the internalization approach is superior because it preserves the beneficial aspects of the conduct in question while effectively addressing its harmful effects. The internalization approach differs from the traditional approach to antitrust regulation in that it seeks optimal deterrence;

TAB 65

Court of King's Bench of Alberta

Citation: Park v The Election Commissioner of Alberta, 2023 ABKB 351

Date: 20230609
Docket: 1901 07269
Registry: Calgary

Between:

Jeffrey Park

Appellant

- and -

The Election Commissioner of Alberta

Respondent

**Reasons for Decision
of the
Honourable Justice M.A. Marion**

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1. Can Park Rely on Alleged Breaches of Section 11 of the <i>Charter</i> ?	11

b. Do True Penal Consequences Flow from an Administrative Penalty in the *EFCDA*?

[69] The second branch to engage section 11 of the *Charter* is the “true penal consequence” branch. A true penal consequence is imprisonment or a fine by which its magnitude and other relevant factors, is imposed for the purpose of redressing the wrong done to society “at large” rather than to secure compliance or the maintenance of internal discipline within a limited sphere of activity: **Guindon** at paras 46 and 75.

[70] A statutory provision that includes the possibility of imprisonment will be criminal no matter the actual sanction imposed: **Guindon** at para 76; **Wigglesworth** at p 562. The *EFCDA* does not include the possibility of imprisonment, rather it contemplates “fines” in the event of the commission of an “offence” (sections 48, 48.1, 48.11, 48.2, 49, 49.1, 50, 50.1), and letters of reprimand (section 51(1)), penalties (section 51(1)), and administrative penalties (section 51.01) in the event of a “contravention” of the *EFCDA*.

[71] A monetary penalty will be a true penal consequence when it is, in purpose or effect, punitive: **Guindon** at para 76.

[72] Park relies on the Election Commissioner’s position, and Justice Dario’s decision, in **Rumpel v Alberta (Election Commissioner)**, 2019 ABQB 938 to support his argument that administrative penalties under the *EFCDA* are punitive. **Rumpel** involved an appeal of an administrative penalty levied due to an over-contribution. At the time, the Commissioner’s practice was to always impose a penalty of double the over-contribution amount, up to the maximum \$10,000 penalty. The Commissioner justified its practice by arguing that it needed a “punitive element” to the penalty, which it says is not present unless the penalty is greater than the over-contribution. In finding the Commissioner’s penalty unreasonable, Justice Dario noted that “every dollar of the penalty has a punitive effect”: **Rumpel** at para 60.

[73] Park asserts, referencing **Rumpel**, that the “Commissioner has previously argued (and this Court has previously held) that the penalty of the type imposed on Mr. Park is punitive in nature”. I disagree with Park’s characterization. Park takes the word “punitive” in **Rumpel** out of context. A penalty may be “punitive” in the “broad sense of the word” for some purposes, but not in the “narrow sense of the word” if it is not imposed as a punishment for the wrongdoer’s past transgressions or moral failings: **R v Samji**, 2017 BCCA 415 at para 100, citing **Thow v British Columbia (Securities Commission)**, 2009 BCCA 46 at para 49. It may be regarded “punitive” from the perspective of the person on whom it is imposed, but that does not necessarily make it a true penal consequence: **Alberta Securities Commission v Brost**, 2008 ABCA 326 at para 54; **Lavallee v Alberta (Securities Commission)**, 2010 ABCA 48 at para 25 **Alberta Securities Commission v Hennig**, 2021 ABCA 411 at paras 50-51.

[74] The issue of whether the administrative penalty was a “true penal consequence” giving rise to the applicability of section 11 of the *Charter* was not before Justice Dario in **Rumpel**. Therefore, her references to “punitive” were in the “broad sense of the word” in the context of an administrative regime, or in respect of how a penalty may be perceived by the recipient, not the legal question of possibly penal criminal sanctions. This is obvious from her statement that “every dollar” of a penalty has “punitive effect”. If Park’s interpretation of **Rumpel** were adopted, it would

lead to the absurd result that any provision that provides for *any* monetary penalty, in *any* amount, would be punitive and give rise to true penal consequences. I reject that interpretation.

[75] Further, any argument made by the Commissioner in *Rumpel* is not an admission that *EFCD*A administrative penalty regime gives rise to true penal consequences, nor does it bind this Court in this case.

[76] I must assess the nature of the *EFCD*A provisions under the guidance from the Supreme Court of Canada. In *Guindon*, the Court noted that whether monetary penalty is a true penal consequence is assessed by looking at considerations such as (1) the magnitude of the penalty; (2) to whom the money is paid; (3) whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing; and (4) whether stigma is associated with the penalty: *Guindon* at para 76; *Canada (Attorney General) v United States Steel Corp*, 2011 FCA 176, 333 DLR (4th) 1, at paras 76-77 [*Canada v United States Steel*]. I consider these non-exhaustive considerations below.

i. Magnitude of the Sanction

[77] The magnitude of the sanction on its own is not determinative; the test is whether the amount at issue is out of proportion to the amount required to achieve regulatory purposes and, if so, it is suggestive of a true penal consequence: *Guindon* at para 77. The amount of the penalty should reflect the objective of deterring non-compliance with the administrative or regulatory scheme: *Guindon* at para 77.

[78] In this case, the magnitude of the administrative penalties levied (\$5,250 each), and even the magnitude of the maximum potential administrative penalty that could be levied for a breach of section 34 of the *EFCD*A (\$10,000 per contravention as per section 51.01(5)(e)), is relatively small. In *Goodwin*, the Supreme Court of Canada held that a 90-day licence suspension and \$4,000 in possible costs and penalties were significant but were not “sufficient to engage” the fair-trial rights in section 11 of the *Charter*, which are “some of the most fundamental in our legal system”. The Court noted that financial penalties considerably more severe have been found not to constitute true penal consequences: *Goodwin* at para 45; *Guindon* at para 80; *Rowan v Ontario Securities Commission*, 2012 ONCA 208; *Canada v United States Steel*; *Lavallee*. In *Guindon*, at para 87, the Court held that a maximum penalty of \$100,000 for a false statement, plus gross compensation related to the statement, “does not demonstrate a purpose extending beyond deterrence to denunciation and punishment”.

[79] In my view, the magnitude of the sanctions actually levied or available under section 51.01 of the *EFCD*A is more indicative of an objective of deterring non-compliance with the *EFCD*A, rather than redressing the wrong done to society arising out of a contravention of the legislation (namely the erosion of the integrity of the election financing system). The administrative penalties are not out of proportion with their regulatory purpose.

[80] This factor is a strong indicator that the administrative penalty does not give rise to true penal consequences.

ii. To Whom the Fine is Paid

[81] If penalties are paid to the administrative body, they are indicative of an administrative penalty and, if they are paid to a general revenue fund, they are indicative of a true penal consequence: *Canada v United States Steel* at para 76; *Wigglesworth* at p 561. However, this is but one consideration and is not a determinative indicator of true penal consequences: *Canada v United States Steel* at para 77; *Guindon* at para 88.

[82] Section 51(3) of the *EFCDA* provides that all penalties collected under section 51 shall be paid into the General Revenue Fund. The administrative penalties in this case were under section 51.01, which does not have a similar section. The Commissioner argued that section 51(3) also applies to administrative penalties under section 51.01, which is consistent with *Rumpel* at para 60. Given the Commissioner's position on this issue, I need not settle the question of whether section 51(3) applies to administrative penalties under section 51.01. I proceed on the assumption that it does and that the administrative penalties in this case would be paid into the General Revenue Fund.

[83] This factor is more consistent with a true penal consequence.

iii. Whether the Magnitude is Determined by Regulatory Considerations Rather than Principles of Criminal Sentencing

[84] The question is whether the magnitude of the administrative penalty is determined by regulatory considerations rather than principles of criminal sentencing: *Guindon* at para 76; *Martineau* at para 62.

[85] Section 51.01(4) of the *EFCDA* mandates that the Commissioner must take into account certain factors in determining the amount of an administrative penalty:

- (a) the severity of the contravention;
- (b) the degree of wilfulness or negligence in the contravention;
- (c) whether or not there were any mitigating factors relating to the contravention;
- (d) whether or not steps have been taken to prevent reoccurrence of the contravention;
- (e) whether or not the person or entity has a history of non-compliance;
- (f) whether or not the person or entity reported the contravention on discovery of the contravention;
- (g) any other factors that, in the opinion of the Election Commissioner, are relevant.

[86] Park argues that these factors directly reflect several fundamental principles of sentencing, including proportionality of the sentence to the gravity of the offence and degree of responsibility and blameworthiness of the offender, the presence of aggravating and mitigating factors, and the totality principle: *Criminal Code*, RSC 1985, c C-46, sections 718.1 and 718.2. In response, the Commissioner points to other administrative penalty regimes that include the consideration of similar factors that are clearly administrative and not criminal: *Moll v College of Alberta Psychologists*, 2011 ABCA 110 at para 91; *Litchfield v College of Physicians and Surgeons of Alberta*, 2008 ABCA 164 at para 20.

[87] On first blush, Park’s argument appears compelling, and I agree that some of the factors in section 51.01(4) bear resemblance to criminal sentencing principles. However, flagging some similarities to criminal sentencing principles is not enough. The sanctioning principles in an administrative penalty regime must be assessed in their totality to determine if the similarities to criminal sentencing move them beyond a regulatory compliance purpose to the purpose of redressing the wrong done to society “at large” by applying the principles of retribution and denunciation: *Guindon* at paras 46 and 75; *Goodwin* at para 41. On a detailed review, significant differences emerge between the *EFCDA* and criminal sentencing principles in respect of determining the magnitude of the administrative penalty under section 51.01(4) of the *EFCDA*.

[88] The fundamental purpose of criminal sentencing is to “protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society”: *Criminal Code*, section 718. In crafting a just and appropriate punishment, proper consideration is to be given to various objectives such as denunciation, deterrence, rehabilitation, providing reparations for harm done to victims, promoting a sense of responsibility and, when necessary, separating offenders from society: *R v Hills*, 2023 SCC 2 at para 54; *Criminal Code*, section 718. No criminal sentencing objective should be applied to the exclusion of all others: *Hills* at para 54.

[89] The *EFCDA* does not have a provision like section 718 of the *Criminal Code* that sets out the purpose of the administrative penalties, but it is clear that the factors set out in section 51.01(4) do not expressly address the *Criminal Code* concepts of rehabilitation, reparations to victims of the contravention, or separating offenders from society.

[90] Section 718.1 of the *Criminal Code* sets out the “fundamental principle” of criminal sentencing, namely that “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”. This the “central tenet” and “the key principle” of Canada’s criminal sentencing regime: *Hills* at para 56; *R v Nasogaluak*, 2010 SCC 6 at para 41; *R v Chowdhury*, 2019 ABCA 205 at para 14. Its purpose is founded in “fairness and justice”, and expresses that the “amount of the punishment an offender receives must be proportionate to the gravity of the offence and the offender’s moral blameworthiness”: *Hills* at para 57; *R v Lacasse*, 2015 SCC 64 at paras 51-54; *R v Ipeelee*, 2012 SCC 13 at paras 36 and 38. Whatever weight a judge may wish to accord to the sentencing objectives, the resulting sentence *must* respect the fundamental principle of proportionality: *Nasogaluak* at para 40.

[91] While elements of proportionality are present in the list of factors in section 51.01(4) of the *EFCDA*, they are just *some* of several factors the Commissioner must consider. The *EFCDA* does not employ a central tenet, key principle, or fundamental requirement of proportionality like

the *Criminal Code*. A review of the elements of the criminal principle of proportionality supports this conclusion.

[92] The “gravity of the offence” in the criminal sentencing proportionality principle refers to the seriousness of the offence in a general sense and is reflected in the potential penalty imposed by Parliament and in any specific features of the commission of the crime: *Hills* at para 58. It should be measured by taking into account the consequences of the offender’s actions on the victims and public safety, and the physical and psychological harms that flowed from the offence: *Hills* at para 58.

[93] Section 51.01(4)(a) of the *EFCDA* (severity of the contravention) may address the seriousness of the offence in the “general sense”. However, the “potential penalty” under the *EFCDA* is limited to relatively small monetary penalties, and section 51.01(4) must be considered within the limits of the sanctioning options in which it operates. Further, section 51.01(4)(a) of the *EFCDA*, by referencing “severity of the contravention” focuses more on the conduct of the offender (how severely was the *EFCDA* contravened?) rather than the “consequences of the offender’s actions” as per *Hills* at para 58. In my view, the *EFCDA* does not employ the same “gravity of the offence” concept as criminal sentencing, nor does it give it the same prominence as criminal sentencing.

[94] The consideration of the “degree of responsibility” (*Criminal Code* section 718.1) and “moral blameworthiness” in the criminal sentencing proportionality principle means that the sentence must be no greater than the offender’s moral culpability and blameworthiness: *Hills* at para 59. In assessing the degree of responsibility or moral culpability, courts must take into account the harm the offender intended or was reckless or wilfully blind to: *R v Friesen*, 2020 SCC 9 at para 88; *R v Arcand*, 2010 ABCA 363 at para 58. The greater harm intended or the greater degree of recklessness or wilful blindness, the greater the moral culpability: *Arcand* at para 58. Other relevant factors may include the offender’s personal circumstances, mental capacity or motive for committing the crime: *Arcand* at para 58.

[95] Section 51.01(4)(b) (degree of willfulness or negligence in the contravention) arguably addresses similar concepts as the degree of responsibility and moral blameworthiness aspects of the proportionality principle in criminal sentencing. However, by referencing negligence the *EFCDA* acknowledges that they may flow without a *mens rea* or intention. Accordingly, the *EFCDA* sanctioning factor in section 51.01(4)(b) is primarily comparing whether there was *mens rea*, or not, as opposed to the *degree* of intent which is more the focus in the criminal moral culpability analysis (with some exceptions). Further, even if section 51.01(4)(b) effectively equates to “degree of responsibility” and moral blameworthiness, as noted the *EFCDA* does not give it the same prominence as criminal sentencing principles because proportionality is not the central tenet of determining an appropriate administrative penalty.

[96] When other sentencing principles in section 718.2 of the *Criminal Code* are reviewed in more detail, they also illustrate differences between section 51.01(4) of the *EFCDA* and criminal sentencing principles.

[97] Section 718.2(a) of the *Criminal Code* expressly provides that a sentence should be “increased or reduced to account for any relevant aggravating or mitigating circumstances relating

to the offence or the offender” and provides a list of deemed aggravating circumstances. In the *EFCDA*, the Legislature chose only to expressly refer to mitigating factors, and only relating to the *contravention*, not the *offender*. Further, the *EFCDA* does not expressly reference aggravating circumstances as a factor that must be considered. Arguably, the mitigating circumstances of the offender, and aggravating circumstances, are partially covered by section 51.04(e) and (f) of the *EFCDA*, although the lack of similar language as employed in the *Criminal Code* suggests the Legislature was contemplating different objectives than in the *Criminal Code*.

[98] Section 718.2(b) of the *Criminal Code* provides that criminal sentencing courts shall take into consideration that a sentence should be “similar to sentences imposed on similar offenders for similar offences committed in similar circumstances”. The sentencing principle of “parity” aims to prevent any substantial or marked disparities in sentences imposed on offenders for similar crimes committed in similar circumstances: *Lacasse* at para 2; *R v Hilbach*, 2023 SCC 3 at para 67. The complete absence of the parity principle in section 51.01(4) of the *EFCDA* illustrates a marked departure from criminal sentencing principles. The Commissioner is not expressly statutorily restricted by its previous decisions in the same way courts are in criminal sentencing provided the Commissioner considers the required factors in section 51.01(4).

[99] As pointed out by the Commissioner, there are also factors that the Commissioner must consider and weigh under section 51.01(4) of the *EFCDA* that are not expressly referenced in criminal sentencing principles. In particular, the requirement that the Commissioner consider “whether or not steps have been taken to prevent reoccurrence of the contravention” (51.01(4)(d)) appears related to regulatory compliance. Further, the required consideration of “whether or not the person has a history of non-compliance” (51.01(4)(e)) and “whether or not the person reported the contravention on discovery of the contravention” (51.01(4)(f)), while arguably relevant to degree of responsibility, moral culpability or aggravating circumstances, which are criminal sentencing concepts, appears more clearly and directly linked to compliance with the specific elections financing requirements in the *EFCDA*.

[100] In my view, considering section 51.01(4) of the *EFCDA*, in the context of the overall purposes and objectives of the *EFCDA*, I find that the main purpose of the factors in section 51.01(4) are to provide the Commissioner guidance and flexibility in determining a penalty that will provide specific deterrence to individuals who contravene the *EFCDA* as well as general deterrence to future participants who engage in activity that is the focus of the *EFCDA*. Like other administrative regimes, its focus is preventative: *Hennig* at para 50; *Cartaway Resources Corp (Re)*, 2004 SCC 26 at paras 4; 55, 60. The fact that a penalty is intended to have a deterrent effect does not take it out of the realm of administrative penalties: *Guindon* at para 83; *Martineau* at para 38. As an aside, in my view, it is the deterrent effect that the Commissioner was arguing in *Rumpel* when it referred to the need for a “punitive element” in its penalties.

[101] In conclusion, while there are elements of section 51.01(4) of the *EFCDA* that are consistent with some aspects of criminal sentencing, the *EFCDA* is quite different in many respects. It does not rise to the level of employing “principles of retribution and denunciation”: *Goodwin* at para 41. Had the Legislature intended otherwise I expect the structure and focus of the *EFCDA* would have been quite different.

[102] For all these reasons, in my view the magnitude of the administrative penalty under the *EFCD*A is determined by regulatory considerations rather than principles of criminal sentencing.

[103] This factor is an indicator that the administrative penalty does not give rise to true penal consequences.

iv. Whether Stigma is Associated with the Penalty

[104] Section 5.2(3)(a) of the *EFCD*A requires the Commissioner to publish its findings and decision on the Chief Electoral Officer's website where an administrative penalty is issued under section 51.01.

[105] Park argues that publication of the administrative penalty is akin to creating a criminal record and is designed to be punitive given the impact it will have on someone who specializes in the management of political and government relations campaigns. The Commissioner acknowledges that there is a stigma attached to publication, which is consistent with *Callaway* at para 56. The Commissioner argues that the mandatory publication is consistent with the transparency objective of the *EFCD*A and is part of the deterrent component of the penalty. The Commissioner argues that the impact does not approach having a permanent criminal record.

[106] In my view, the stigma associated with the imposition of an administrative penalty in this case, while real, is not a stigma comparable to that attached to a criminal conviction: *Guindon* at para 84. Further, the mere act of publishing disciplinary decisions and findings is but one factor and does not necessarily mean they have true penal consequences rendering them criminal in nature. While publication of the administrative penalty under the *EFCD*A amplifies the stigma to some extent, and is certainly a relevant factor, in my view, considering it in the overall context of the *EFCD*A, it does not come close to the stigma associated with a criminal conviction.

v. Conclusion re True Penal Consequences

[107] Based a consideration of all the factors noted in *Guindon*, and the overall context of the *EFCD*A, I find that the administrative penalties contemplated by the *EFCD*A, and actually imposed in this case, do not give rise to true penal consequences.

c. Conclusion re Application of Section 11 of the *Charter*

[108] I have concluded that the administrative penalty regime under the *EFCD*A is not criminal in nature and does not give rise to true penal consequences. Accordingly, I find that section 11 of the *Charter* does not apply and is not engaged.

3. Were Park's Section 11 *Charter* rights breached?

[109] Given my finding that section 11 of the *Charter* is not applicable to the administrative penalty regime in the *EFCD*A, and is not engaged, the answer to this question is no. No remedy under section 24 of the *Charter* is available.

TAB 66

Court of Appeal

CA004246

BETWEEN:

LESTER H. LAVERS,

KALOMIRA LAVERS

and

U.S. DUNGAREE SEAFARERS LTD.

PETITIONERS

(APPELLANTS)

(RESPONDENTS BY CROSS-APPEAL)

AND:

MINISTER OF FINANCE OF BRITISH COLUMBIA,

ATTORNEY GENERAL OF BRITISH COLUMBIA,

MINISTER OF NATIONAL REVENUE,

ATTORNEY GENERAL OF CANADA)

RESPONDENTS

(RESPONDENTS)

AND

MINISTER OF NATIONAL REVENUE

ATTORNEY GENERAL OF CANADA

(APPELLANTS BY CROSS-APPEAL)

REASONS FOR JUDGMENT

[Page 7]

matters of a regulatory nature--primarily intended to regulate the conduct of taxpayers with reference to their complying with the requirements of the respective Income Tax Acts. The penalties which may be imposed upon such assessment are designed to achieve that objective.

In contra-distinction, prosecutions for a violation of s. 239 are properly characterized as criminal and penal matters intended to "promote public order and welfare within a public sphere of activity" by deterring the public from the commission of flagrant breaches of the Income Tax Act.

Accordingly, I find that the assessments by the Minister and the imposition of penalties for a violation of s. 163 of the federal Income Tax Act and s. 23 of the British Columbia Income Tax Act do not constitute a finding of guilty or a punishment for an offence which comes within s. 11(h) of the Charter.

(b) "True Penal Consequence"

In concluding that the assessments of the Minister and the imposition of penalties pursuant thereto cannot be properly characterized as an "offence" within s. 11(h) of the Charter, I have only dealt with the "nature" of the proceedings. This leaves to be resolved the question of whether the punishment imposed pursuant to the assessments of the Minister constitutes "true penal consequences" so as to bring the penalties consequent upon the assessment proceedings within the prohibition expressed in s. 11(h) of the Charter. Madam Justice Wilson in Wigglesworth, supra, enunciated the "true penal consequence" test in these words (at p. 561):

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

She acknowledged that the imposition of a fine "may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus not attract the application of s. 11" (p. 561). This would particularly be so where the power to impose fines is for the purpose of achieving a particular private objective.

Madam Justice Wilson also observed that if a person is subject to penal consequences such as imprisonment that person should be entitled to the protection provided by s. 11 of the Charter.

In the present case the penalties which can be imposed following the assessments by the Minister pursuant to s. 23(1) of the Income Tax Act (B.C.) and s. 163(2) of the Income Tax Act (Canada) for filing a false statement do not carry with them any threat of imprisonment, nor do they give a discretionary range of punishment. They are restricted in amount to 25 per cent of the tax sought to be evaded and, in the case of a wilful attempt to evade the payment of taxes, to 50 per cent of such tax. By contrast, the taxpayer who is guilty of a violation of s. 239 is liable to a fine ranging from 25 per cent to 50 per cent of the amount of tax sought to be evaded or to imprisonment for a time not exceeding two years or to both imprisonment and a fine.

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In my view, the distinction in the severity of the respective penalties indicates that Parliament intended that the imposition of the statutory penalty following assessments by the Minister would reflect a sufficiently significant monetary punishment to deter taxpayers from failing to comply with the Income Tax Acts and would thereby achieve the objective of this administrative procedure. It is also an incentive to diligence for those who might be grossly negligent but not truly criminal. On the other hand, the severity of the public sentence which could be imposed following a conviction under s. 239 clearly points to Parliament's intention to provide a punishment designed to redress a public wrong. I do not consider this distinction in the nature and purpose of the two punishments to be diminished by the fact that all fines end up in the consolidated revenue fund, via the Receiver General of Canada. In the circumstances this is the only appropriate office to which such payments could be made. In summary, therefore, the penalty assessment, while not trivial, is not so severe as to amount to a "true penal consequence".

I find support for the conclusion I have reached from the decision of George's Contracting, supra, where this Court, after considering the Wigglesworth decision, found the Minister's assessment and consequent penalty to be a civil proceeding to which s. 11(h) of the Charter did not apply.

Accordingly, I find that the assessments of the Minister and the penalties imposed as a consequence of such assessments do not come within s. 11(h); they are not criminal or quasi-criminal "by nature", nor are the penalties a "true penal consequence".

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III. If finally "punished for the offence, not to be ... punished for it again"

Finding that the penalty assessment is not an "offence" is sufficient for the disposing of this appeal. If, however, the appellants had been successful in demonstrating that the Minister's assessments came within s. 11(h) of the Charter, either because of the nature of the offence or its penal consequences, they would have still been faced with a further hurdle on this appeal; namely, that of demonstrating that the Minister's assessments and the consequent penalties of March and April, 1983 (still under appeal) constitute punishment "again" for the violation of s. 239 of the federal Income Tax Act and the consequent sentence imposed on October 6, 1983. If it did not, the appellants are not entitled to the protection of s. 11(h).

In the present case, unlike the previous cases cited, no question is raised as to the validity of the criminal prosecution, conviction or the consequent sentence imposing a fine on the ground that the taxpayers were being found guilty and punished again for an offence for which the Minister had previously assessed a penalty--nor is any other ground for attacking the validity of the prosecution or sentence under s. 239 raised--presumably because the taxpayers in such circumstances would have been met with the George's Contracting case and the other cases cited. Those cases state unequivocally that a penalty assessment will not bar subsequent criminal proceedings.

Rather, the appellants here adopt the position that it is the imposition of penalties pursuant to the Minister's assessments in March and April, 1983, in

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addition to the sentences imposed for a breach of s. 239 on October 6, 1983, which constitutes a violation of s. 11(h) of the Charter. In other words, they assert that a prior criminal conviction could bar a subsequent confirmation of a penalty assessment.

Because of the circuitous route adopted by the appellants to seek the protection afforded by s. 11(h) of the Charter, it is important to keep in mind that s. 11(h) still requires, as a

TAB 67

**SUPREME COURT OF CANADA**

CITATION: R. v. Hills, 2023 SCC
2

APPEAL HEARD: March 22,
2022

JUDGMENT RENDERED:
January 27, 2023

DOCKET: 39338

BETWEEN:

Jesse Dallas Hills
Appellant

and

His Majesty The King
Respondent

- and -

**Director of Public Prosecutions, Attorney General of Ontario, Attorney
General of Nova Scotia, Attorney General of Saskatchewan, British Columbia
Civil Liberties Association, Criminal Lawyers' Association (Ontario),
Canadian Bar Association and Canadian Civil Liberties Association**
Intervenors

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,
Kasirer and Jamal JJ.

**REASONS FOR
JUDGMENT:** Martin J. (Wagner C.J. and Moldaver, Karakatsanis, Brown,
Rowe, Kasirer and Jamal JJ. concurring)
(paras. 1 to 175)

the gravity of the offence and the moral culpability of the individual before the court, there will necessarily be a consideration of the circumstances of the commission of the offence and the personal characteristics of the offender. The goal should be to determine as specific a punishment as would emerge from a traditional sentencing hearing — especially because this is the penalty that would be served if the mandatory minimum were declared unconstitutional.

[51] I then turn to cases in which the constitutional challenge involves the presentation of reasonably foreseeable offenders by way of hypothetical scenarios. Since what is being challenged is a law of general application, this Court has repeatedly used and authorized the use of reasonable hypotheticals to test the law's scope, reach, nature and effects. I explain the purposes they serve and the limitations to which they are subject. They may include personal characteristics but they must be reasonable in the sense of being reasonably foreseeable and realistic. While a bit more flexibility is needed to determine what a proportionate sentence would be for a reasonably foreseeable offender, every attempt at precision is encouraged to ensure that the comparison under stage two may be conducted in a fair manner.

(1) Sentencing an Individual Offender

[52] When the constitutional challenge to a mandatory minimum proceeds on the basis of the particular circumstances of the individual offender charged and convicted, the task for the judge at stage one of the s. 12 inquiry set out in *Nur* is a familiar one: to determine a fit and proportionate sentence for the particular offender

before the court. In this section I provide an overview of the relevant sentencing provisions and principles, with a focus on the need for a fit, proportionate and precise sentence, having regard to the offender's personal characteristics and the circumstances surrounding the commission of the offence.

(a) *General Sentencing Principles*

[53] The general principles of sentencing in the *Criminal Code* and the common law govern when evaluating the just and appropriate sentence for the actual or reasonably foreseeable offender (*Nur*, at paras. 40-42). Each sentence must be selected based on the particular facts of the case and in light of existing case law (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 43). Courts should employ sentencing tools and guides that are most relevant to their jurisdiction. In crafting a fit sentence, judges may reference sentencing ranges or starting points as appropriate to reach a proportionate sentence, so far as these tools align with established principles and objectives of sentencing (see *R. v. Parranto*, 2021 SCC 46, at para. 16).

[54] To assist in evaluating what constitutes a just and appropriate punishment in a given case, Parliament enacted s. 718 of the *Criminal Code* (or s. 38 of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, where appropriate). Proper consideration is to be given to various objectives such as denunciation, deterrence, rehabilitation, providing reparations for harm done to victims, promoting a sense of responsibility and, when necessary, separating offenders from society. No sentencing objective should be

applied to the exclusion of all others. Courts should also consider any aggravating and mitigating circumstances relating to the offence or to the offender.

[55] In addition, s. 718.2(e) of the *Criminal Code* provides a mandatory direction to consider the unique situation of Aboriginal offenders for all offences (*Gladue*, at para. 93; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 84-85). Sentencing judges must consider the systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the court and the types of sentencing procedures and sanctions which may be appropriate in the circumstances for that offender. Sanctions other than imprisonment are to be considered. While this Court has not addressed the issue, certain provincial courts of appeal have found that, in the case of Black offenders and groups who experience systemic discrimination, social context evidence or background factors which may have contributed to the offender being before the court can also serve as a mitigating factor at sentencing (see, e.g., *R. v. Morris*, 2021 ONCA 680, 159 O.R. (3d) 641, at paras. 13 and 87-95; *R. v. Anderson*, 2021 NSCA 62, 405 C.C.C. (3d) 1, at para. 114).

(b) *Proportionality*

[56] Proportionality is a “central tenet” of Canada’s sentencing regime, with roots that predate the recognition of it as the fundamental principle of sentencing in s. 718.1 of the *Criminal Code* (*Ipeelee*, at para. 36, citing *R. v. Wilmott* (1966), 58 D.L.R. (2d) 33 (Ont. C.A.); see *R. v. Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12; *Nasogaluak*, at paras. 40-42; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at

paras. 40-42). Indeed, “whatever weight a judge may wish to accord to the objectives [for sentencing prescribed in ss. 718 to 718.2 of the *Criminal Code*], the resulting sentence *must* respect the fundamental principle of proportionality” (*Nasogaluak*, at para. 40 (emphasis in original)).

[57] The purpose of proportionality is founded in “fairness and justice” (*R. v. Priest* (1996), 30 O.R. (3d) 538 (C.A.), at p. 546). It is to prevent unjust punishment for the “sake of the common good” (p. 547) and it serves as a limiting function to ensure that there is “justice for the offender” (*Ipeelee*, at para. 37). As the “*sine qua non* of a just sanction” (para. 37), the concept expresses that the amount of punishment an offender receives must be proportionate to the gravity of the offence and the offender’s moral blameworthiness (*R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at paras. 70-71; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 51-54; *Ipeelee*, at paras. 36 and 38; *Nur*, at para. 43; C. C. Ruby, *Sentencing* (10th ed. 2020), at §2.14).

[58] The “gravity of the offence” refers to the seriousness of the offence in a general sense and is reflected in the potential penalty imposed by Parliament and in any specific features of the commission of the crime (*R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.), at para. 90). The gravity of the offence should be measured by taking into account the consequences of the offender’s actions on victims and public safety, and the physical and psychological harms that flowed from the offence. In some cases where there is bias, prejudice or hatred, the motivation of the offender may also be

relevant (see s. 718.2(a)(i) of the *Criminal Code*). The offender's moral culpability or degree of responsibility should be measured by gauging the essential substantive elements of the offence including the offence's *mens rea*, the offender's conduct in the commission of the offence, the offender's motive for committing the offence, and aspects of the offender's background that increase or decrease the offender's individual responsibility for the crime, including the offender's personal circumstances and mental capacity (*Hamilton*, at para. 91; *Boudreault*, at para. 68; *Ipeelee*, at para. 73).

[59] Further, the sentence imposed must be commensurate with the responsibility and "moral blameworthiness of the offender" (*Ipeelee*, at para. 37). The sentence must be no greater than the offender's moral culpability and blameworthiness (*Nasogaluak*, at paras. 40-42; *M. (C.A.)*, at para. 40; *R. v. Martineau*, [1990] 2 S.C.R. 633, at p. 645).

[60] In setting out the two-stage process in *Nur*, McLachlin C.J. said at para. 46:

First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. Then, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence.

Based on this passage, some argue that the first stage is limited to consideration of a proportionate sentence solely *for the offence*. The claim is that only the nature of the offence governs and there is no room to take into account other aspects of

proportionality, like moral blameworthiness or the personal characteristics of the offender.

[61] With respect, this narrow reading is incomplete and suggests that McLachlin C.J. chose, without any explanation, to only reference half of the well-known whole of proportionality. It is more sensible to read her reference to a “proportionate sentence” as incorporating both the gravity of the offence and the moral blameworthiness of the offender. Her requirement that the sentence be assessed according to the objectives and principles of sentencing in the *Criminal Code* expressly acknowledges and incorporates the offender’s personal characteristics and circumstances. Under those principles, there is no proportionate sentence that only takes into account the offence and ignores the offender. The sentencing contemplated at the first stage in *Nur* therefore encompasses both aspects of proportionality.

(c) *The Sentence Should Be Specific and Defined*

[62] Sentencing is a highly individualized and discretionary endeavour (*R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496, at para. 4; *M. (C.A.)*, at para. 92). Each sentence is to be custom tailored to match the particular offence, as well as the offender (*R. v. Bottineau*, 2011 ONCA 194, 269 C.C.C. (3d) 227; *R. v. Angelillo*, 2006 SCC 55, [2006] 2 S.C.R. 728; *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399). There is no “one size fits all” penalty (*R. v. Lee*, 2012 ABCA 17, 58 Alta. L.R. (5th) 30, at para. 12), as sentencing is “an inherently individualized” and “profoundly subjective process” (*M. (C.A.)*, at para. 92; *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46):

The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community.

(*M. (C.A.)*, at para. 91)

[63] During the course of argument, counsel often argue for a punishment within a certain sentencing range, or courts of appeal establish ranges or starting points to pursue parity. Nevertheless, a sentencing judge cannot at the end of the day simply approximate a sentence or otherwise provide a range of penalties. The judge is expected to articulate an individual, specific and defined sentence. They cannot order that an offender be imprisoned for around two or three months, or that a sentence be “around three years” or “fall within the range of time”. Judges must exercise their discretion in each case and fix a specific and defined punishment.

[64] Sentencing is not an exact science. It can be difficult for sentencing judges to select the exact fit punishment as there is often more than one correct sentencing response to a crime (*Hamilton*, at paras. 85 and 156; *Ruby*, at §2.5; *Shropshire*, at para. 48, citing *R. v. Muise* (1994), 94 C.C.C. (3d) 119 (N.S.C.A.), at pp. 123-24). However, that is the burden sentencing judges confront daily. At this first stage of s. 12, while there may be reference to sentencing ranges and starting points for the offence to assist in the determination of the fit penalty, there should be no approximation in the final sentence. The key question is: what specifically is the fit sentence for this individual offender?

[65] Precision and certainty about the legal penalty is required because all must know exactly what punishment was imposed and when it will end. Similarly, if the mandatory minimum falls, the sentence affixed by the judge at the first stage of *Nur* will be applied to the offender. Scrupulously selecting a precise and defined sentence also supports an analytically fair and principled result at the second stage of the s. 12 inquiry.

[66] When Lamer J. in *Smith*, at p. 1073, wrote that a court must first consider “the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender”, he was talking about how to assess gross disproportionality at the second stage of the analysis — not how to conduct a sentencing hearing. He did not say that setting the fit and proportionate sentence at the first stage could involve a “range of sentences” as urged upon us by some interveners. Even reasonably foreseeable offenders, for whom there is greater latitude, call for careful calibration of discretion and as specific a sentence as required in a traditional and typical sentencing proceeding.

(2) Sentencing Reasonably Foreseeable Offenders and the Use of Reasonable Hypotheticals

[67] In other cases, the courts will be asked to consider the circumstances of reasonably foreseeable offenders not before them. In these cases, the constitutional analysis will be supplemented by or conducted on the basis of reasonable hypothetical scenarios that raise realistic issues about the scope of the mandatory minimum and its

TAB 68

Her Majesty The Queen in Right of the Province of Alberta *Appellant/Respondent on cross-appeal*

v.

Lyle Marcellus Nasogaluak *Respondent/Appellant on cross-appeal*

and

Director of Public Prosecutions of Canada, Attorney General of Ontario, Attorney General of Manitoba, Canadian Civil Liberties Association, Criminal Lawyers' Association (Ontario) and Criminal Trial Lawyers' Association *Intervenors*

INDEXED AS: R. v. NASOGALUAK

2010 SCC 6

File No.: 32423.

2009: May 20; 2010: February 19.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of Rights — Right to life, liberty and security of person — Police abuse — Whether police officers used excessive force during accused's arrest — If so, whether police conduct amounted to violation of accused's rights under s. 7 of Canadian Charter of Rights and Freedoms.

Constitutional law — Charter of Rights — Remedy — Sentence reduction — Police abuse — Breaches of accused's constitutional rights during arrest and detention — Whether sentence reduction can be just and appropriate remedy under s. 24(1) of Canadian Charter of Rights and Freedoms for breach of accused's constitutional rights — Whether breaches of accused's constitutional rights should be addressed through sentencing process under Criminal Code — Limits on

Sa Majesté la Reine du chef de la province de l'Alberta *Appelante/Intimée au pourvoi incident*

c.

Lyle Marcellus Nasogaluak *Intimé/Appellant au pourvoi incident*

et

Directeur des poursuites pénales du Canada, procureur général de l'Ontario, procureur général du Manitoba, Association canadienne des libertés civiles, Criminal Lawyers' Association (Ontario) et Criminal Trial Lawyers' Association *Intervenants*

RÉPERTORIÉ : R. c. NASOGALUAK

2010 CSC 6

N° du greffe : 32423.

2009 : 20 mai; 2010 : 19 février.

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

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

Droit constitutionnel — Charte des droits — Droit à la vie, à la liberté et à la sécurité de la personne — Conduite abusive des policiers — Les policiers ont-ils employé une force excessive pour procéder à l'arrestation de l'accusé? — Dans l'affirmative, la conduite des policiers constituait-elle une violation des droits que garantit à l'accusé l'art. 7 de la Charte canadienne des droits et libertés?

Droit constitutionnel — Charte des droits — Réparation — Réduction de peine — Conduite abusive des policiers — Violation des droits constitutionnels de l'accusé au cours de l'arrestation et de la détention — La réduction de peine peut-elle constituer une réparation convenable et juste sous le régime de l'art. 24(1) de la Charte canadienne des droits et libertés en cas de violation des droits constitutionnels de l'accusé? — Les dispositions du Code criminel relatives à la détermination de la peine

on the facts of this case. The substantial interference with Mr. Nasogaluak's physical and psychological integrity that occurred upon his arrest and subsequent detention clearly brings this case under the ambit of s. 7 (*R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519). The excessive use of force by the police officers, compounded by the failure of those same officers to alert their superiors to the extent of the injuries they inflicted on Mr. Nasogaluak and their failure to ensure that he received medical attention, posed a very real threat to Mr. Nasogaluak's security of the person that was not in accordance with any principle of fundamental justice. On that evidence and record, we may assume that there was a breach of s. 7 and that there was no limit prescribed by law justifying such a breach. The conclusion that s. 25 was breached, in that excessive, unnecessary force was used by the police officers at the time of the arrest, confirms it.

B. *Sentence Reduction to Remedy a Charter Breach*

(1) The Principles of Sentencing

[39] The central issue in this appeal concerns the possibility of reducing an offender's sentence to take account of a violation of his or her constitutional rights. Our Court must determine whether a s. 24(1) remedy is necessary to address the consequences of a *Charter* breach or whether this can be accomplished through the sentencing process. In addressing this issue, it is necessary first to review the principles that guide the sentencing process under Canadian law. The objectives and principles of sentencing were recently codified in ss. 718 to 718.2 of the *Criminal Code* to bring greater consistency and clarity to sentencing decisions. Judges are now directed in s. 718 to consider the fundamental purpose of sentencing as that of contributing, along with crime prevention measures, to "respect for the law and the maintenance of a just,

statuant que les policiers avaient employé une force excessive lors de l'arrestation de M. Nasogaluak. Qui plus est, je suis d'avis que les faits de l'espèce établissent aisément l'existence d'une violation. En effet, lors de son arrestation et de sa détention, M. Nasogaluak a subi une atteinte à son intégrité physique et psychologique d'une importance telle qu'il ne fait pas de doute que l'art. 7 a été enfreint (*R. c. Morgentaler*, [1988] 1 R.C.S. 30; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519). L'emploi d'une force excessive par les policiers, de même que leur omission d'informer leurs supérieurs de l'étendue des blessures qu'ils avaient infligées à M. Nasogaluak et de veiller à ce qu'il reçoive des soins médicaux constituaient une menace bien réelle à la sécurité de sa personne, contraire aux principes de justice fondamentale. Devant la preuve et le dossier, on peut supposer qu'une atteinte aux droits garantis par l'art. 7 est survenue et qu'aucune limite prescrite par la loi ne justifiait cette atteinte, ce que vient confirmer la conclusion que l'art. 25 n'a pas été respecté. En effet, les policiers avaient employé au moment de l'arrestation une force excessive, pas nécessaire.

B. *La réduction de peine à titre de réparation pour violation de la Charte*

(1) Les principes de détermination de la peine

[39] La question essentielle que pose le présent pourvoi est celle de la possibilité de réduire la peine d'un délinquant dont les droits constitutionnels ont été violés. Notre Cour doit décider si une réparation fondée sur le par. 24(1) est nécessaire pour remédier aux conséquences d'une violation de la *Charte* ou si ce résultat peut être accompli par la mise en œuvre du processus de détermination de la peine. Pour trancher cette question, il faut d'abord examiner les principes qui guident la détermination de la peine en droit canadien. Les objectifs et principes de détermination de la peine ont récemment été énoncés aux art. 718 à 718.2 du *Code criminel* dans le but d'assurer la cohérence et la clarté des décisions rendues en la matière. L'article 718 exige que les juges prennent en compte l'objectif essentiel du prononcé des peines, à savoir contribuer,

peaceful and safe society". This purpose is met by the imposition of "just sanctions" that reflect the usual array of sentencing objectives, as set out in the same provision: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation, and a recent addition: the promotion of a sense of responsibility in the offender and acknowledgement of the harm caused to the victim and to the community.

parallèlement à d'autres initiatives de prévention du crime, « au respect de la loi et au maintien d'une société juste, paisible et sûre ». Un tel objectif est réalisé par l'infliction de « sanctions justes » adaptées aux objectifs suivants de détermination de la peine énoncés dans la disposition : la dénonciation des comportements illégaux, la dissuasion générale et individuelle, l'isolement des délinquants, leur réinsertion sociale, la réparation des torts causés et, objectif ajouté récemment, la prise de conscience par le délinquant de ses responsabilités et la reconnaissance des torts qu'il a causés à la victime et à la collectivité.

[40] The objectives of sentencing are given sharper focus in s. 718.1, which mandates that a sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender". Thus, whatever weight a judge may wish to accord to the objectives listed above, the resulting sentence *must* respect the fundamental principle of proportionality. Section 718.2 provides a non-exhaustive list of secondary sentencing principles, including the consideration of aggravating and mitigating circumstances, the principles of parity and totality, and the instruction to consider "all available sanctions other than imprisonment that are reasonable in the circumstances", with particular attention paid to the circumstances of aboriginal offenders.

[40] L'article 718.1 précise les objectifs de la détermination de la peine. Il prescrit que la peine doit être « proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant ». Ainsi, indépendamment du poids que le juge souhaite accorder à l'un des objectifs susmentionnés, la peine *doit* respecter le principe fondamental de proportionnalité. De plus, l'art. 718.2 comporte une liste non exhaustive de principes secondaires, notamment l'examen des circonstances aggravantes ou atténuantes, les principes de parité et de totalité et la nécessité d'examiner « toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances », plus particulièrement lorsqu'il s'agit de délinquants autochtones.

[41] It is clear from these provisions that the principle of proportionality is central to the sentencing process (*R. v. Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12). This emphasis was not borne of the 1996 amendments to the *Code* but, rather, reflects its long history as a guiding principle in sentencing (e.g. *R. v. Wilmott* (1966), 58 D.L.R. (2d) 33 (Ont. C.A.)). It has a constitutional dimension, in that s. 12 of the *Charter* forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. But what does proportionality mean in the context of sentencing?

[41] Il ressort clairement de ces dispositions que le principe de proportionnalité constitue un élément central de la détermination de la peine (*R. c. Solowan*, 2008 CSC 62, [2008] 3 R.C.S. 309, par. 12). L'importance fondamentale accordée à ce principe ne découle pas des modifications apportées au *Code* en 1996; mais témoigne plutôt du fait qu'il joue depuis longtemps un rôle de principe directeur en matière de détermination de la peine (p. ex. *R. c. Wilmott* (1966), 58 D.L.R. (2d) 33 (C.A. Ont.)). Ce principe possède une dimension constitutionnelle, puisque l'art. 12 de la *Charte* interdit l'infliction d'une peine qui est exagérément disproportionnée au point de ne pas être compatible avec le principe de la dignité humaine propre à la société canadienne. Mais qu'entend-on par proportionnalité dans le contexte de la détermination de la peine?

[42] For one, it requires that a sentence not *exceed* what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the “just deserts” philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 533-34, *per* Wilson J., concurring). Understood in this latter sense, sentencing is a form of judicial and social censure (J. V. Roberts and D. P. Cole, “Introduction to Sentencing and Parole”, in Roberts and Cole, eds., *Making Sense of Sentencing* (1999), 3, at p. 10). Whatever the rationale for proportionality, however, the degree of censure required to express society’s condemnation of the offence is always limited by the principle that an offender’s sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.

[43] The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a “fit” sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, [1987] 2 S.C.R. 309; *M. (C.A.)*; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance

[42] D’une part, ce principe requiert que la sanction n’*excède* pas ce qui est juste et approprié compte tenu de la culpabilité morale du délinquant et de la gravité de l’infraction. En ce sens, le principe de la proportionnalité joue un rôle restrictif. D’autre part, à l’optique axée sur l’existence de droits et leur protection correspond également une approche relative à la philosophie du châtiment fondée sur le « juste dû ». Cette dernière approche vise à garantir que les délinquants soient tenus responsables de leurs actes et que les peines infligées reflètent et sanctionnent adéquatement le rôle joué dans la perpétration de l’infraction ainsi que le tort qu’ils ont causé (*R. c. M. (C.A.)*, [1996] 1 R.C.S. 500, par. 81; *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, p. 533-534, motifs concordants de la juge Wilson). Sous cet angle, la détermination de la peine représente une forme de censure judiciaire et sociale (J. V. Roberts et D. P. Cole, « Introduction to Sentencing and Parole », dans Roberts et Cole, dir., *Making Sense of Sentencing* (1999), 3, p. 10). Toutefois, sans égard au raisonnement servant d’assise au principe de la proportionnalité, le degré de censure requis pour exprimer la réprobation de la société à l’égard de l’infraction demeure dans tous les cas contrôlé par le principe selon lequel la peine infligée à un délinquant doit correspondre à sa culpabilité morale et non être supérieure à celle-ci. Par conséquent, les deux optiques de la proportionnalité confluent pour donner une peine qui dénonce l’infraction et qui punit le délinquant sans excéder ce qui est nécessaire.

[43] Les articles 718 à 718.2 du *Code* sont rédigés de manière suffisamment générale pour conférer aux juges chargés de déterminer les peines un large pouvoir discrétionnaire leur permettant de façonner une peine adaptée à la nature de l’infraction et à la situation du délinquant. Sous réserve de certaines règles particulières prescrites par la loi, le prononcé d’une peine « juste » reste un processus individualisé, qui oblige le juge à soupeser les objectifs de détermination de la peine de façon à tenir compte le mieux possible des circonstances de l’affaire (*R. c. Lyons*, [1987] 2 R.C.S. 309; *M. (C.A.)*; *R. c. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.)). Aucun objectif de détermination de la peine ne prime les autres. Il appartient au juge

of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the *Code* and in the case law.

[44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[45] The discretion of a sentencing judge is also constrained by statute, not only through the general sentencing principles and objectives enshrined in ss. 718 to 718.2 articulated above but also through the restricted availability of certain sanctions in the *Code*. For instance, s. 732 prohibits a court from ordering that a sentence of imprisonment exceeding 90 days be served intermittently. Similar restrictions exist for sanctions such as discharges (s. 730), fines (s. 734), conditional sentences (s. 742.1) and

qui prononce la sanction de déterminer s'il faut accorder plus de poids à un ou plusieurs objectifs, compte tenu des faits de l'espèce. La peine sera par la suite ajustée — à la hausse ou à la baisse — dans la fourchette des peines appropriées pour des infractions similaires, selon l'importance relative des circonstances atténuantes ou aggravantes, s'il en est. Il découle de ce pouvoir discrétionnaire du juge d'arrêter la combinaison particulière d'objectifs de détermination de la peine et de circonstances aggravantes ou atténuantes devant être pris en compte que chaque affaire est tranchée en fonction des faits qui lui sont propres, sous réserve des lignes directrices et des principes fondamentaux énoncés au *Code* et dans la jurisprudence.

[44] Le vaste pouvoir discrétionnaire conféré aux juges chargés de la détermination de la peine comporte toutefois des limites. Il est en partie circonscrit par les décisions qui ont établi, dans certaines circonstances, des fourchettes générales de peines applicables à certaines infractions, en vue de favoriser, conformément au principe de parité consacré par le *Code*, la cohérence des peines infligées aux délinquants. Il faut cependant garder à l'esprit que, bien que les tribunaux doivent en tenir compte, ces fourchettes représentent tout au plus des lignes directrices et non des règles absolues. Un juge peut donc prononcer une sanction qui déroge à la fourchette établie, pour autant qu'elle respecte les principes et objectifs de détermination de la peine. Une telle sanction n'est donc pas nécessairement inappropriée, mais elle doit tenir compte de toutes les circonstances liées à la perpétration de l'infraction et à la situation du délinquant, ainsi que des besoins de la collectivité au sein de laquelle l'infraction a été commise.

[45] La loi restreint aussi le pouvoir discrétionnaire du juge de la peine, non seulement par l'adoption de principes et objectifs généraux de détermination de la peine consacrés aux art. 718 à 718.2, qui ont été exposés précédemment, mais aussi par l'existence d'autres dispositions du *Code* écartant certaines sanctions. À titre d'exemple, l'art. 732 interdit aux tribunaux d'ordonner qu'une peine d'emprisonnement de plus de 90 jours soit purgée de façon discontinue. Des restrictions similaires

probationary terms (s. 731). Parliament has also seen fit to reduce the scope of available sanctions for certain offences through the enactment of mandatory minimum sentences. A relatively new phenomenon in Canadian law, the minimum sentence is a forceful expression of governmental policy in the area of criminal law. Certain minimum sentences have been successfully challenged under s. 12 of the *Charter* on the basis that they constituted grossly disproportionate punishment in the circumstances of the case (*R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Bill* (1998), 13 C.R. (5th) 125 (B.C.S.C.)), while others have been upheld (*R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90). Absent a declaration of unconstitutionality, minimum sentences must be ordered where so provided in the *Code*. A judge's discretion does not extend so far as to override this clear statement of legislative intent.

[46] Appellate courts grant sentencing judges considerable deference when reviewing the fitness of a sentence. In *M. (C.A.)*, Lamer C.J. cautioned that a sentence could only be interfered with if it was “demonstrably unfit” or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of a relevant factor (para. 90; see also *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 14-15; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 123-26; *R. v. McDonnell*, [1997] 1 S.C.R. 948, at paras. 14-17; *R. v. Shropshire*, [1995] 4 S.C.R. 227). As Laskin J.A. explained in *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, however, this does not mean that appellate courts can interfere with a sentence simply because they would have weighed the relevant factors differently:

To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about.

visent des sanctions comme les absolutions (art. 730), les amendes (art. 734), les ordonnances de sursis (art. 742.1) et les ordonnances de probation (art. 731). Le législateur a également jugé bon de réduire l'étendue des châtimens possibles à l'égard de certaines infractions en établissant des peines minimales obligatoires. Phénomène relativement nouveau en droit canadien, la peine minimale est l'expression claire d'une politique générale dans le domaine du droit pénal. Certaines peines minimales ont été invalidées sur le fondement de l'art. 12 de la *Charte* au motif qu'elles constituaient des châtimens exagérément disproportionnés eu égard aux circonstances de l'affaire (*R. c. Smith*, [1987] 1 R.C.S. 1045; *R. c. Bill* (1998), 13 C.R. (5th) 125 (C.S.C.-B.)), alors que d'autres ont été maintenues (*R. c. Morrissey*, 2000 CSC 39, [2000] 2 R.C.S. 90). À moins qu'elles n'aient été déclarées inconstitutionnelles, les peines minimales prévues au *Code* sont obligatoires. Le pouvoir discrétionnaire d'un juge n'est pas si large qu'il lui permette de déroger à cette expression claire de la volonté du législateur.

[46] Les tribunaux d'appel font preuve d'une grande déférence à l'égard des décisions des juges prononçant les peines. Dans l'arrêt *M. (C.A.)*, le juge en chef Lamer a rappelé qu'une peine ne peut être modifiée que si elle n'est « manifestement pas indiquée » ou si elle découle d'une erreur de principe, de l'omission de prendre en considération un facteur pertinent ou d'une insistance trop grande sur un facteur approprié (par. 90; voir également *R. c. L.M.*, 2008 CSC 31, [2008] 2 R.C.S. 163, par. 14-15; *R. c. Proulx*, 2000 CSC 5, [2000] 1 R.C.S. 61, par. 123-126; *R. c. McDonnell*, [1997] 1 R.C.S. 948, par. 14-17; *R. c. Shropshire*, [1995] 4 R.C.S. 227). Toutefois, comme l'a expliqué le juge Laskin dans *R. c. McKnight* (1999), 135 C.C.C. (3d) 41 (C.A. Ont.), au par. 35, cela ne signifie pas que les tribunaux d'appel peuvent modifier une peine simplement parce qu'ils auraient accordé un poids différent aux facteurs pertinents :

[TRADUCTION] Suggérer que le juge de première instance a commis une erreur de principe parce que, de l'avis du tribunal d'appel, il a accordé trop de poids à un facteur pertinent ou trop peu à un autre équivaut à faire fi de toute déférence. La pondération des facteurs pertinents, le processus de mise en balance, voilà l'objet

To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.

Given the breadth of the sentencing judge's discretion, the question remains: What role should the facts alleged to constitute a *Charter* breach play in the determination of a fit sentence? It is to this issue that I now turn.

(2) The Role of *Charter* Breaches in the Regular Sentencing Process

[47] The sentencing principles described above must be understood and applied within the overarching framework of our Constitution. Thus it may, at times, be appropriate for a court to address a *Charter* breach when passing sentence. This may be accomplished without resort to s. 24(1) of the *Charter*, given the court's broad discretion under ss. 718 to 718.2 of the *Code* to craft a fit sentence that reflects all the factual minutiae of the case. If the facts alleged to constitute a *Charter* breach are related to one or more of the relevant principles of sentencing, then the sentencing judge can properly take those facts into account in arriving at a fit sentence. Section 718.2(a) of the *Code* provides that a court should reduce a sentence "to account for any relevant . . . mitigating circumstances relating to the offence or the offender". It would be absurd to suggest that simply because some facts also tend to suggest a violation of the offender's *Charter* rights, they could no longer be considered relevant mitigating factors in the determination of a fit sentence.

de l'exercice du pouvoir discrétionnaire. La déférence dont il faut faire preuve à l'égard des décisions prises par le juge dans l'exercice de son pouvoir discrétionnaire commande qu'on évalue la façon dont il a soupesé ou mis en balance les différents facteurs au regard de la norme de contrôle de la raisonnable. Ce n'est que si le juge du procès a exercé son pouvoir discrétionnaire de façon déraisonnable, en insistant trop sur un facteur ou en omettant d'accorder suffisamment d'importance à un autre, que le tribunal d'appel pourra modifier la peine au motif que le juge a commis une erreur de principe.

Compte tenu de l'étendue du pouvoir discrétionnaire du juge chargé de la détermination de la peine, la question demeure : Comment les faits qui, prétend-on, constituent une violation de la *Charte* devraient-ils influencer sur la détermination de la peine appropriée? Je vais maintenant examiner cette question.

(2) Le rôle des atteintes à la *Charte* dans le processus normal de détermination de la peine

[47] Les principes de détermination de la peine décrits précédemment doivent être interprétés et appliqués en respectant le cadre fondamental établi par notre Constitution. Par conséquent, il peut, à l'occasion, arriver que le tribunal soit justifié de prendre en considération une violation de la *Charte* lors du prononcé de la peine. Il pourrait agir ainsi sans recourir au par. 24(1) de la *Charte*, en raison du pouvoir discrétionnaire étendu que lui confèrent les art. 718 à 718.2 du *Code* en vue de façonner une peine appropriée, reflétant bien tous les faits de l'espèce. Le juge du procès peut à bon droit tenir compte des faits qui, affirme-t-on, constituent une violation de la *Charte* pour déterminer la peine appropriée si ces derniers se rattachent à un ou à plusieurs principes pertinents de détermination de la peine juste et appropriée. Aux termes de l'al. 718.2a) du *Code*, la peine infligée par le tribunal devrait être adaptée « aux circonstances [. . .] atténuantes liées à la perpétration de l'infraction ou à la situation du délinquant ». Il serait absurde de prétendre que, simplement parce que certains faits tendent également à démontrer l'existence d'une atteinte à des droits garantis au délinquant par la *Charte*, ces mêmes faits ne peuvent constituer des circonstances atténuantes pertinentes pour déterminer la peine appropriée.

TAB 69

Her Majesty The Queen *Appellant*

v.

Jeromie Keith D. Proulx *Respondent*

and

The Attorney General of Canada and the Attorney General for Ontario *Interveners*

INDEXED AS: R. v. PROULX

Neutral citation: 2000 SCC 5.

File No.: 26376.

1999: May 25, 26; 2000: January 31.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory,* McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law — Sentencing — Conditional sentences — Accused pleading guilty to dangerous driving causing death and dangerous driving causing bodily harm and receiving sentence of 18 months of incarceration — Whether Court of Appeal erred in substituting conditional custodial sentence for jail term — Proper interpretation and application of conditional sentencing regime — Distinction between conditional sentence of imprisonment and suspended sentence with probation — Meaning of “safety of the community” — Criminal Code, R.S.C., 1985, c. C-46, ss. 742.1, 742.3.

After a night of partying involving consumption of some alcohol, the accused decided to drive his friends home even though he knew that his vehicle was not mechanically sound. For a period of 10 to 20 minutes, the accused, who had only seven weeks of experience as a licensed driver, drove erratically, weaving in and out of traffic, tailgating and trying to pass other vehicles without signalling, despite steady oncoming traffic and slippery roads. As the accused was trying to pass another vehicle, he drove his car into an oncoming lane of traffic, side-swiped a first car and crashed into a

*Cory J. took no part in the judgment.

Sa Majesté la Reine *Appelante*

c.

Jeromie Keith D. Proulx *Intimé*

et

Le procureur général du Canada et le procureur général de l'Ontario *Intervenants*

RÉPERTORIÉ: R. c. PROULX

Référence neutre: 2000 CSC 5.

N° du greffe: 26376.

1999: 25 et 26 mai; 2000: 31 janvier.

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

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Droit criminel — Détermination de la peine — Emprisonnement avec sursis — L'accusé a plaidé coupable à une accusation de conduite dangereuse ayant causé la mort et à une accusation de conduite dangereuse ayant causé des lésions corporelles et a été condamné à 18 mois d'incarcération — La Cour d'appel a-t-elle fait erreur en substituant l'emprisonnement avec sursis à la peine d'incarcération infligée initialement — Façon dont il convient d'interpréter et d'appliquer le régime d'octroi du sursis à l'emprisonnement — Distinction entre l'emprisonnement avec sursis et le sursis au prononcé de la peine avec probation — Sens de l'expression «sécurité de la collectivité» — Code criminel, L.R.C. (1985), ch. C-46, art. 742.1, 742.3.

Après une nuit de fête au cours de laquelle il avait consommé une certaine quantité d'alcool, l'accusé a décidé d'aller reconduire ses amis chez eux en automobile, même s'il savait que le véhicule n'était pas en bon état mécanique. Pendant une période de 10 à 20 minutes, l'accusé, qui ne comptait que sept semaines d'expérience au volant depuis l'obtention de son permis de conduire, a conduit de manière erratique, zigzaguant, talonnant les véhicules qui le précédaient et tentant de dépasser sans actionner son clignotant, et ce malgré la chaussée glissante et le flot constant de véhicules venant

*Le juge Cory n'a pas pris part au jugement.

incarceration where appropriate in the circumstances.

I turn now to the question of when a conditional sentence may be appropriate having regard to the six sentencing objectives set out in s. 718.

(i) Denunciation

Denunciation is the communication of society's condemnation of the offender's conduct. In *M. (C.A.)*, *supra*, at para. 81, I wrote:

In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R. v. Sargeant* (1974), 60 Cr. App. R. 74, at p. 77: "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass".

Incarceration will usually provide more denunciation than a conditional sentence, as a conditional sentence is generally a more lenient sentence than a jail term of equivalent duration. That said, a conditional sentence can still provide a significant amount of denunciation. This is particularly so when onerous conditions are imposed and the duration of the conditional sentence is extended beyond the duration of the jail sentence that would ordinarily have been imposed in the circumstances. I will discuss each point in turn.

First, the conditions should have a punitive aspect. Indeed, the need for punitive conditions is the reason why a probationary sentence was rejected and a sentence of imprisonment of less than two years imposed. As stated above, conditions such as house arrest should be the norm, not the exception. This means that the offender should be confined to his or her home except when working, attending school, or fulfilling other conditions of his or her sentence, e.g. community service,

autres que l'incarcération lorsque les circonstances le justifient.

Je vais maintenant examiner, au regard des six objectifs de la détermination de la peine énoncés à l'art. 718, la question de savoir dans quelles circonstances l'emprisonnement avec sursis est une mesure appropriée.

(i) Dénonciation

La dénonciation est l'expression de la condamnation par la société du comportement du délinquant. Dans *M. (C.A.)*, précité, au par. 81, j'ai écrit ce qui suit:

Bref, une peine assortie d'un élément réprobateur représente une déclaration collective, ayant valeur de symbole, que la conduite du contrevenant doit être punie parce qu'elle a porté atteinte au code des valeurs fondamentales de notre société qui sont constatées dans notre droit pénal substantiel. Comme l'a dit le lord juge Lawton dans *R. c. Sargeant* (1974), 60 Cr. App. R. 74, à la p. 77: [TRADUCTION] «la société doit, par l'entremise des tribunaux, communiquer sa répulsion à l'égard de certains crimes, et les peines qu'ils infligent sont le seul moyen qu'ont les tribunaux de transmettre ce message».

L'incarcération produit habituellement un effet dénonciateur plus grand que l'emprisonnement avec sursis, mesure généralement plus clémentine qu'une peine d'emprisonnement de durée équivalente. Cela dit, l'emprisonnement avec sursis peut néanmoins avoir un effet dénonciateur appréciable, particulièrement dans les cas où l'ordonnance de sursis est assortie de conditions rigoureuses et que sa durée d'application est plus longue que la peine d'emprisonnement qui aurait ordinairement été infligée dans les circonstances. Je vais examiner chacun de ces points à tour de rôle.

Premièrement, les conditions imposées devraient comporter un aspect punitif. De fait, la nécessité d'imposer des conditions punitives est la raison même pour laquelle le tribunal a écarté la probation et infligé une peine d'emprisonnement de moins de deux ans. Comme il a été indiqué précédemment, des conditions telles que la détention à domicile devraient être la règle et non l'exception. Cela veut dire que le délinquant devrait être confiné à son domicile, sauf lorsqu'il travaille, qu'il

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TAB 70

Her Majesty The Queen *Appellant*

v.

C.A.M. *Respondent*

INDEXED AS: R. v. M. (C.A.)

File No.: 24027.

1995: June 1; 1996: March 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
BRITISH COLUMBIA

Criminal law — Sentencing — Totality principle — Accused pleading guilty to numerous counts of sexual assault, incest and assault with a weapon — Offences arising from pattern of sexual, physical and emotional abuse inflicted upon his children over a number of years — Trial judge sentencing accused to cumulative sentence of 25 years' imprisonment — Court of Appeal reducing sentence to term of 18 years and 8 months — Whether Court of Appeal erred in concluding that fixed-term cumulative sentences should not exceed term of imprisonment of 20 years, absent special circumstances.

Criminal law — Sentencing — Retribution legitimate principle of sentencing.

Criminal law — Sentencing — Appeals — Standard of review appellate court should adopt in reviewing fitness of sentence.

The accused pleaded guilty to numerous counts of sexual assault, incest and assault with a weapon, in addition to other lesser offences, arising from a largely uncontested pattern of sexual, physical and emotional abuse inflicted upon his children over a number of years. None of the offences committed carried a penalty of life imprisonment. The trial judge, remarking that the offences were as egregious as any he had ever had occasion to deal with, sentenced the accused to a cumulative sentence of 25 years' imprisonment, with individual sentences running both consecutively and concurrently. The Court of Appeal reduced the sentence to 18 years and 8 months. Following a line of jurisprudence it had developed in recent years, the court concluded that

Sa Majesté la Reine *Appelante*

c.

C.A.M. *Intimé*

RÉPERTOIRE: R. c. M. (C.A.)

N° du greffe: 24027.

1995: 1^{er} juin; 1996: 21 mars.

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

Droit criminel — Détermination de la peine — Principe de totalité — L'accusé a plaidé coupable à de nombreux chefs d'agression sexuelle, d'inceste et d'agression armée — Les infractions résultaient de sévices d'ordre sexuel, physique et émotif qu'il a infligés systématiquement à ses enfants durant un certain nombre d'années — Le juge du procès a condamné l'accusé à une peine cumulative de 25 ans d'emprisonnement — La Cour d'appel a réduit la peine à 18 ans et 8 mois — La Cour d'appel a-t-elle commis une erreur en concluant que les peines cumulatives d'une durée déterminée ne devraient pas, sauf circonstances spéciales, dépasser 20 ans d'emprisonnement?

Droit criminel — Détermination de la peine — Le châtiment est un principe légitime de détermination de la peine.

Droit criminel — Détermination de la peine — Appels — Norme de contrôle appliquée par les cours d'appel dans l'examen de la justesse des peines.

L'accusé a plaidé coupable à de nombreux chefs d'agression sexuelle, d'inceste, d'agression armée, ainsi qu'à d'autres infractions moins graves, résultant de sévices d'ordre sexuel, physique et émotif, pour la plupart non contestés, qu'il a infligés systématiquement à ses enfants durant un certain nombre d'années. Aucune des infractions commises n'était punissable par l'emprisonnement à perpétuité. Soulignant que les infractions étaient aussi atroces que tout ce dont il avait jamais eu à s'occuper, le juge du procès a condamné l'accusé à une peine cumulative de 25 ans d'emprisonnement, certaines peines devant être purgées concurremment d'autres consécutivement. La Cour d'appel a réduit la peine à 18 ans et 8 mois. Suivant une jurisprudence qu'elle avait éta-

offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more. As R. Cross has noted in *The English Sentencing System* (2nd ed. 1975), at p. 121: "The retributivist insists that the punishment must not be disproportionate to the offender's deserts."

ment se traduit par la détermination objective, raisonnée et mesurée d'une peine appropriée, reflétant adéquatement la culpabilité morale du délinquant, compte tenu des risques pris intentionnellement par le contrevenant, du préjudice qu'il a causé en conséquence et du caractère normatif de sa conduite. De plus, contrairement à la vengeance, le châtement intègre un principe de modération; en effet, le châtement exige l'application d'une peine juste et appropriée, rien de plus. Comme R. Cross l'a fait remarquer dans *The English Sentencing System* (2^e éd. 1975), à la p. 121: [TRADUCTION] «Les rétributivistes insistent sur le fait que la peine ne doit pas être disproportionnée avec le dû du contrevenant.»

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Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R. v. Sargeant* (1974), 60 Cr. App. R. 74, at p. 77: "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass". The relevance of both retribution and denunciation as goals of sentencing underscores that our criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear in committing an enumerated offence. Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively

Il convient également de faire une distinction, sur le plan conceptuel, entre le châtement et sa sœur légitime, la réprobation. Le châtement exige que la peine infligée par le tribunal reflète adéquatement la culpabilité morale du contrevenant visé. Pour sa part, l'objectif de réprobation commande que la peine indique que la société condamne la conduite de ce contrevenant. Bref, une peine assortie d'un élément réprobateur représente une déclaration collective, ayant valeur de symbole, que la conduite du contrevenant doit être punie parce qu'elle a porté atteinte au code des valeurs fondamentales de notre société qui sont constatées dans notre droit pénal substantiel. Comme l'a dit le lord juge Lawton dans *R. c. Sargeant* (1974), 60 Cr. App. R. 74, à la p. 77: [TRADUCTION] «la société doit, par l'entremise des tribunaux, communiquer sa répulsion à l'égard de certains crimes, et les peines qu'ils infligent sont le seul moyen qu'ont les tribunaux de transmettre ce message». La pertinence du châtement et de la réprobation en tant qu'objectifs de la détermination de la peine fait bien ressortir que notre système de justice pénale n'est pas simplement un vaste régime de sanctions négatives visant à empêcher les conduites objectivement préjudiciables en haussant le coût que doit supporter le contrevenant qui commet une infraction énumérée. Notre droit criminel est également un système de valeurs. La peine qui exprime la réprobation de la société est uniquement le moyen par lequel ces valeurs sont communiquées. En résumé, en plus d'attacher des conséquences négatives

instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*.

As a closing note to this discussion, it is important to stress that neither retribution nor denunciation alone provides an exhaustive justification for the imposition of criminal sanctions. Rather, in our system of justice, normative and utilitarian considerations operate in conjunction with one another to provide a coherent justification for criminal punishment. As Gonthier J. emphasized in *Goltz*, *supra*, at p. 502, the goals of the penal sanction are both "broad and varied". Accordingly, the meaning of retribution must be considered in conjunction with the other legitimate objectives of sentencing, which include (but are not limited to) deterrence, denunciation, rehabilitation and the protection of society. Indeed, it is difficult to perfectly separate these interrelated principles. And as La Forest J. emphasized in *Lyons*, the relative weight and importance of these multiple factors will frequently vary depending on the nature of the crime and the circumstances of the offender. In the final analysis, the overarching duty of a sentencing judge is to draw upon all the legitimate principles of sentencing to determine a "just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.

C. *Did the Court of Appeal err in holding that the Crown was obligated to bring dangerous offender proceedings?*

As a third ground of appeal, the Crown submits that the majority of the Court of Appeal erred by stating that the Crown had an obligation to bring dangerous offender proceedings under Part XXIV of the *Criminal Code* against the respondent. The relevant passage of the judgment of Wood J.A.

tives aux comportements indésirables, les peines infligées par les tribunaux devraient également être infligées d'une manière propre à enseigner de manière positive la gamme fondamentale des valeurs communes que partagent l'ensemble des Canadiens et des Canadiennes et qui sont exprimées par le *Code criminel*.

En guise d'observations finales dans le cadre du présent examen, il importe de souligner que ni le châtement ni la réprobation uniquement ne justifient complètement l'application de sanctions pénales. Au contraire, dans notre système de justice, des considérations normatives et utilitaristes opèrent conjointement pour donner une justification cohérente des sanctions pénales. Comme l'a signalé le juge Gonthier dans *R. c. Goltz*, précité, à la p. 502, les objectifs visés par les sanctions pénales sont à la fois «généraux et divers». Par conséquent, il faut examiner le sens de l'objectif de châtement en corrélation avec les autres objectifs légitimes de la détermination de la peine, qui comprennent (notamment) la dissuasion, la réprobation, la réadaptation et la protection de la société. En effet, il est difficile de séparer nettement ces principes interreliés. Comme le juge La Forest l'a mentionné dans *Lyons*, l'importance et le poids relatifs de ces multiples facteurs varieront souvent selon la nature du crime et la situation du délinquant. En dernière analyse, le devoir général du juge qui inflige la peine est de faire appel à tous les principes légitimes de détermination afin de fixer une peine «juste et appropriée», qui reflète la gravité de l'infraction commise et la culpabilité morale du contrevenant.

C. *La Cour d'appel a-t-elle commis une erreur en concluant que le ministère public avait l'obligation de présenter une demande pour faire déclarer l'intimé délinquant dangereux?*

Comme troisième moyen d'appel, le ministère public fait valoir que la majorité de la Cour d'appel a commis une erreur en statuant qu'il avait l'obligation de présenter une demande pour faire déclarer l'intimé délinquant dangereux en vertu de la partie XXIV du *Code criminel*. Le passage perti-

TAB 71

s. 718.21 of the <i>Criminal Code</i>	s. 79(3.2) of the <i>Competition Act</i>	Factors set out in <i>Re Eron Mortgage Corporation</i> , [2000] 7 BCSC Weekly Summary 22, for orders under ss. 161 and 162 of the <i>British Columbia Securities Act</i> (See <i>R v. Samji</i> , 2017 BCCA 415 at para 96)	s. 51.01(4) of the <i>Alberta Election Finances and Contributions Disclosure Act</i> (See <i>Park v. The Election Commissioner of Alberta</i> , 2023 ABKB 351 at para 85)
718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors: (a) any advantage realized by the organization as a result of the offence; (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence; (c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution; (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;	79(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following: (a) the effect on competition in the relevant market; (b) the gross revenue from sales affected by the practice; (c) any actual or anticipated profits affected by the practice; (d) the financial position of the person against whom the order is made; (d.1) the amount that the person against whom the order is made is required to pay under an order made under subsection (4.1);	• the seriousness of respondent's conduct, • the harm suffered by investors as a result of the respondent's conduct, • the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct, • the extent to which the respondent was enriched, • factors that mitigate the respondent's conduct, • the respondent's past conduct, • the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,	a) the severity of the contravention; b) the degree of wilfulness or negligence in the contravention; c) whether or not there were any mitigating factors relating to the contravention; d) whether or not steps have been taken to prevent reoccurrence of the contravention; e) whether or not the person or entity has a history of non compliance; f) whether or not the person or entity reported the contravention on

(e) the cost to public authorities of the investigation and prosecution of the offence; (f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence; (g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct; (h) any penalty imposed by the organization on a representative for their role in the commission of the offence; (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and (j) any measures that the organization has taken to reduce	(e) the history of compliance with this Act by the person against whom the order is made; and (f) any other relevant factor.	• the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or advisor to issuers, • the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets, • the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and • orders made by the Commission in similar circumstances in the past.	discovery of the contravention; g) any other factors that, in the opinion of the Election Commissioner, are relevant.
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the likelihood of it committing a subsequent offence.			
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TAB 72

COURT OF APPEAL FOR BRITISH COLUMBIA

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

Date: 20171201
Docket: CA43961

Between:

Regina

Respondent

And

Rashida Abdulrasul Samji

Appellant

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

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

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

Counsel for the Respondent: L. Vizsolyi

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

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

Written Reasons by:

The Honourable Madam Justice Fisher

Concurred in by:

The Honourable Chief Justice Bauman

Concurring Reasons by:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

Criminal sentencing principles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

Stigma and effect

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

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

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

TAB 73

Citation: ☼ R. v. Samji
2016 BCPC 0145

Date: ☼20160526
File No: 232139-1
Registry: Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(Criminal Division)

REGINA

v.

RASHIDA ABDULRASUL SAMJI

CORRIGENDUM

**RULING ON VOIR DIRE
OF THE
HONOURABLE JUDGE G. RIDEOUT**

Counsel for the Crown:
Counsel for the Defendant:
Place of Hearing:
Dates of Hearing:
Date of Judgment:

K. Marks and L. Vizsolyi
R. Peck, QC and M. Shah
Vancouver, B.C.
February 16, 17, 18, 2016
May 26, 2016

[96] Hearings pursuant to ss. 161 and 162 of the *Act* differ from criminal proceedings. Borrowing Fish J.'s language in *Martineau*, at para. 45, in the context of ss. 161 and 162 of the *Act*,

No one is charged No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the [penalty] is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of a civil action.

[97] In addition, the Commission need not follow the formal rules of evidence that apply in the courts. It will consider all relevant evidence, such as oral testimony, transcripts, affidavits, and hearsay evidence.

[98] As noted at para. 92 of this Ruling, before any administrative sanctions can be imposed, the Commission must establish the alleged contravention(s) on a balance of probabilities.

(c) Conclusion on the By Nature Test

[99] I conclude that the process leading to the imposition of the \$33 million AMP is not criminal in nature.

(iv) Whether the \$33 Million AMP Constitutes a “True Penal Consequence”

[100] An AMP constitutes a “true penal consequence” when it is imposed to redress the wrong done to society at large rather than to secure compliance: *Wigglesworth*, at para. 28, affirmed in *Guindon*, at para. 75. However, it should be noted that only rarely would a proceeding fail the “by nature” test but pass the “true penal consequence test”:

Wigglesworth, at para. 26. The question then becomes whether Samji's case is one of those "unusual" cases: *ibid*.

[101] To determine if the purpose of the \$33 million AMP is punitive, I rely almost exclusively on the Commission's sanctions decision: 2015 BCSECCOM 29 and I discuss the following factors: the magnitude of the AMP, the recipient of the AMP, and the applicability of the sentencing principles.

[102] To determine if the effect of the \$33 million AMP is punitive, I consider the effect of the AMP on Samji's financial, professional, personal, social, and vocational life.

(a) The Purpose of the AMP

[103] Administrative sanctions have been characterized as remedial rather than punitive: *Re Mithras Management Ltd. (1990)*, 13 OSCB 1600 (Ont Securities Comm), affirmed in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, at para. 43.

[104] In the context of the *Act*, ss. 161 and 162 provide a broad spectrum of administrative sanctions. They are determined and issued by the Commission to protect the integrity of the securities industry but not to punish those who have contravened the *Act* or those who have acted contrary to the public interest: *Re Orr*, 2001 BCSECCOM 1106, at para. 15. The Commission most frequently uses administrative sanctions as "orders in the public interest".

[105] *The Magnitude of the AMP*. The magnitude of an AMP on its own is not determinative that the AMP constitutes a "true penal consequence": *Guindon*, at paras.

76-77. However, if the magnitude is out of proportion to the amount required to achieve regulatory purposes, the AMP is more likely to constitute a true penal consequence: *ibid*.

[106] By its own, the \$33 million AMP is unquestionably a significant financial penalty. Samji notes that the \$33 million AMP is the largest AMP imposed by the Commission on an individual. She also notes that this amount is greater than any criminal fine that would likely be imposed, either pursuant to BC *Offence Act* or the *Code*. However, criminal fines will not be the only potential penalties faced by Samji, if she is convicted of any of the criminal charges. For instance, if Samji is convicted of a single count of theft over \$5000 contrary to s. 334(a) of the *Code*, she would be liable to a potential maximum prison sentence of 10 years. Should she be convicted of a single count of fraud over \$5000 contrary to s. 380(1)(a) of the *Code*, she would be liable to a potential maximum prison sentence of 14 years.

[107] In the circumstances of Samji's misconduct, the magnitude of the AMP is directly tied to the Commission's objective of deterring non-compliance with the *Act*: 2015 BCSECCOM 29. Over a time span of 9 years, Samji took not less than \$100 million from over 200 investors: *ibid*. She exercised significant planning and premeditation in the creation of the scheme: *ibid*. Furthermore, the success of the scheme was contributed by her status as a notary public.

[108] The regulation of capital markets is notoriously complex and requires a high degree of experience and knowledge in those who may participate in capital market investing. Capital markets become unsustainable when fraudulent activities are not

deterred. For example, the subprime mortgage meltdown, which unravelled in the US in 2007 and 2008, was largely fuelled by fraudulent activities. In the same period of time, Bernard Madoff, through Madoff Investment Securities, operated a multibillion-dollar Ponzi scheme. Similar to Samji, Madoff attracted investors through word-of-mouth and amassed an impressive client list. With the unravelling of capital markets in 2007 and 2008, Madoff's Ponzi scheme was also exposed. He is currently serving a 150-year prison sentence.

[109] To protect investors from unfair, improper, or fraudulent practices and to protect capital markets, the Commission can have "an unlimited power to fine" without violating the enumerated rights under s. 11, as long as the fine was "fully consonant with the maintenance of discipline and order within a limited private sphere of activity":

Wigglesworth, at para. 24. As such, the Commission has the authority to impose substantial AMPs to ensure compliance with the *Act*. It must be remembered that AMPs should not be viewed simply as "a cost of doing business" by those who would commit fraud: *Rowan*, at para. 80.

[110] The Commission imposed the AMP to specifically deter Samji and to generally deter others from committing large-scale frauds: 2015 BCSECCOM 29. To carry out its regulatory purposes, the Commission can consider deterrence when imposing an AMP: *Cartaway Resources Corp*, at para. 60. As such, the Commission has imposed the AMP to fulfil its regulatory purposes and not to punish Samji.

[111] The Recipient of the AMP. If the recipient of the monetary sanction is not a consolidated revenue fund, then the fine is more likely to be an internal or private matter of discipline: *Guindon*.

[112] Pursuant to s. 15 the *Act*, any payments made by Samji towards the \$33 million AMP will not go into a consolidated revenue fund. Rather, Samji's payments will only be used for (1) operational regulation of the markets, (2) investor education, and (3) payments to individuals who have successfully made a claim for the funds collected.

[113] Applicability of Sentencing Principles. Sentencing involves a balancing of many different interests. It is not simply a process to impose penalties or costs on an offender. Instead, it "positively instils the basic set of values shared by all Canadians as expressed by the *Criminal Code*": *R. v. CAM*, [1996] 1 SCR 500 (SCC), at para. 81. Sentencing principles are set out in ss. 718-718.2 of the *Code*. These sections aim to "bring greater consistency and clarity" to sentencing: *R. v. Nasogaluak*, 2010 SCC 6, at para. 39.

[114] The balancing exercise of different interests and sentencing principles, such as deterrence and proportionality, are not unique to criminal proceedings: *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22, at 24:

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

- the *seriousness* of respondent's conduct;
- the harm suffered by investors as a result of the respondent's conduct;
- the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct;
- the extent to which the respondent was enriched;

- *factors that mitigate* the respondent's conduct;
- the respondent's *past conduct*;
- the *risk* to investors and capital markets posed by the respondent's continued participation in the capital markets of British Columbia;
- the respondent's *fitness* to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers;
- the need to demonstrate the *consequences of inappropriate* conduct to those who enjoy the benefits of access to the capital markets;
- the *need to deter* those who participate in the capital markets from engaging in inappropriate conduct; and
- orders made by the Commission in *similar circumstances* in the past.
(Italics Mine)

[115] To determine the appropriate administrative sanctions against Samji, the Commission considered the above factors. It further placed an emphasis on its mandate to regulate the securities industry.

[116] In imposing the disgorgement order pursuant to s. 161(1)(g) of the *Act*, the Commission distinguished potential outcomes of concurrent bankruptcy, civil, and criminal proceedings from securities proceedings: 2015 BCSECCOM 29, at paras. 37-38.

[117] In imposing the \$33 million AMP pursuant to s. 162 of the *Act*, the Commission noted that the penalty reflected the “seriousness of [Samji’s] misconduct and the other factors relevant to sanctions, making it appropriate for [Samji] personally. It also serves as a meaningful and substantial general deterrent to others who would engage in similar misconduct”: 2015 BCSECCOM 29, at para. 56. The Commission rejected the Executive Director’s suggestion of a \$100 million AMP and Samji’s suggestion of a \$1 million AMP: *ibid*, at paras. 54-55. The Commission held that a \$100 million AMP

would “go beyond any meaningful bounds of deterrence for [Samji] or others” but a \$1 million AMP would not be sufficient to encourage compliance with the *Act*: *ibid*.

[118] Purpose of the AMP. Overall, the Commission held that the imposed sanctions against Samji were protective and preventative, intended to serve as “a meaningful and substantial deterrent” to both Samji and others: 2015 BCSECCOM 29, at para. 56.

(b) Effect of the AMP

[119] Both Samji and the Attorney General agree that Samji has been stigmatized. However, the stigma has arisen largely from the Commission’s findings that she had perpetrated a fraud and not the Commission proceedings. After all, Samji did not attend the Commission proceedings in person. Her legal counsel at that time appeared on her behalf.

[120] The Commission’s findings that Samji had perpetrated a large scale of fraud attracted media attention and negatively impacted Samji’s financial, professional, personal, social, and vocational life.

[121] Media Attention. The large scale of the fraud naturally attracted media attention. The content of the media reporting was mostly drawn from the Commission proceedings. The proceedings were open to the public because one of the purposes of the Commission is to protect the public from fraud, which is achieved through public hearings and news releases about contraventions of the *Act*. Furthermore, the media publications disclosed Samji’s sworn statements during the investigation interviews. For example, the publications included Samji’s description of the investors as: “...

seasoned people, not uneducated, and it would not take a rocket scientist to figure some of this out”: Transcript, February 16, 2016, at 40, ll. 5-9.

[122] Samji complained that the media had labelled her as the “Magic Lady”. However, as noted at para. 75 of this Ruling, the media did not coin this label. It was first used by Samji’s investors to describe her ability to make quick returns on their investment. Samji complained that the media had taken the label out of context, but failed to explain how this was so.

[123] Although Samji opines that the media attention has socially embarrassed and upset her, she has not argued that the information published by the media is exaggerated, biased, or untruthful.

[124] The stigma caused by the media publications is expected and not exceptional. Individuals who commit securities fraud should reasonably expect that their misconduct would likely be scrutinized by the Commission. When they are sanctioned, news media will likely broadcast the results of the Commission proceedings. By informing the public of the Commission proceedings, including identified misconduct and sanctions, the Commission proceedings and media publications protect investors from fraudulent practices and instil public confidence in the securities system. Additionally, the Commission proceedings and media publications deter potential non-compliance with the *Act* by those who may misconduct themselves in the securities industry.

[125] Samji’s Professional Life. Samji no longer enjoys the professional status of a public notary. However, no reasonable person would expect that Samji could maintain her status in light of her misconduct. After all, she defrauded many investors and

received millions of dollars from them. The planned, premeditated, and complex scheme was in operation for nine years. Samji acknowledges that many investors' lives have become "extremely difficult" as a result of her fraudulent activities.

[126] Samji's Personal and Social Life. Due to the Commission's findings, Samji has been excluded by her family and community. Most of her family has refused to speak to her. She also has been isolated from her community.

[127] Samji's Vocational Life. The Commission's findings have also negatively impacted Samji's employment prospects. After resigning as a notary public in 2012, Samji applied for several jobs but was not hired. In 2013, a friend hired her as a receptionist. She was then laid off after her arrest in 2013. Thereafter, she was unemployed for almost two years. In June 2015, another friend hired her as a receptionist at an Inn in the Fraser Valley.

[128] Not Comparable to a Criminal Conviction. An AMP constitutes a "true penal consequence" when the effect of it is punitive. I find the administrative sanctions, including the \$33 million AMP, are not punitive in their effect.

[129] The label of "fraudster" carries a significant social stigma: *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7, at para. 29. However, the stigma suffered by Samji is not comparable to that attached to a criminal conviction. As discussed above, Samji bears the stigma of being a fraudster as found by the Commission. However, this stigma only reflects the social repugnance of her misconduct.

[130] The stigma suffered by Samji does not reflect the degree of fault for her perpetration of the scheme. When determining the appropriate administrative sanctions against Samji, the Commission considered the seriousness of Samji's conduct, the harm suffered by her investors, and factors that may mitigate Samji's misconduct. However, these factors were only considered in the context of the Commission's mandate to regulate the securities industry and to deter participants in the securities industry from non-compliance with the Act. The imposed sanctions did not redress or condemn the moral blameworthiness of Samji's misconduct.

[131] The AMP is significant and Samji will remain obligated to pay the AMP after she is discharged from bankruptcy. However, the AMP does not interfere with the life, liberty, or security of Samji: *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48. Samji has not paid any portion of the AMP or disgorgement order. Due to her bankruptcy status and her current limited financial means, she will unlikely be able to pay any part of the AMP or disgorgement order in the future. The Commission has not taken any enforcement measure to collect the AMP. Moreover, default of payment of the AMP sanction and disgorgement order will not result in imprisonment. Lastly, Samji could have challenged the administrative sanctions through a judicial review as allowed by s. 167 of the Act. She elected not to do so.

[132] If Samji were found guilty of any of the criminal charges, additional stigma would arise from the registration of a criminal record and the likelihood of the imposition of a jail sentence. Moreover, she would be labelled as a criminal.

(c) Conclusion on the "True Penal Consequence Test"

[133] I conclude that the regulatory penalties imposed by the Commission, including the AMP, do not amount to a “true penal consequence”.

(v) Whether Section 11(h) Precludes Criminal Prosecution Against Samji

[134] The Commission imposed administrative sanctions against Samji for purposes of deterrence: 2015 BCSECCOM 29, at para. 56. The effect of these sanctions is not punitive: Part V.(iv).(b). of this Ruling. As such, s. 11(h) does not preclude criminal prosecution against Samji.

[135] Law enforcement in the capital markets involves an integrated system of both the *Act* and the *Code*. The *Act* regulates the securities industry: *Johnson*. It aims primarily to protect investors from unfair, improper, or fraudulent practices: *Pezim*, at 589. The *Act* also fosters capital market efficiency and instils public confidence in the system: *ibid*. In contrast, the *Code* redresses the wrong done to society at large: *Wigglesworth*, at para. 24.

[136] In the context of fraud, s. 57(b) of the *Act* is drafted broadly to protect investors and to foster public confidence in the capital markets: *Walker*, at para. 34. Section 57(b) prohibits anyone from directly or indirectly, engaging in or participating in conduct relating to securities or exchange contracts, if the person knows, or reasonably should know, that the conduct perpetrates a fraud. However, compared to s. 380 of the *Code*, s. 57(b) of the *Act* only applies to a specific group of individuals, i.e., individuals who participate in the securities industry, such as Samji. Section 380 of the *Code* prohibits “anyone” in Canada from defrauding another person of any property, money or valuable security or any service.

TAB 74

Court of Queen's Bench of Alberta

Citation: Lavallee v. Alberta (Securities Commission), 2009 ABQB 17

Date: 20090109

Docket: 0801 05159, 0801 05161

Registry: Calgary

Between:

Lambert “Bert” Lavallee

Applicant

- and -

Alberta Securities Commission

Respondent

Docket: 0801 05161

and Between:

Arbour Energy Inc. and Dennis Morice

Applicants

- and -

Alberta Securities Commission

Respondent

Reasons for Judgment
of the
Associate Chief Justice
Neil Wittmann

I. Introduction

[1] This application challenges the constitutional validity and quasi-constitutional conformity of ss. 29(e) and 29(f) of the *Alberta Securities Act*, R.S.A. 2000, c. S-4 (“*Securities*”).

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confronted about the ASC proceedings. He feels depressed, anxious and has become reclusive. The Applicant Lavallee has not provided evidence showing the consequences of the proceedings in his life.

[119] It seems that most individuals involved in similar proceedings in which their honesty is questioned will experience some level of stress. I have no doubt that Morice has been affected by the proceedings and that, as a result, he has suffered stress. However, it is not the type of harm protected under s. 7. In light of *Blencoe*, I fail to see how the effect of the potential consequences in the matters before me compare to the kind of stigma attached to an overlong and vexatious pending criminal trial or can compare with proceedings initiated for the purpose of removing a child from parental care. Section 7 is not meant to afford protection against ordinary stresses suffered by most people as a result of civil or administrative proceedings.

[120] In light of the case law and the evidence before me, I conclude that the operation of ss. 29(e) and (f) does not engage s.7 of the *Charter*. Therefore, it is not necessary to determine whether the alleged deprivation is in accordance with the principles of fundamental justice.

5. Section 11

[121] The Applicants challenge the constitutionality of ss. 29(e) and (f). They argue that in light of *Wigglesworth*, ss. 29(e) and (f) are contrary to s. 11(d) of the *Charter* because they do not afford a fair hearing. The Applicants submit that in light of *Wigglesworth*, the s. 11 *Charter* protections should be extended to individuals who find themselves the subject of proceedings that may lead to the imposition of penal consequences, regardless of whether the proceedings themselves may be labelled “penal” or “punitive”.

[122] Section 11 (d) of the *Charter* provides as follows:

11. Any person charged with an offence has the right

[...]

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[123] Section 199 of the *Securities Act* currently provides for the imposition of a maximum penalty of \$1,000,000 for a person or company who contravenes or fails to comply with Alberta securities laws; the preceding legislation provided that the ASC could order payment of an “administrative penalty of not more than \$100,000 in the case of an individual or not more than \$500,000 in the case of any other person or company for each contravention or failure to comply”: *Securities Amendment Act, 2005*, S.A. 2005, c. 18, s. 26; *Securities Amendment Act, 1999*, S.A. 1999, c. 15, s. 35.

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[124] The Applicants argue that the sanctions that may be imposed in these proceedings bear no relationship to the ASC's mandate of protecting the integrity of the capital market and the public interest. They submit that the availability of the hybrid procedures, either before the ASC or the Provincial Court, the near exclusive use of ASC hearings for enforcement, the magnitude of the potential administrative penalty coupled with the availability of non monetary sanctions such as lifelong bans, which may seriously affect the economic life of an individual, show that the matter is no longer in the regulatory sphere, but must be assimilated to an offence because of the true penal consequences. Thus, it is argued that the protections of s. 11 must be afforded. They submit that, in this case, this is substantiated by the fact that the proceedings before the ASC are not initiated by a private litigant, that the ASC has the mandate to act in the public interest and that the specific allegations in this case involve dishonesty and fraudulent conduct which are stigmatizing. Moreover, the matters are being prosecuted in an adversarial manner at a public hearing.

[125] The ASC annual reports sometimes use contravention and offence interchangeably. The 2008 Annual Report states that the "ASC can impose fines known as 'administrative penalties'": Memorandum of Argument of Applicants, tab 5, p. 18; tab 1, p. 4. The Applicants argue that the wording found in the annual reports supports their claim that the ASC may impose punitive fines. The Applicants also raise the ASC's press release which refers to the allegations against the Applicants Arbour and Morice and other respondents before the ASC, making the allegations even more public: Memorandum of Argument of Applicants, tab 7.

[126] In addition, the Applicants argue that the factors considered relevant when determining the appropriate sanction, which include the seriousness of the allegations, the harm suffered, the benefits received and the need to deter, not only in the case being considered but also more generally, are indicative that the public interest is an important element similar to what is involved in criminal sentencing matters. In other words, the Applicants argue that the sanctions available and the factors taken into consideration for the sanctioning are indicative that the purpose is not to maintain discipline in a private sphere of activity, but is rather one of punishment and retribution in the public interest. Moreover, the same conduct may lead to enforcement in Provincial Court (s. 194) or before the ASC (ss. 198 and 199).

[127] Generally, the Attorney General contends that s. 11 is not engaged. The Attorney General argues that the remedial discretion of an ASC panel needs to be understood as allowing for regulatory discretion only. Thus, it is submitted that the ASC's discretion cannot be exercised as to impose sanctions which would be penal in nature.

[128] The Attorney General argues that *Holoboff* disposes of the Applicants' s. 11 argument, so far as it relates to the possible disqualifications under s.198 of the *Securities Act*. The Attorney General concedes that the Applicants' situation is different, because, in this case, there are also potential financial penalties involved, but adds that in *Wigglesworth*, Wilson J. contemplates that even an unlimited power to fine may be exercised for regulatory purposes and not for the purpose of redressing harm done to society at large. In other words, the size of an available administrative penalty does not demonstrate, in itself, that a proceeding threatens true penal consequences. It is

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submitted that in light of *Wigglesworth*, if the fine imposed is aimed at maintaining discipline and order within a limited private sphere of activity, then it does not constitute a true penal consequence. For instance, the Attorney General takes the position that the sum of \$46,000,000 allegedly extracted from investors in the Arbour and Morice matter is an appropriate example to illustrate that a \$1,000,000 penalty may, in fact, serve as purely administrative and regulatory purposes and that, to the contrary, a maximum of \$100,000 for penalty would be a modest cost of doing business. The Attorney General submits that, because incentives are necessary, financial penalties of a certain magnitude are therefore sometimes required in order to effectively maintain internal discipline within the regulated activity of trading in securities. The Attorney General contends that a potential sanction does not necessarily result in true penal consequences only because some factors taken into account for sanctioning a criminal behaviour are also relevant for determining a sanction of a regulated activity.

[129] The Attorney General contends that the constitutionality of s. 29 cannot be put at risk by a misinterpretation of s. 199. The Attorney General argues further that if the Applicants were to be subjected to a penalty that amounted to a penal sanction, it would contravene the *Securities Act*'s regulatory purposes. The Applicants could appeal the order on that ground.

[130] The ASC submits that ss. 29(e) and (f) do not violate s. 11 of the *Charter*. It argues that the Applicants' argument is premised upon the unwarranted proposition that the ASC will misunderstand its sanctioning mandate, ignore judicial guidelines and impose penal sanctions under s. 199 of the *Securities Act*, rather than sanctions that are preventative and protective. The ASC concedes that there is an incidental overlap between securities enforcement and criminal law when referring, for instance, to concepts such as fraud. However, it argues that the *Securities Act* purports to set up rules for an efficient capital market and that the overlap does not take away the fundamental regulatory focus of the ASC. The ASC also submits that the fashioning of appropriate sanctions for securities law contraventions is within the ASC's expertise. Generally, it asserts that the ASC's sanctioning mandate is protective and preventative, not punitive or remedial.

[131] The ASC argues that the Supreme Court of Canada has given guidance with respect to the general deterrence in sanctioning securities offences and that there is no reason to presume that the guidance will be ignored. As argued by the Attorney General, the ASC submits that in any event, if there were misapplication, it could be remedied by way of appeal.

[132] Referring to *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, the ASC submits that it is to be assumed that the decision maker will exercise its discretionary powers in a constitutionally acceptable manner. Thus, in this case, it ought to be assumed that the ASC panels hearing the matter will, if justified in the public interest, for the purposes of protection and prevention, impose sanctions within the constitutional limits.

[133] The ASC argues that s. 11 *Charter* rights are not engaged because there is no reason to conclude that a penal sanction will be imposed. It is submitted that regulatory proceedings undertaken pursuant to s. 29 of the *Securities Act* do not entail true penal consequences. The ASC

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argues that regulatory proceedings that are for the protection of the public are not offences. For instance, the ASC referred to *Johnson v. British Columbia (Securities Commissions)* (2001), 158 B.C.A.C. 69 in which Donald J.A., writing for the British Columbia Court of Appeal, stated, at para. 42, that the administrative penalty of up to \$100,000 did not alter the “[*Securities*] Act’s basic character as regulatory legislation.”

[134] Furthermore, the ASC submits that in light of *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737, the ability under the *Securities Act* to have recourse to quasi-criminal and regulatory proceedings for the same contraventions is irrelevant and insufficient to engage s. 11 of the *Charter*.

[135] During oral argument, Sorenson and Merendon raised the importance of assessing the powers granted by the statute since the ASC is a statutory tribunal. They argue that the ASC has the ability to impose an “administrative penalty” and that a penalty is necessarily penal, which means that there is a penal consequence by intention. In other words, they submit that the ASC is empowered to impose penal consequences. In addition, Sorenson and Merendon argue that if a fine is not necessarily penal, a penalty is always penal.

[136] In *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, La Forest J., writing for the Court, made it clear that the context is crucial in the analysis of *Charter* rights protection. Decided in a s. 7 context, La Forest J. in *Fitzpatrick* stated that a regulatory framework leads to some particular considerations which differ from other contexts:

[29] At issue in this case is the ability of the government to enforce important regulatory objectives relating to the conservation and management of the groundfish fishery. To suggest that s. 7 of the *Charter* protects individuals who voluntarily [sic] participate in this fishery from being “conscripted” against themselves, by having information used against them that they were knowingly required to provide as a condition of obtaining their fishing licences, would in my view be to overshoot the purposes of the *Charter*. The right against self-incrimination has never yet been extended that far; nor should it be. The *Charter* was not meant to tie the hands of the regulatory state.

[30] In determining the ambit of the principle against self-incrimination in this case, it is important to consider the context in which the appellant’s claim arises. This Court has often stated that the context of a *Charter* claim is crucial in determining the extent of the right asserted; see for example my comments in *Lyons, supra*, at p. 361, and in *Thomson Newspapers, supra*, at pp. 505-8 and 516-17. In particular, in *Wholesale Travel, supra*, at p. 226, Cory J. held that “a *Charter* right may have different scope and implications in a regulatory context than in a truly criminal one”, and that “constitutional standards developed in the criminal context cannot be applied automatically to regulatory offences”. These comments must be borne in mind in approaching the appellant’s claims, for it is made in the context of a detailed regulatory regime that governs state conservation

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and management of the fishery. In this regulatory environment, we must be careful to avoid automatically applying rules that have been developed respecting self-incrimination in the criminal sphere.

[137] The Applicants heavily rely on *Wigglesworth* to support their claim that the potential administrative penalty is high enough to engage s. 11 of the *Charter*. In *Wigglesworth*, the issue was whether the appellant's conviction of a "major service offence" under the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9 precluded subsequent proceedings under the *Criminal Code* with respect to the same misconduct. Answering this question required a determination of whether a major service offence constituted an offence and, if so, whether the prosecution for the offence of common assault under the *Criminal Code* violated the right protected under s. 11(h) of the *Charter* not to be tried and punished again for the same offence.

[138] In *Wigglesworth*, Wilson J., writing for the majority of the Court, stated at 559 that she believed a matter could fall within s. 11 "either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence."

[139] Wilson J. described at 560 the kind of matters that typically falls within s. 11. She distinguished public matters from private, domestic or disciplinary matters:

In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity: see, for example, *Re Law Society of Manitoba and Savino*, *supra*, at p. 292, *Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission* (1986), 54 O.R. (2d) 544 (H.C.), at p. 549, and *Re Barry and Alberta Securities Commission*, *supra*, at p. 736, *per* Stevenson J.A. There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.

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[140] However, Wilson J. specified that, even if a matter does not typically fall within s. 11 of the *Charter*, the protections afforded under s. 11 may still apply if there is the imposition of true penal consequences. She gave the example of an unlimited power to fine or a fine of a certain magnitude which would be imposed for redressing the wrong done to society. Wilson J. stated the following at 560-561:

This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity. In “Annotation to *R. v. Wigglesworth*” (1984), 38 C.R. (3d) 388 [Saskatchewan Court of Appeal judgment] , at p. 389, Professor Stuart states:

... other *punitive* forms of disciplinary measures, such as fines or imprisonment, are indistinguishable from criminal punishment and should surely fall within the protection of s. 11(h).

I would agree with this comment but with two caveats. First, the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. One *indiciu*m of the purpose of a particular fine is how the body is to dispose of the fines that it collects. If, as in the case of proceedings under the *Royal Canadian Mounted Police Act*, the fines are not to form part of the Consolidated Revenue Fund but are to be used for the benefit of the Force, it is more likely that the fines are purely an internal or private matter of discipline: *Royal Canadian Mounted Police Act*, s. 45. [...] [Emphasis added]

[141] In *Wigglesworth*, Wilson J. found that the officer charged under the Code of Discipline faced true penal consequences since, if found guilty, there was a risk of imprisonment. However, Wilson J. concluded that the prosecution for the alleged criminal assault should not be stayed because the offences were different. One matter was disciplinary answerable to his profession and the other one was answerable to the society at large. She stated the following at 566:

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I would hold that the appellant in this case is not being tried and punished for the same offence. The “offences” are quite different. One is an internal disciplinary matter. The accused has been found guilty of a major service offence and has, therefore, accounted to his profession. The other offence is the criminal offence of assault. The accused must now account to society at large for his conduct. He cannot complain, as a member of a special group of individuals subject to private internal discipline, that he ought not to account to society for his wrongdoing. His conduct has a double aspect as a member of the R.C.M.P. and as a member of the public at large. To borrow from the words of the Chief Justice quoted above, I am of the view that the two offences were “two different ‘matters’, totally separate one from the other and not alternative one to the other”. While there was only one act of assault there were two distinct delicts, causes or matters which would sustain separate convictions.

[142] My reading of *Wigglesworth* is that, on one hand, the fact that the *Securities Act* is regulatory legislation is obviously not sufficient to determine whether the consequences of the application of s. 29 leads to true penal consequences. On the other hand, the dollar amount of the administrative penalty or its magnitude is not determinative, in itself, to qualify as a true penal consequence. In fact, it is the magnitude of the administrative penalty combined with the purpose for which it can be imposed that will determine whether it entails true penal consequences.

[143] In *Martineau*, a customs officer requested, by written notice, that the appellant pay a sum of \$315,458, submitting that this amount equalled the value of the goods that he allegedly attempted to export by making false statements. The *Customs Act*, R.S.C. 1985(2nd Supp.), c.1 [“*Customs Act*”] allows for the forfeiture of property in case of breaches of the *Customs Act*. In the event the property in question cannot be located, the *Customs Act* also authorizes the forfeiture of an amount of money equal to the value of the property. Section 124 of the *Customs Act* provides as follows:

124. (1) Where an officer believes on reasonable grounds that a person has contravened any of the provisions of this Act or the regulations in respect of any goods or conveyance, the officer may, if the goods or conveyance is not found or if the seizure thereof would be impractical, serve a written notice on that person demanding payment of

(a) an amount of money determined under subsection (2) or (3), as the case may be; or

(b) such lesser amount as the Minister may direct.

[...]

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[144] The appellant exercised the recourse provided under the *Customs Act* requesting a review of the customs officer's decision. The respondent upheld the demand for payment stating that the goods had not been reported in accordance with the *Customs Act*. The respondent alleged that the goods were in fact stolen automobiles. Subsequently, the appellant appealed the respondent's decision by way of an action as provided by s. 135 of the *Customs Act*. The appellant requested that the respondent's decision be varied and that it be replaced by a judgment cancelling the notice requiring payment. Before filing a defence, the respondent filed a notice of motion for the purpose of examining the appellant for discovery. The appellant contested the motion alleging that this would violate his right against self-incrimination under s. 11 (c) of the *Charter*. The issue before the Supreme Court was whether the appellant was "charged with an offence" within the meaning of s. 11 of the *Charter*.

[145] Fish J., writing for the Court, stated that in order to determine the nature of the proceeding, the case law needed to be reviewed in light of the following criteria: (1) the objectives of the legislation and the particular challenged provisions; (2) the purpose of the sanction; and (3) the process leading to the imposition of the sanction.

[146] In *Martineau*, the Court had to determine whether s. 124 of the *Customs Act* provided for a penal proceeding. The objectives of the legislation are to regulate, oversee and control cross-border movements of people and goods. Fish J. stated, at para. 26, that the attainment of the *Customs Act*'s objectives depends on the effectiveness of the voluntary or self-reporting system provided under the legislation. Civil and penal mechanisms were implemented for ensuring the enforcement of the legislation. In *Martineau*, the allegation that the appellant made false statements could give rise to a notice demanding payment (s. 124), to criminal prosecution by way of summary conviction or indictment or to both a demand for payment and criminal prosecution. The appellant argued on this ground that the nature of the imputed offence could not be drawn based solely on the respondent's choice of proceedings. The Appellant submitted that, since the "offence" may have penal consequences, it was penal in nature. Fish J. rejected this reasoning:

[30] As stated by McLachlin J. (as she then was) in *R. v. Shubley*, [1990] 1 S.C.R. 3, at pp. 18-19: "The question of whether proceedings are criminal in nature is concerned not with the nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves".

[31] In the case at bar, the fact that the false statements could result in criminal prosecution does not in itself mean that a notice of ascertained forfeiture can properly be characterized as a penal proceeding. The fact that a single violation can give rise to both a notice of ascertained forfeiture and a criminal prosecution is irrelevant. The appropriate test is the nature of the proceedings, not the nature of the act. [Emphasis in the original]

[147] Fish J. found at para. 56 that the notice of ascertained forfeiture was not penal in nature, but rather "an administrative measure intended to provide a timely and effective means of

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enforcing the [*Customs Act*].” In light of *Wigglesworth*, the Court still had to determine whether the demanded sum of \$315,458 was a fine of sufficient magnitude, which was imposed for “redressing a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness of customs requirements”: *Martineau* at para. 60.

[148] In *Martineau*, the appellant submitted that because the imposed fine was six times greater than the potential maximum fine upon summary conviction under the *Customs Act*, it was a true penal consequence. Fish J. found that the appellant’s argument was flawed. He agreed that the amount demanded was greater than a potential sanction that the appellant would face in a summary conviction, but Fish J. also pointed out that had the prosecution been brought by indictment, the maximum fine would have been \$500,000. He added that in either case, the fine does not replace the ascertained forfeiture. Fish J. distinguished the sanctions stating that the latter fine was clearly penal, but that the amount demanded in the case before the Court was civil in nature and purely economic, considering that to obtain the amount in question, a simple mathematical calculation needed to be done. Fish J. added that forfeiture was an *in rem* proceeding in which the subject was the thing itself and in which was not premised on the guilt or innocence of the owner of the forfeited property. A demand by written notice was not stigmatizing. Furthermore, the notice of ascertained forfeiture had no purpose of redressing a wrong done to society; the principles of criminal liability and sentencing were not relevant when determining the amount.

[149] In light of *Martineau*, I agree with the ASC that the fact that s. 194 of the *Securities Act* clearly engages s. 11 because there is a possibility of imprisonment is not a determinant factor in qualifying the nature of the penalties found under ss. 198 and 199. Moreover, the fact that the ASC annual reports use some words loosely is not conclusive, considering that the same annual reports also state that the two enforcement regimes are different and that one may lead to imprisonment but not the other: Memorandum of Argument of Applicants, tab 5, p. 18; tab 1, p. 4.

[150] The issue as to whether s. 11 of the *Charter* is engaged under s. 29 of the *Securities Act* or a similar provision has not been decided in Alberta in light of an administrative penalty, considering that s. 165.1 (now s. 199) was enacted after *Brosseau* and *Holoboff*. In *Brosseau*, there was no s. 11 *Charter* challenge before the Supreme Court and in *Holoboff* there was no administrative penalty at issue. I find that these cases are nonetheless instructive in that they show the importance of identifying the purpose of the sanction in the determination as to whether there is an offence and whether there is a true penal aspect to the sanction. In this case, I must determine the purpose of the administrative penalty under the *Securities Act* in order to see whether a contravention to the legislation is an offence under s. 11 of the *Charter*.

[151] Section 19 of the *Securities Act* provides that the money from s. 199 administrative penalties is considered revenue of the ASC which may be spent only for specific purposes including the education of investors and the promotion and enhancement of knowledge with respect to the operation of the securities and financial markets:

Financial matters re Commission

19(1) All fees, costs, administrative penalties under section 199, settlement money and other revenue arising with respect to the administration of Alberta securities laws or any other enactments administered by the Commission are the revenues of the Commission.

[...]

(5) Notwithstanding subsections (1) and (2), money that is received by the Commission from administrative penalties under section 199 may be expended only for the purposes of educating investors and promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets.

[152] This indicium tends towards the conclusion that the administrative penalty is purely an internal or private matter.

[153] The purpose of the potential sanctions, as well as the considerations taken into account in the sanctioning process may also guide my decision in this application. Even though the Applicants do not challenge the sanctions themselves, they are arguing that the administrative penalty leads to penal consequences and that a fair trial within the meaning of s. 11 of the *Charter* should be afforded.

[154] In *McLeod v. Alberta (Securities Commission)*, 2006 ABCA 231, 391 A.R. 121, leave to appeal to S.C.C. refused, 31648 (February 22, 2007), the appellants appealed from two decisions of the ASC which upheld the TSX Venture Exchange's findings that the appellants were unsuitable and which disqualified them from being directors or officers, and, also prohibited one of the appellants from being an employee, agent or consultant of companies listed on the TSX Venture Exchange. The ASC also upheld the sanctions imposed by the TSX Venture Exchange.

[155] One of the issues before the Court of Appeal in *McLeod* was whether the sanctions imposed on the appellants were excessive, harsh as well as unfair, and thus unreasonable. The Court concluded that the purpose of the sanctions in the matter before it was primarily to protect the public interest and maintain confidence in the markets. Referring to *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R.132, the Court of Appeal stated at para. 61 that "[p]ast conduct has been recognized as a predictor of future conduct and is a proper factor for consideration in fashioning a sanction." The Court of Appeal agreed that the following factors, which were previously identified by the ASC, are relevant in the determination of sanctions:

[62] While the Act does not mandate factors to be taken into account in protecting the public interest by means of sanctions, we accept the relevance of the

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factors previously identified by the ASC in *Lamoureux Re*, [2002] A.S.C.D. No. 125 at para. 11:

“The Commission and other securities regulatory authorities in Canada have also expressed their view that, when making orders under s. 198 or 199 of the *Act* or comparable provisions in other jurisdictions, to protect the public, we consider a broad range of factors such as:

- the seriousness of the allegations proved against the respondent,
- the respondent's past conduct, including prior sanctions, mitigating factors,
- the respondent's experience in the capital markets, the level of the respondent's activity in the capital markets,
- whether the respondent recognizes the seriousness of the improper activity,
- the harm suffered by investors as a result of the respondent's activities,
- the benefits received by the respondent as a result of the improper activity,
- the risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction,
- the damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities,
- the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity,
- the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets, and
- previous decisions made in similar circumstances.”

[156] In this application, the Applicants have singled out a few of the considerations, previously approved by the Court of Appeal, as evidence that the factors taken into account when imposing a sanction are indicative that the purpose is not to maintain discipline in a private sphere of activity, but rather to impose punishment and retribution. As stated earlier, the purposes of the *Securities Act* include the protection of investors and the public, the efficiency of the capital markets and ensuring the public's confidence in the system. Although I do agree that, considered in isolation,

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and without considering the overarching purposes of the *Securities Act*, the alleged harm suffered by investors as a result of the Applicants' activities, the alleged benefits received by the Applicants as a result of the improper activity and the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, may tend towards a conclusion of an intent to punish.

[157] However, when considering all the factors as a whole, it is clear that not taking those factors into consideration would likely jeopardize the attainment of the objectives of the *Securities Act*. For instance, without a certain level of deterrence, it is likely that the investors would not receive efficient protection. Also, if the harm suffered and the benefits received are not taken into account, the public's confidence in the system may be seriously shaken. In any event, although I do not have to decide this, it appears that if a sanction is imposed based on consideration of irrelevant factors or which is disproportionate consideration the purposes of the *Securities Act*, it can be raised in appeal: *Brost* (2008, C.A.) at paras. 52-55.

[158] In *Cartaway Resources Corp. (Re)*, 2004 SCC 26, [2004] 1 S.C.R. 672, a group of securities brokers including the respondents orchestrated the purchase of Cartaway Resources Corporation ("Cartaway") and funnelled some mining claims into it through a shelf company. Without disclosing to investors the material change in Cartaway's business to a mining exploration firm, they entered into a private placement which was split among friends and other employees of First Marathon Securities Limited, thereby relying on a prospectus exemption to which they were not entitled, in violation of s. 61 of the British Columbia *Securities Act*. The British Columbia Securities Commission found that it was in the public interest to impose the maximum financial penalty of \$100,000. The majority of the Court of Appeal found that the imposition of the penalty was too severe and unreasonable in the circumstances and substituted a penalty of \$10,000 for each respondent. One of the issues before the Supreme Court of Canada was whether the Securities Commission may consider general deterrence - deterrence which targets society generally, in an effort to show the negative consequence of wrongdoing - as a factor in assessing a penalty in the public interest under s. 162 of the British Columbia *Securities Act*. Writing for the Court, LeBel J., allowed the appeal and reinstated the Securities Commission's order.

[159] LeBel J. referred to the theory behind deterrence as follows:

[55] In this appeal we are asked whether it is reasonable to decide that general deterrence has a role to play in the policing of capital markets. The conventional view is that participants in capital markets are rational actors. This is probably more true of market systems than it is of social behaviour. It is therefore reasonable to assume, particularly with reference to the expertise of the Commission in regulating capital markets, that general deterrence has a proper role to play in determining whether to make orders in the public interest and, if they choose to do so, the severity of those orders.

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[56] This approach is consonant with United States securities jurisprudence, which accepts that general deterrence may be a consideration in imposing penalties for fraudulent behaviour. The rationale is that the public interest demands appropriate sanctions to secure compliance with the rules, regulations and policies of the Securities and Exchange Commission (“SEC”): see, e.g., *United States v. Matthews*, 787 F.2d 38 (2d Cir. 1986), at p. 47. Civil penalties are increasingly important to the SEC for a number of reasons, including general deterrence: see R. G. Ryan, “Securities Enforcement: Civil Penalties in SEC Enforcement Cases: A Rising Tide” (2003), 17 *Insights* 17.

[160] LeBel J. found that general deterrence is an appropriate factor in assessing a penalty in the public interest. He stated at para. 4 that “[g]eneral deterrence is both prospective and preventative in orientation” and that, as such, it “falls squarely within the public interest jurisdiction of securities commissions to maintain investor confidence in the capital markets.” He found that the maximum penalty was rationally connected to the conduct of the respondents globally.

[161] LeBel J. was very clear that general deterrence was an important consideration in the fashioning of a penalty and making orders which are both protective and preventative. Of course, general deterrence should not be the only consideration:

[60] In my view, nothing inherent in the Commission's public interest jurisdiction, as it was considered by this Court in *Asbestos*, *supra*, prevents the Commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative. Ryan J.A. recognized this in her dissent: “The notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others” (para. 125).

[61] The *Oxford English Dictionary* (2nd ed. 1989), vol. XII, defines “preventive” as “[t]hat anticipates in order to ward against; precautionary; that keeps from coming or taking place; that acts as a hindrance or obstacle”. A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction under s. 162. The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act.

[62] It may well be that the regulation of market behaviour only works effectively when securities commissions impose *ex post* sanctions that deter forward-looking market participants from engaging in similar wrongdoing. That is

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a matter that falls squarely within the expertise of securities commissions, which have a special responsibility in protecting the public from being defrauded and preserving confidence in our capital markets. [Emphasis added]

[162] Clearly, only considering some of the factors that have been recognized as relevant in the sanctioning process will not be determinant as to whether a sanction is punitive or constitute a true penal consequence. In *Cartaway*, LeBel J. stated, at para. 64, that “Courts should review the order globally to determine whether it is reasonable” and that “unreasonable weight given to a particular factor, including general deterrence, will render the order itself unreasonable. [Emphasis in original]”

[163] The existence of administrative penalties under the *Securities Act* can be justified in light of the general purposes of the legislation. For instance, one can easily understand that, in some cases, a trading ban would adversely affect investors and that the imposition of an administrative penalty may be the only sanction which would allow the attainment of the purposes of *Securities Act*: see for example *Morrison Williams Investment Management Ltd., Re* (2000), 7 ASCS 2888.

[164] I agree with the Court of Appeal in *Brost* (2008, C.A.) that the potential imposition of administrative penalties of a certain magnitude reflects the legislative intent to ensure that penalties are not simply considered as another cost of doing business.

[165] In light of the legislation at issue and the case law, I find that no true penal consequences arise under ss. 198 and 199. Therefore, I conclude that the operation of ss. 29(e) and (f) of the *Securities Act* does not engage s. 11 of the *Charter*.

D. Alberta Bill of Rights and enjoyment of property

[166] The *Canadian Bill of Rights*, S.C. 1960, c. 44 reprinted in R.S.C. 1985, App. III and the *Alberta Bill of Rights* are quasi-constitutional instruments: see for example *Bell Canada* at para. 28; *Alberta v. Nilsson*, 1999 ABQB 440, 246 A.R. 201 at para. 121, aff'd on other grounds 2002 ABCA 283, 320 A.R. 88, leave to appeal ref'd [2003] 2 S.C.R. xi. As stated by Dussault and Borgeat at 253:

Those Charters [including *Canadian Bill of Rights* and Quebec Charter] take precedence over any ordinary Act unless specifically stated otherwise; they are suppletive wherever an ordinary Act fails to mention the obligation to respect the elementary *audi alteram partem* rule of natural justice, and they restore the full force of the rule in cases where an ordinary Act appears to restrict its application. [Citations omitted]

[167] Section 1(a) of the *Alberta Bill of Rights* states as follows:

TAB 75

A-456-12
2014 FCA 18

A-456-12
2014 CAF 18

Marc Lemire (*Appellant*)

Marc Lemire (*appelant*)

v.

c.

Canadian Human Rights Commission, Richard Warman, the Attorney General of Canada (*Respondents*)

La Commission canadienne des droits de la personne, Richard Warman, le Procureur général du Canada (*intimés*)

and

et

African Canadian Legal Clinic (*Intervener*)

L'African Canadian Legal Aid Clinic (*intervenante*)

INDEXED AS: CANADA (CANADIAN HUMAN RIGHTS COMMISSION) v. WARMAN, SUB NOM. LEMIRE v. CANADA (CANADIAN HUMAN RIGHTS COMMISSION)

RÉPERTORIÉ : CANADA (COMMISSION CANADIENNE DES DROITS DE LA PERSONNE) c. WARMAN, SUB NOM. LEMIRE c. CANADA (COMMISSION CANADIENNE DES DROITS DE LA PERSONNE)

Federal Court of Appeal, Evans, Gauthier and Stratas JJ.A—Toronto, November 14, 2013; Ottawa, January 31, 2014.

Cour d'appel fédérale, juges Evans, Gauthier et Stratas, J.C.A.—Toronto, 14 novembre 2013; Ottawa, 31 janvier 2014.

Human Rights — Appeal from Federal Court decision granting judicial review of Canadian Human Rights Tribunal decision — Tribunal determining that appellant contravening Canadian Human Rights Act (CHRA), s. 13 but declining to grant remedy on basis that when combined with penalty provisions of CHRA (ss. 51(1)(c) and 54(1.1)), s. 13 breaching Canadian Charter of Rights and Freedoms (Charter), s. 2(b), not saved by s. 1 thereof — Federal Court agreeing that penalty provisions of CHRA not saved by Charter, s. 1 — However, finding that Tribunal having no jurisdiction to scrutinise Commission's conduct in administering s. 13 as part of its s. 1 analysis, allowing judicial review on ground that offending provisions could be severed from CHRA so as to preserve validity of CHRA, s. 13 — Whether Commission's conduct in administering CHRA, s. 13 relevant to determining whether s. 13 reasonable limit on Charter, s. 2(b) rights, saved by s. 1; whether application of CHRA, s. 13 to communication of hate messages through Internet constituting minimal impairment of right to freedom of expression guaranteed by Charter, s. 2(b); whether Tribunal erring in invalidating penalty provisions in CHRA, ss. 54(1)(c), 54(1.1) on ground punitive in nature — Manner in which Commission enforcing CHRA, s. 13 not relevant to determination of constitutional validity thereof — Federal Court thus correct in that regard — As to application of CHRA, s. 13 to Internet, Supreme Court of Canada's analysis in Canada (Human Rights Commission) v. Taylor (adopted in Saskatchewan (Human Rights Commission) v. Whatcott),

Droits de la personne — Appel interjeté à l'encontre d'une décision de la Cour fédérale qui a accueilli la demande de contrôle judiciaire d'une décision du Tribunal canadien des droits de la personne — Le Tribunal a conclu que l'appelant avait contrevenu à l'art. 13 de la Loi canadienne sur les droits de la personne (LCDP), mais a refusé de rendre une ordonnance de réparation au motif que, lorsque l'art. 13 était combiné aux dispositions de la LCDP relatives aux sanctions (les art. 51(1)c) et 54(1.1)), il violait l'art. 2b) de la Charte canadienne des droits et libertés (la Charte) et ne pouvait pas être justifié aux termes de l'article premier de la Charte — La Cour fédérale a convenu avec le Tribunal que les dispositions de la LCDP relatives aux sanctions n'étaient pas justifiées aux termes de l'article premier de la Charte — Cependant, la Cour fédérale a décidé que le Tribunal n'avait pas compétence pour examiner la façon dont la Commission appliquait l'art. 13 dans le cadre de l'analyse du Tribunal au regard de l'article premier de la Charte, et a accueilli la demande de contrôle judiciaire au motif que les dispositions attaquées pouvaient être dissociées de la LCDP de manière à préserver la validité de l'art. 13 — Il s'agissait de savoir si la manière dont la Commission a appliqué l'art. 13 était pertinente pour rechercher si cette disposition pose une limite raisonnable aux droits visés à l'art. 2b) de la Charte et est donc justifiée par l'article premier, si l'application de l'art. 13 de la LCDP à la communication de messages haineux par Internet constituait une atteinte minimale au droit à la liberté d'expression garanti

a person in breach of section 13 to make a payment in support of an organization or activity beneficial to the group targeted by the hate speech. However, identifying appropriate recipients might well present serious practical problems for the Tribunal.

[97] There is no basis in the record for asserting that the potential imposition of liability to make a payment to the general revenue fund of up to \$10 000 has a more chilling effect on freedom of expression than the liability to pay up to \$20 000 under paragraph 54(1)(b) to individuals specifically identified in a hate message. Indeed, by limiting the amount payable to a single penalty of no more than \$10 000 paragraph 54(1)(c) imposes a lower limit on potential liability than would a provision to compensate multiple individual victims of hate speech, even if they were not specifically identified.

[98] When viewed in the context of the CHRA's remedial scheme, the imposition of a penalty under paragraph 54(1)(c) and subsection 54(1.1) carries no more of a moral stigma than a finding that an individual has wilfully or recklessly engaged in the communication of hate speech, and by virtue of paragraph 54(1)(b) is required to compensate specifically identified individuals.

[99] On the comparatively rare occasions when hate speech specifically identifies individuals within the targeted group, the Tribunal may both award compensation to the victims under paragraph 54(1)(b) and impose a penalty under paragraph 54(1)(c). This additional sanction may be particularly appropriate to deter those who have repeatedly engaged in discriminatory practices.

[100] I do not, with respect, agree with the Judge's view that the factors in subsection 54(1.1) that the Tribunal must consider when deciding whether to impose a penalty under paragraph 54(1)(c) necessarily give the provisions a punitive character. In my opinion, they are consistent with the objectives of general deterrence (paragraph 54(1.1)(a)) and specific deterrence

à exiger que la personne qui contrevient à l'article 13 effectue un paiement à un organisme ou un programme au profit du groupe visé par le discours haineux. Cependant, le Tribunal pourrait bien éprouver dans la pratique de sérieuses difficultés à identifier des bénéficiaires appropriés.

[97] Il n'y a rien au dossier qui permette d'inférer que la possibilité d'être condamné à verser au Trésor un montant pouvant aller jusqu'à 10 000 \$ a un effet plus paralysant sur la liberté d'expression que l'obligation de payer jusqu'à concurrence de 20 000 \$ en vertu de l'alinéa 54(1)(b) à des personnes identifiées dans un message haineux. Certes, en limitant le montant payable à une sanction unique d'au plus 10 000 \$, l'alinéa 54(1)(c) impose un plafond à la responsabilité éventuelle qui est inférieur au montant que pourrait atteindre une sanction imposée en vertu d'une disposition obligeant à indemniser plusieurs victimes d'un discours haineux prises individuellement, même si elles n'étaient pas identifiées.

[98] Lorsqu'elle est appréciée au regard du régime de réparation de la LCPD, l'imposition d'une sanction aux termes de l'alinéa 54(1)(c) et du paragraphe 54(1.1) ne donne pas lieu à un plus grand stigmatisme moral qu'une conclusion selon laquelle une personne a communiqué de manière délibérée ou inconsiderée un discours haineux et est tenu en vertu de l'alinéa 54(1)(b) d'indemniser les personnes identifiées.

[99] Dans les cas comparativement rares où un discours haineux identifie des personnes au sein du groupe visé, le Tribunal peut accorder une indemnité aux victimes aux termes de l'alinéa 54(1)(b) et imposer une sanction en vertu de l'alinéa 54(1)(c). Cette sanction additionnelle peut s'avérer particulièrement indiquée pour dissuader les récidivistes.

[100] Soit dit avec égards, je ne puis retenir la conclusion du juge portant que les facteurs recensés au paragraphe 54(1.1), que le Tribunal doit prendre en compte avant de décider d'imposer une sanction en vertu de l'alinéa 54(1)(c), confèrent nécessairement aux dispositions un caractère punitif. À mon avis, ces facteurs

(paragraph 54(1.1)(b)), and thus of enhancing compliance with section 13.

[101] For example, the requirement that a penalty may only be imposed in respect of wilful or reckless conduct is also found in subsection 53(3), which directs payment to the victim. The discriminator's state of mind is relevant to whether the imposition of financial liability is appropriate to ensure compliance and to deter.

[102] The requirement that the Tribunal must consider the individual's ability to pay can also be regarded as linked to deterrence: a person of limited means may be deterred from future breaches by a smaller penalty than a wealthier person. Similarly, it may take a larger penalty to deter a person who has been a repeat offender. In truth, the considerations relevant to sentencing may overlap with those governing the imposition of an administrative penalty since both are designed to prevent statutorily prohibited conduct.

[103] That Parliament chose the word "penalty" to describe the financial liability that may be imposed in respect of wilful hate speech that does not specifically identify individuals cannot justify characterizing the impugned provisions as punitive.

[104] In short, even though the financial liability imposed under paragraph 54(1)(c) and subsection 54(1.1) may not be based on a loss to individual victims, they are not penal in nature. Rather, they represent a reasonable means of imposing financial accountability for the damage caused by the vilification of targeted groups and of deterring the communication of hate speech in order to decrease discrimination against them.

s'accordent avec les objectifs de dissuasion générale (alinéa 54(1.1)a)) et de dissuasion spécifique (alinéa 54(1.1)b)), et donc avec l'objectif consistant à favoriser le respect de l'article 13.

[101] Par exemple, le paragraphe 53(3), qui prévoit la possibilité d'ordonner qu'un paiement soit fait à la victime, prévoit lui aussi qu'une sanction peut seulement être imposée lorsque l'acte sanctionné était délibéré ou inconsideré. L'état d'esprit de l'auteur de la communication est pertinent lorsqu'il s'agit de rechercher s'il est indiqué d'imposer une responsabilité financière pour assurer le respect de la loi ou en dissuader la transgression.

[102] L'exigence faite au Tribunal de prendre en compte la capacité de payer de l'individu peut également être rattachée à la dissuasion : la personne aux moyens limités est susceptible d'être dissuadée de récidiver par une sanction d'un montant moins élevé que dans le cas de la personne plus fortunée. De même, une sanction d'un montant plus élevé peut s'avérer nécessaire pour dissuader le récidiviste. En vérité, les considérations pertinentes au regard de la détermination de la peine peuvent recouper celles qui régissent l'imposition d'une sanction administrative, puisque les dispositions visent dans les deux cas à prévenir une conduite interdite par la loi.

[103] Le fait que le législateur ait choisi le mot « sanction » (« *penalty* ») pour qualifier la responsabilité financière qui peut être imposée en cas de discours haineux délibéré qui n'identifie aucune personne ne saurait justifier que les dispositions attaquées soient qualifiées de punitives.

[104] En bref, même si la responsabilité financière imposée en vertu de l'alinéa 54(1)c) et du paragraphe 54(1.1) n'est pas nécessairement fondée sur une perte subie par des victimes prises individuellement, ces dispositions ne sont pas de nature pénale. Elles représentent plutôt une voie, d'une part, d'imposer une responsabilité financière au titre du dommage causé par le fait de diffamer des groupes ciblés, et d'autre part, de décourager la communication de discours haineux afin de réduire la discrimination à l'endroit de ces groupes.

TAB 76

Federal Court



Cour fédérale

Date: 20250708

Docket: T-2722-23

Citation: 2025 FC 1213

Toronto, Ontario, July 8, 2025

PRESENT: Madam Justice Go

BETWEEN:

**BGIS GLOBAL INTEGRATED SOLUTIONS
CANADA LP**

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Halocarbons are greenhouse gases that contribute to depletion of the ozone layer and climate change. In Canada, Parliament enacted various statutory regimes, including the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 [EVAMPA], to minimize and/or reverse the harmful effect of human activities on the environment and to tackle climate change.

[86] As the SCC found in *Wigglesworth*, the fact that the fines collected in that case did not form part of the Consolidated Revenue Fund but were to be used for the benefit of the Royal Canadian Mounted Police made it more likely that the fines were purely an internal or private matter of discipline: *Wigglesworth* at 561. While I do not consider the Environmental Damages Fund to be private or internal in nature, the fact that the AMPs are credited to a specific fund, as opposed to the Consolidated Revenue Fund is another indicator that the nature of the proceedings under *EVAMPA* are not criminal in nature.

(b) *Are the AMPs a true penal consequence?*

[87] BGIS submits a true penal consequence is one that imposes “imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within [a] limited sphere of activity.” *Guindon* at para 46, citing *Wigglesworth* at 561 and *Martineau* at para 57. BGIS submits that the AMPs are a true penal consequence and the EPTC failed to consider the BGIS’s submissions to that effect.

[88] BGIS makes several arguments to support its position.

[89] First, BGIS submits that while the magnitude of the AMPs in this case is not so high as to be definitively punitive when considered without context, the penalty is a true penal consequence because achieving perfect compliance with no recurrence of the violation is impossible, making the penalty’s quantum disproportionate to the amount required to achieve regulatory purposes.

[90] BGIS further submits that the sentencing principle of deterrence is incorporated into the determination of the magnitude of penalties through a consideration of the recipient's history of non-compliance and any economic gain resulting from the non-compliance. BGIS submits that in the criminal law context, the SCC has defined deterrence as "the imposition of a sanction for the purpose of discouraging the offender and others from engaging in criminal conduct:" *R v BWP*; *R v BVN*, 2006 SCC 27 at para 2. It follows that the same principle should apply when considering the magnitude of penalties under *EVAMPR*. The magnitude of a penalty issued under *EVAMPA* can be increased for the amount of harm done to the environment, and the penalties are paid into the Environmental Damages Fund. According to BGIS, these factors indicate that the penalties are intended to some extent to provide reparation for harm done in a manner consistent with the principles of criminal sentencing.

[91] I am not persuaded by these arguments.

[92] As a starting point, I note that the SCC in *Guindon* observed that there is inevitably some overlap between the analysis of the purpose of the scheme and the purpose of the sanction although courts must look at both separately to the extent that is possible; however, the SCC also noted that situations in which a proceeding meets one but not both branches will be rare: *Guindon* at para 46.

[93] The SCC in *Guindon* dealt with penalties issued for false statements made under the *Income Tax Act*. While finding that the purpose of the proceedings in issue was to promote honesty and deter gross negligence, or worse, on the part of the preparers, the SCC found the

proceedings in question not to be criminal in nature and they did not lead to the imposition of true penal consequences. The SCC held:

[75] Administrative monetary penalties are designed as sanctions to be imposed through an administrative process. They are not imposed in a criminal proceeding. Thus, the issue of whether a person who is the subject of an ostensibly administrative regime is in reality “charged with an offence” is addressed by the second *Wigglesworth/Martineau* test: Does the sanction impose a true penal consequence? *Wigglesworth* teaches that a true penal consequence is imprisonment or a fine which, having regard to its magnitude and other relevant factors, is imposed to redress the wrong done to society at large rather than simply to secure compliance: see p. 561.

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

[95] As BGIS acknowledges, the penalty imposed in this case, \$5000 for each of the two violations, is not significant. During the House Debates, AMPs were described as “relatively low financial penalties that are appropriate enforcement tools for responding to violations of law that are relatively minor in nature.” In any event, as the parties agree, the magnitude of the penalty is not determinative on its own; even large penalties can be considered administrative, as opposed to criminal in nature: *Guindon* at para 77.

[96] I also note that in *Guindon*, the SCC considered whether deterrence could be a factor indicative of true penal consequences in that case and adopted the FCA's finding that the maximum penalty of \$100,000 plus the person's gross compensation "does not demonstrate a purpose extending beyond deterrence to denunciation and punishment of the offender for the 'wrong done to society': *Wigglesworth*, *supra*, at page 561. Rather, in light of the possibility of false statements going undetected, penalties of such magnitude are necessary to prevent them from being regarded as just 'another cost of doing business': *United States Steel [Corp.]*, *supra*, at paragraph 77. [para. 47]:" *Guindon* at para 87. In other words, that the fine in question may serve as a deterrence is also not relevant.

[97] I consider BGIS's further argument that it faces significant stigma with regard to these penalties, resulting in a true penal consequence. BGIS contends that the imposition of an AMP, even one with a relatively low monetary value, can be a deciding factor in BGIS's bid for Requests for Proposals [RFPs], which are highly competitive and through which BGIS secures the majority of its work. Further, the *EVAMPA* does not allow for the ability to request the removal of a violation from the records, which BGIS submits increases stigma — in contrast to the AMPs in another regime which were found to have no "stigma associated with the penalties as no criminal record is established and any notation of the violation in the records of the Minister can be removed by request after five years:" *Mario Côté Inc v Canada (Canadian Food Inspection Agency)*, 2015 CART 25 at para 36 [*Mario Côté*]. Finally, the protection of the environment has been found to be a fundamental value and as such, the imposition of penalties may have a serious detrimental impact on BGIS's reputation generally: *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40.

[98] I find little guidance from the jurisprudence on the issue of stigma, both in terms of the nature of the stigma, and the type of evidence the Courts may require from the party who is asserting the presence of stigma. From the case law, the Courts seem to use the term “stigma” as it attaches to criminal acts such as murder, theft and the like. The Courts has also noted the concept of “moral blameworthiness” that may justify the stigma, indicating a “moral” quality to the question of stigma: *Martineau* at paras 11-12.

[99] It may well be that, as more Canadians become concerned about climate change and attach ever greater importance to the need for environmental protection, there will be those who consider breaches of environmental law immoral and liken such breaches to criminal acts. However, in this case, other than stating there exists such social stigma, BGIS presents no evidence to support its assertion. As the Respondent points out, and I agree, the only evidence BGIS submitted to the EPTC about the impact of an AMP on BGIS related to its ability to win or lose a particular RPF thus implicating its financial interests. BGIS provided no evidence to the EPTC to establish social stigma, if any, that may be associated with the receipt of an AMP.

[100] Finally, just because *EVAMPA* does not allow for the ability to request the removal of a violation from the records, as BGIS submits, does not make AMP a true penal consequence. In *Mario Côté*, the fact that the notation of the violation in the records can be removed by request after five years was but one factor the member cited for finding the sanctions imposed are not true penal consequences. The member also noted the lack of imprisonment, the modest amounts of the fines, the fact that the magnitude of the fine is determined by statutory provisions and not

by principles of criminal sentencing, and the lack of stigma associated with the penalties as no criminal record is established.

[101] Other than the possibility of the removal of the records, all the other factors noted in *Mario Côté* are present in this case, thus leading to the conclusion that the AMPs do not amount to true penal consequences.

[102] Based on the above, I find that paragraph 11(d) of the *Charter* does not apply to the absolute liability regime under *EVAMPA* as it applies to paragraph 3(a) of the *FHR 2003*.

- (2) Did the EPTC err in finding that a mental element is necessary to engage the principles of fundamental justice under section 7 of the *Charter*?

[103] BGIS submits that the EPTC erroneously held that the absolute liability regime under *EVAMPA* does not offend the principles of fundamental justice because it requires no mental element. BGIS argues that a liability regime does not need to have a mental element for it to offend the principles of natural justice: *Re BC Motor Vehicle Act*, [1985] 2 SCR 486.

[104] BGIS further submits that the principles of fundamental justice under section 7 of the *Charter* are basic principles that underlie the notions of justice and fairness, citing *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 19 [*Charkaoui*], and that they find their meaning in the cases and traditions that form the basic norms for how the state deals with its citizens: *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4. BGIS adds that these principles include a guarantee of procedural

fairness, and that the central issue in determining whether the principles of natural justice have been observed is whether the process is fundamentally unfair to the affected person: *Charkaoui* at paras 19, 22. Finally, citing *R v City of Sault Ste. Marie*, [1978] 2 SCR 1299 [*Sault Ste. Marie*] at 1311-1312, BGIS reiterates that absolute liability violates “fundamental principles of penal liability” and that there is “generally held revulsion against punishment of the morally innocent.” *Sault Ste. Marie* at 1310.

[105] While I take no issues with the submissions BSIC makes on the principles of fundamental justice, their arguments on section 7 must fail due to one fundamental flaw, namely, BGIS fails to demonstrate any deprivation of life, liberty, or security of the person to trigger a section 7 analysis in the first place.

[106] As the SCC instructed in *R v White*, [1999] 2 SCR 417 at para 38, when a court is asked to determine whether section 7 has been infringed, the analysis consists of three stages. The first stage involves asking whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests. The second stage involves identifying and defining the relevant principle or principles of fundamental justice. At the final stage, the court must determine whether the deprivation has occurred in accordance with the relevant principle or principles.

[107] BGIS’s argument skips the first stage of the three-prong test. At the hearing, I asked BGIS to clarify which one of their section 7 interests is engaged in this case. Counsel for BGIS

did not address my question directly but merely reiterated that there are principles of fundamental justice at stake.

[108] Without demonstrating how BGIS's section 7 interests have been engaged by the absolute liability regime under the *EVAMPA*, there is no need for the EPTC, and now the Court, to consider whether the regime offends the fundamental principles under section 7 of the *Charter*.

C. *What is the appropriate remedy?*

[109] Given my findings above, I need not address the parties' argument on section 1 of the *Charter*. BGIS's application is dismissed.

V. Conclusion

[110] The application for judicial review is dismissed.

VI. Costs

[111] The parties will have 30 days from the date of this decision to make their submissions on costs.

TAB 77

Her Majesty The Queen *Appellant*

v.

Orval Stuart Finlay *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General of British Columbia and the Attorney General for Alberta *Interveners*

INDEXED AS: R. v. FINLAY

File No.: 22596.

1992: October 15; 1993: September 9.

Present: Lamer C.J. and L'Heureux-Dubé, Sopinka, Cory and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Charter of Rights — Fundamental justice — Mens rea — Criminal Code prohibiting storing of firearms or ammunition "in a careless manner" — Whether offence satisfies minimum fault requirements under s. 7 of Canadian Charter of Rights and Freedoms — Criminal Code, R.S.C., 1985, c. C-46, s. 86(2).

Criminal law — Mens rea — Criminal Code prohibiting storing of firearms or ammunition "in a careless manner" — Whether offence satisfies minimum fault requirements under s. 7 of Canadian Charter of Rights and Freedoms — Criminal Code, R.S.C., 1985, c. C-46, s. 86(2).

The accused was charged with storing firearms and ammunition in a careless manner, contrary to s. 86(2) of the *Criminal Code*. He was granted a stay of proceedings in Provincial Court, on the basis that s. 86(2) violated s. 7 of the *Canadian Charter of Rights and Freedoms* in a manner that could not be justified under s. 1 of the *Charter*. The Court of Queen's Bench reversed this judgment and ordered that the matter proceed to trial. It found that since the defence of due diligence was

Sa Majesté la Reine *Appelante*

c.

^a **Orval Stuart Finlay** *Intimé*

et

^b **Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général du Manitoba,**
^c **le procureur général de la Colombie-Britannique et le procureur général de l'Alberta** *Intervenants*

RÉPERTORIÉ: R. c. FINLAY

^d

N^o du greffe: 22596.

1992: 15 octobre; 1993: 9 septembre.

^e Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Sopinka, Cory et McLachlin.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

^f *Droit constitutionnel — Charte des droits — Justice fondamentale — Mens rea — Le Code criminel interdit l'entreposage d'armes à feu ou de munitions «d'une manière négligente» — L'infraction satisfait-elle à l'exigence minimale en matière de faute aux termes de l'art. 7 de la Charte canadienne des droits et libertés? — Code criminel, L.R.C. (1985), ch. C-46, art. 86(2).*

^h *Droit criminel — Mens rea — Le Code criminel interdit l'entreposage d'armes à feu ou de munitions «d'une manière négligente» — L'infraction satisfait-elle à l'exigence minimale en matière de faute aux termes de l'art. 7 de la Charte canadienne des droits et libertés? — Code criminel, L.R.C. (1985), ch. C-46, art. 86(2).*

L'inculpé a été accusé d'avoir entreposé des armes à feu et des munitions d'une manière négligente, en contravention du par. 86(2) du *Code criminel*. Il a obtenu un arrêt des procédures en cour provinciale, pour le motif que le par. 86(2) du *Code* viole l'art. 7 de la *Charte canadienne des droits et libertés* d'une manière dont la justification ne peut pas se démontrer en vertu de l'article premier de la *Charte*. La Cour du Banc de la Reine a infirmé ce jugement et a ordonné la tenue du procès.

an acceptable basis of liability which meets the fault requirement of s. 7 of the *Charter*.

The objective test for negligence is discussed in *R. v. Gosset*, [1993] 3 S.C.R. 76, released this same day. In *Gosset*, I found that the proper interpretation of the fault element under s. 86(2) is conduct that constitutes a marked departure from the standard of care of a reasonably prudent person. If a reasonable doubt exists either that the conduct in question did not constitute a marked departure from that standard of care, or that reasonable precautions were taken to discharge the duty of care in the circumstances, a verdict of acquittal must follow. In *Gosset*, I found that the objective assessment of fault also had to consider the capacity of an accused to meet the standard of care required in the circumstances, and the accused's ability to control or compensate for his or her incapacities. There is, however, no "reverse onus" on an accused to establish on the balance of probabilities that he or she exercised due diligence in order to negate a finding of fault under s. 86(2).

As I indicate in *Gosset*, civil negligence and "penal" negligence must be distinguished from one another. In the context of penal negligence, where a finding of carelessness may result in imprisonment, the assessment of liability is no longer directed, as it is in the civil context, to the apportionment of loss; rather, that assessment has become linked to the punishment of morally blameworthy conduct, in order to avoid punishing those who could not have acted other than they did.

In order to conform with the principle of fundamental justice that the morally innocent not be deprived of liberty, the objective assessment of fault under s. 86(2) must allow for the existence of a reasonable doubt as to either the sufficiency of the precautions taken by the accused to avoid the creation of risk, or the capacity of the accused to meet the standard of care of a reasonably prudent

gence peut constituer un fondement acceptable de responsabilité qui satisfait à l'exigence en matière de faute que prévoit l'art. 7 de la *Charte*.

a Le critère objectif de la négligence est étudié dans l'arrêt *R. c. Gosset*, [1993] 3 R.C.S. 76, rendu simultanément. Dans cet arrêt, j'ai conclu que l'interprétation adéquate de l'élément de faute en vertu du par. 86(2) est la conduite qui constitue un écart marqué par rapport à la norme de diligence qu'observerait une personne raisonnablement prudente. S'il existe un doute raisonnable soit que la conduite en question ne constituait pas un écart marqué par rapport à la norme de diligence, soit que les précautions raisonnables ont été prises pour s'acquitter de l'obligation de diligence dans les circonstances, il faut prononcer un verdict d'acquittement. Dans *Gosset*, j'ai conclu que l'évaluation objective de la faute devait également prendre en considération la capacité d'un accusé de satisfaire à la norme de diligence requise dans les circonstances et sa possibilité de contrôler ou de compenser ses lacunes. Il n'y a toutefois pas d'«inversion de la charge de la preuve» qui imposerait à un accusé d'établir selon la prépondérance des probabilités qu'il a exercé une diligence raisonnable permettant d'écarter une imputation de faute en vertu du par. 86(2).

Comme je l'indique dans l'arrêt *Gosset*, il faut faire une distinction entre la négligence civile et la négligence «pénale». Dans le contexte de la négligence pénale, où une conclusion d'insouciance peut entraîner une peine d'emprisonnement, l'évaluation de la responsabilité ne va plus, comme c'est le cas en matière civile, dans le sens de la répartition de la perte; cette évaluation se rattache plutôt à la sanction de la conduite moralement blâmable, afin d'éviter de punir les personnes qui n'auraient pu agir autrement.

Pour être conforme au principe de justice fondamentale voulant que la personne moralement innocente ne soit pas privée de sa liberté, l'évaluation objective de la faute en vertu du par. 86(2) doit permettre que l'existence d'un doute raisonnable quant à savoir si l'accusé a pris suffisamment de précautions pour éviter de créer des risques ou s'il avait la capacité de satisfaire à la norme de dili-

person in the circumstances to result in an acquittal. Based on the interpretation of this section in *R. v. Gosset* set out above, I find s. 86(2) satisfies the minimum fault requirement under s. 7.

(2) Stigma Analysis

The only remaining question, therefore, is to determine whether the social stigma which attaches to a conviction under this provision is sufficiently grave to warrant imposing a subjective fault requirement for s. 86(2) of the *Code*. This analysis must consider both the gravity of the offence and the moral blameworthiness of a person who engages in such conduct. As a supplemental factor, the penalties to which the offence gives rise should also be considered.

Section 86(2) renders a person convicted liable to imprisonment for up to two years for a first offence, and up to five years for a second offence. In *Wholesale Travel Group Inc.*, *supra*, where the Court was considering a statute which also provided for up to five years' imprisonment, I concluded the following (at p. 185):

A conviction for false/misleading advertising will rest on a variety of facts, many of which will not reveal any dishonesty but, rather, carelessness and the conviction of same does not brand the accused as being dishonest. [Emphasis added.]

In my view, applying this same reasoning to s. 86(2) of the *Code*, given the nature of the offence, the absence of any proof of advertence in the imposition of a conviction, and the range of punishment upon conviction, there is not sufficient stigma arising from a conviction under s. 86(2) to require a subjective *mens rea*.

The stigma attaching to a conviction under s. 86(2) has been recently examined by Arbour J.A.

gence qu'observerait une personne raisonnablement prudente dans les circonstances donne lieu à un acquittement. En me fondant sur l'interprétation que j'en ai donnée dans l'arrêt *R. c. Gosset*, je conclus que le par. 86(2) satisfait à l'exigence minimale en matière de faute que prévoit l'art. 7.

(2) L'analyse relative aux stigmates

Il ne reste donc qu'à déterminer si les stigmates sociaux qui se rattachent à une déclaration de culpabilité prononcée en vertu de cette disposition sont suffisamment graves pour justifier l'imposition d'une exigence subjective en matière de faute dans le cas du par. 86(2) du *Code*. Cette analyse doit prendre en considération à la fois la gravité de l'infraction et le caractère moralement blâmable qui se rattache à une personne qui a adopté une telle conduite. À titre de facteur supplémentaire, il faudrait également tenir compte des peines auxquelles l'infraction peut donner lieu.

Le paragraphe 86(2) rend la personne reconnue coupable passible d'un emprisonnement maximal de deux ans dans le cas d'une première infraction et de cinq ans dans le cas d'une deuxième infraction. Dans l'arrêt *Wholesale Travel Group Inc.*, précité, où la Cour examinait une loi qui prévoyait également un emprisonnement maximal de cinq ans, j'ai conclu (à la p. 185):

Dans le cas de la publicité fausse ou trompeuse, la déclaration de culpabilité repose sur divers faits, dont un bon nombre ne participent pas de la malhonnêteté, mais plutôt de l'insouciance, et la déclaration de culpabilité à cet égard ne donne pas à l'accusé l'étiquette de la malhonnêteté. [Je souligne.]

À mon avis, si l'on applique le même raisonnement au par. 86(2) du *Code*, étant donné la nature de l'infraction, l'absence de toute preuve que l'accusé a agi consciemment lorsqu'une déclaration de culpabilité est prononcée et l'étendue de la peine en cas de déclaration de culpabilité, il n'y a pas suffisamment de stigmates qui découleraient d'une déclaration de culpabilité prononcée en vertu de ce paragraphe pour exiger une *mens rea* subjective.

Les stigmates qui se rattachent à une déclaration de culpabilité prononcée en vertu du par. 86(2) ont

in *R. v. Durham*, *supra*, at pp. 611-12. Arbour J.A. offered the following observations regarding the importance of the standard of fault in the analysis of social stigma, at p. 612:

A conviction for careless storage of a firearm, known to comport no subjective awareness of the risk created by the conduct, and otherwise not associated with any other form of social deviance, would not carry the same stigma as a conviction for careless use of a firearm by a person shown to have deliberately created or undertaken a substantial and unjustifiable risk, with full awareness of the danger created. Aside from the basic assertion that every criminal conviction generates a significant social stigma, which is true as far as it goes, the more precise appreciation of what distinguishes the stigma attached to a conviction for fraud, from the stigma of a conviction for sexual assault, possession of counterfeit money or careless storage of a firearm, depends on a multitude of factors, including not only the social repugnance of the conduct, but the degree of fault with which it is committed.

After taking into account these factors, Arbour J.A. concluded that s. 86(2) of the *Code* does not give rise to sufficient social stigma to require a subjective *mens rea* under s. 7 of the *Charter*. I agree with this conclusion.

VI. Disposition

Based on the above analysis, I would answer the constitutional questions as follows:

1. Does s. 86(2) of the *Criminal Code*, R.S.C., 1985, c. C-46, infringe or deny the right to life, liberty and security of the person, and the right not to be deprived of that right, except in accordance with the principles of fundamental justice, as guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

été examinés récemment par le juge Arbour dans l'arrêt *R. c. Durham*, précité, aux pp. 611 et 612. Celle-ci a fait les remarques suivantes en ce qui concerne l'importance de la norme de faute dans l'analyse des stigmates sociaux, à la p. 612:

[TRADUCTION] Une déclaration de culpabilité pour entreposage d'une arme à feu d'une manière négligente, qui est reconnue comme ne comportant pas une conscience subjective des risques que cette conduite entraînait et qui n'est par ailleurs associée à aucune autre forme de déviation sociale, n'engendrerait pas les mêmes stigmates qu'une déclaration de culpabilité pour utilisation d'une arme à feu d'une manière négligente par une personne dont il serait prouvé qu'elle a délibérément créé ou pris un risque grave et injustifiable, tout en étant tout à fait consciente du danger créé. À part l'affirmation de base selon laquelle toute déclaration de culpabilité en matière criminelle engendre des stigmates sociaux importants, ce qui est vrai en soi, l'évaluation plus précise de ce qui distingue les stigmates qui se rattachent à la déclaration de culpabilité pour fraude de la déclaration de culpabilité pour agression sexuelle, possession de monnaie contrefaite ou entreposage d'une arme à feu d'une manière négligente, dépend d'une multitude de facteurs, y compris non seulement la répugnance de la société pour la conduite en question, mais le degré de faute avec lequel celle-ci est adoptée.

Après avoir pris ces facteurs en considération, le juge Arbour a conclu que le par. 86(2) du *Code* n'entraîne pas suffisamment de stigmates sociaux pour exiger une *mens rea* subjective en conformité avec l'art. 7 de la *Charte*. Je souscris à cette conclusion.

VI. Dispositif

Compte tenu de l'analyse ci-dessus, je suis d'avis de répondre aux questions constitutionnelles de la façon suivante:

1. Le paragraphe 86(2) du *Code criminel*, L.R.C. (1985), ch. C-46, porte-t-il atteinte au droit à la vie, à la liberté et à la sécurité de sa personne et à celui de ne se voir porter atteinte à ce droit qu'en conformité avec les principes de justice fondamentale, que garantit l'art. 7 de la *Charte canadienne des droits et libertés*?

Réponse: Non.

TAB 78

**Regina v. Durham
Regina v. Stratigeas
[Indexed as: R. v. Durham; R. v. Stratigeas]**

**10 O.R. (3d) 596
[1992] O.J. No. 1951
Action No. 670/91 and 791/91**

**Court of Appeal for Ontario,
Brooke, Arbour and Doherty JJ.A.
September 22, 1992**

Charter of Rights and Freedoms -- Fundamental justice -- Section 86(2) of Criminal Code creating offence of careless use or storage of firearms -- Offence being regulatory offence rather than true crime -- Stigma attached to conviction not great -- Mens rea requirement of s. 86(2) not violating s. 7 of Charter -- Canadian Charter of Rights and Freedoms, s. 7 -- Criminal Code, R.S.C. 1985, c. C-46, s. 86(2).

In two separate cases, the trial judges ordered the stay of a charge of careless storage or careless use of a firearm contrary to s. 86(2) of the Criminal Code on the basis that that subsection violated s. 7 of the Canadian Charter of Rights and Freedoms. It was held that s. 86(2) imposed criminal liability on the basis of a civil standard of negligence, that the minimum degree of fault associated with civil negligence was not sufficient to attract liability for a true crime where foreseeability of consequences forms an essential element of the offence, and that foreseeability of consequences formed an essential element of the offence in s. 86(2). It was further held that no person should be stigmatized to the extent that they would be if convicted under s. 86(2) on the basis of a minimum fault amounting to no more than civil negligence. The Crown appealed.

Held, the appeal should be allowed.

None of the modes of commission of the offence in s. 86(2) requires proof of any consequence. In any event, the presence of a consequence in the definition of the crime is not determinative of the fault analysis for the purpose of s. 7 of the Charter.

If the decision of the Supreme Court of Canada in *R. v. Nova Scotia Pharmaceutical Society* means that proof of conduct amounting to civil negligence is sufficient to meet the constitutional requirement of fault for all criminal offences, save murder, attempted murder, and the like, s. 86(2) is constitutionally unimpeachable. In any event, as the Supreme Court jurisprudence presently stands, the constitutional validity of s. 86(2) can be safely affirmed if either (a) the section creates a mere regulatory offence, rather than a true crime, or (b) the offence does not carry the special stigma that compels subjective mens rea.

Section 86(2) is part of an overall regulatory scheme whereby a duty was imposed on all persons in possession of firearms to handle, store and use their weapons carefully. As s. 86(2) is directed

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

Detailed regulations, presented to us in draft form, provide for the storage of firearms, distinguishing between restricted and non-restricted firearms.

As the law presently stands, I think that s. 86(2) is directed to the regulated, although not necessarily the licensed, defendant. Consequently, it should be classified as a regulatory offence for which nothing more than a defence of due diligence is constitutionally required. Looking at the section in context, it is clearly part and parcel of the entire field of gun control regulation which the federal government has occupied, more or less, in part through a licensing-type form of control, in part through outright prohibitions, and, in the case of s. 86(2), through punishing negligence. Although enacted solely on the strength of the federal criminal law power contained in s. 91(27) of the Constitution Act, 1867, gun control has undeniably a strong regulatory base. This dual aspect of the legislation was embodied in the comments of Chief Justice Dickson in *Schwartz*, supra, where he said, at p. 117 C.C.C., p. 470 S.C.R.:

It [Part III of the Code] embodies wholly legitimate societal concerns for stricter regulation and control of guns and other offensive weapons.

Yet he added, at p. 119 C.C.C., pp. 471-72 S.C.R.:

The Code thus contains . . . "a comprehensive 'gun control' legislative scheme intended to discourage the use of firearms by the criminal element of our society".

There is obviously enough of a criminal underpinning to the gun control legislation to have it validly enacted by Parliament under its criminal law power, and for the entire legislation to have found its place in the Criminal Code. On the other hand, along with the gaming provisions, Part III of the Code stands out as a largely administrative scheme, which regulates an often legitimate activity which happens to have a strong historical link with crime. In that context, had it been the sole criterion applicable, I would have concluded that it was open to Parliament, without infringing s. 7 of the Charter, to impose liability on the civil standard of negligence for careless use or storage of firearms, as part of its effort to regulate and control the possession and handling of firearms. As stated above, in light of the various opinions expressed in *Wholesale Travel*, supra, I believe that I should conduct an alternative analysis and examine whether the stigma attached to a conviction for that offence is such as to dictate a higher constitutionally mandated standard.

(e) The stigma attached to conviction

Generally speaking, there is likely to be more stigma attached to a criminal conviction than to the violation of a non-criminally related statute. Yet not all criminal offences carry the same amount of stigma. The stigma is proportional not only to the gravity of the conduct and of its consequences, but to the level of fault, represented by the mental element, with which the act or

omission was performed. This can be no better illustrated than by comparing the difference between a conviction for murder and a conviction for manslaughter. In the same way, the social stigma attached to a conviction for careless use or storage of a firearm will adjust over time to reflect an understanding of the gravity of the conduct, which in turn will be determined by the degree of fault, the moral blameworthiness of the offender. The social stigma comes not only from the fact of a criminal conviction, with its attendant criminal record, fingerprinting etc., but from the likelihood of imprisonment, the possibility of a penitentiary term, rather than a mere reformatory one, being imposed, and the association of the crime with other forms of social deviance. Therefore, in determining the degree of stigma likely to attach to a conviction for careless use of a firearm, it is important to take into account the mental element of the offence. A conviction for careless storage of a firearm, known to comport no subjective awareness of the risk created by the conduct, and otherwise not associated with any other form of social deviance, would not carry the same stigma as a conviction for careless use of a firearm by a person shown to have deliberately created or undertaken a substantial and unjustifiable risk, with full awareness of the danger created. Aside from the basic assertion that every criminal conviction generates a significant social stigma, which is true as far as it goes, the more precise appreciation of what distinguishes the stigma attached to a conviction for fraud, from the stigma of a conviction for sexual assault, possession of counterfeit money or careless storage of a firearm, depends on a multitude of factors, including not only the social repugnance of the conduct, but the degree of fault with which it is committed.

It is constitutionally impermissible for Parliament to treat as murder a conduct devoid of the essential characteristic upon which the stigmatization of murderers came to be based, the moral turpitude represented by the intention to kill. In the same way, if it is his dishonesty that stigmatizes the convicted thief, Parliament will not be permitted, absent justification under s. 1 of the Charter, to brandish as a thief someone who has not been shown to be dishonest. In my opinion, this is the extent to which cases such as *Vaillancourt*, supra, and *Reference re S. 94(2) of the Motor Vehicle Act*, supra, compel the consideration of stigma as a factor from which compliance with s. 7 may be determined. Even though a person convicted of an offence under s. 86(2) of the Code will carry the stigma of having a criminal conviction, that is not sufficient to dictate that the offence must contain a subjective mental element.

IV CONCLUSION

If *Nova Scotia Pharmaceutical*, supra, means that proof of negligent conduct is sufficient to meet the constitutional requirement of fault for all criminal offences, save murder, attempted murder and the like, s. 86(2) is constitutionally unimpeachable. In any event, I find that s. 86(2) creates an offence which has a significant regulatory component and which does not carry the special stigma associated with the highest form of deviance, accompanied by the equivalent highest degree of moral blameworthiness. The desirability of requiring that guilt be dependent on a subjective state of mind is, in that case, a matter of legislative choice, not a constitutional imperative. Having found no violation of s. 7, I find it unnecessary to engage in a s. 1 analysis.

With the greatest respect for those who have expressed a contrary view, I have concluded that in both appeals before us the trial judges erred in declaring s. 86(2) of the Criminal Code unconstitutional and in staying the proceedings against the respondents. Both appeals are

TAB 79

**Her Majesty The Queen on the information
of Mark Caswell** *Appellant*;

and

**The Corporation of The City of Sault Ste.
Marie** *Respondent*.

1977: October 13, 14; 1978: May 1.

Present: Laskin C.J. and Martland, Ritchie, Spence,
Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

*Criminal law — Public welfare offences — Mens rea
— Reasonable mistake as a defence — Scope of
defence of due diligence — Offences not requiring proof
of mens rea but not strict liability offences.*

*Criminal law — Duplicity — Water pollution —
Provision prohibiting discharging or depositing or caus-
ing or permitting discharge that may impair water
quality — Test for duplicity — The Ontario Water
Resources Commission Act, R.S.O. 1970, c. 332, s.
32(1) — Criminal Code, ss. 724, 731.*

The respondent City entered into an agreement with a company for the disposal of all refuse originating in the City. The company was to furnish a site and adequate labour, material and equipment. The site selected bordered Cannon Creek which runs into Root River. The method of disposal adopted was the "area" or "continuous slope" method of sanitary land fill, whereby garbage is compacted in layers which are covered each day by natural sand or gravel. The site had previously been covered with a number of fresh water springs that flowed into the creek. Material was dumped to submerge these springs and the garbage and wastes dumped over this material, ultimately to within twenty feet of the creek. Pollution resulted and the company was convicted of a breach of s. 32(1) of *The Ontario Water Resources Commission Act*. The City also charged under that section, which provides that every municipality or person that discharges, or deposits, or causes, or permits the discharge or deposit of any material of any kind into any water course, or on any shore or bank thereof is guilty of an offence. In dismissing the charge against the City the trial judge found that the City had nothing to do with the actual operations, that the company was an independent contractor and that its employees were not employees of the City. On appeal by trial *de novo* the judge found that the offence was one of

**Sa Majesté La Reine sur la dénonciation de
Mark Caswell** *Appelante*;

et

**La Corporation de la ville de Sault
Ste-Marie** *Intimée*.

1977: 13 et 14 octobre; 1978: 1^{er} mai.

Présents: Le juge en chef Laskin et les juges Martland,
Ritchie, Spence, Pigeon, Dickson, Beetz, Estey et Pratte.

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

*Droit criminel — Infraction contre le bien-être public
— Mens rea — Défense fondée sur l'erreur raisonnable
de fait — Portée de la défense de diligence raisonnable
— Infractions ne requérant pas une preuve de mens rea
mais n'étant pas de responsabilité stricte.*

*Droit criminel — Accusation double ou multiple —
Pollution de l'eau — Interdiction de décharger, déposer
ou de faire décharger ou déposer ou de permettre de
décharger ou de déposer des matières qui risquent
d'altérer la qualité de l'eau — Critère pour déterminer
si une accusation est multiple — The Ontario Water
Resources Commission Act, S.R.O. 1970, chap. 332,
par. 32(1) — Code criminel, art. 724 et 731.*

La ville intimée a conclu avec une compagnie un contrat pour l'élimination de tous les déchets de la ville. Aux termes du contrat, la compagnie devait fournir un emplacement ainsi que la main-d'œuvre et le matériel nécessaires. L'emplacement choisi était en bordure du ruisseau Cannon qui se jette dans la rivière Root. La compagnie a adopté la méthode de décharge contrôlée dite «de remblayage systématique et continue», consistant à répandre les déchets, à les tasser en couches qui sont recouvertes quotidiennement de sable et de gravier. Avant cela, il y avait à cet endroit plusieurs sources d'eau potable qui coulaient dans le ruisseau. On a recouvert et enfoui ces sources avec des matériaux, pour y déposer ensuite les ordures et les déchets, jusqu'à environ vingt pieds du ruisseau. D'où la pollution. La compagnie a été déclarée coupable de violation du par. 32(1) de *The Ontario Water Resources Commission Act*. Une accusation fondée sur le même paragraphe a également été portée contre la ville. Aux termes de ce paragraphe, est coupable d'une infraction toute municipalité ou personne qui décharge, dépose ou fait décharger ou déposer ou permet de décharger ou de déposer dans un cours d'eau ou sur une de ses rives, ou en tout endroit, des matières de quelque nature que ce soit qui risquent d'altérer la qualité de l'eau. En rejetant l'accusation en première instance, le juge a conclu que la ville

more, although not determinative, it is not irrelevant that the information has been laid in the precise words of the section.

I am satisfied that the Legislature did not intend to create different offences for polluting, dependent upon whether one deposited, or caused to be deposited, or permitted to be deposited. The legislation is aimed at one class of offender only, those who pollute.

In *R. v. Matspeck Construction Co. Ltd.*¹⁴, Hughes J. considered the very section now under study and, adopting the approach I favour, concluded that the charge was not duplicitous. The judge said, at p. 732:

There can be no doubt in the mind of accused that he is charged with having in one mode or another, discharged or deposited material into water and that this material may have impaired its quality.

On the other hand, in the English case of *Ross Hillman Limited v. Bond*¹⁵, where very similar language was used, May J. said, p. 291, that the *Act* (in that case s. 40 (5)(b) of the *Road Traffic Act, 1972*) created three distinct types of offence. I think that the authority of the English cases in this area of the law must be carefully considered and their aid discounted to the extent that the statutory provisions applicable differ from those contained in our *Code*.

I conclude that the charge in this case is not duplicitous. It is unnecessary, therefore, to consider whether a defendant can raise a duplicity objection for the first time on appeal.

The Mens Rea Point

The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental

soit pas déterminant, il n'est pas sans intérêt de relever que la dénonciation a été formulée dans les termes mêmes du paragraphe en question.

Je suis convaincu que la Législature n'a pas voulu créer différentes infractions par pollution, selon qu'on a déposé, fait déposer ou permis de déposer des déchets. La législation vise une catégorie de coupables seulement: ceux qui polluent.

Dans l'arrêt *R. v. Matspeck Construction Co. Ltd.*¹⁴, le juge Hughes a examiné l'article en question ici et, adoptant l'approche que je préconise, a conclu qu'il n'y avait pas d'accusation multiple. Le juge a dit, à la p. 732:

[TRADUCTION] L'accusé ne peut nullement douter qu'il est accusé d'avoir, d'une manière ou d'une autre, déchargé ou déposé des matières dans l'eau et que ces matières peuvent en avoir altéré la qualité.

En revanche, dans l'arrêt anglais, *Ross Hillman Limited v. Bond*¹⁵, où l'on trouve des expressions très similaires, le juge May a dit, à la p. 291, que la *Loi* (dans ce cas, l'al. 40(5)b) de la *Road Traffic Act, 1972*) créait trois genres d'infractions. Je pense qu'on doit soigneusement évaluer la portée de la jurisprudence anglaise dans ce domaine du droit et la tempérer dans la mesure où les dispositions législatives applicables sont différentes de celles de notre *Code*.

Je conclus qu'en l'espèce, il ne s'agit pas d'une accusation multiple. Il est, en conséquence, inutile d'examiner la question de savoir si un défendeur peut opposer la multiplicité pour la première fois en appel.

La question de la mens rea

La distinction entre l'infraction criminelle réelle et l'infraction contre le bien-être public est de première importance. Dans le cas d'une infraction criminelle, le ministère public doit établir un élément moral, savoir, que l'accusé qui a commis l'acte prohibé l'a fait intentionnellement ou sans se soucier des conséquences, en étant conscient des faits constituant l'infraction ou en refusant volontairement de les envisager. L'élément moral exigé

¹⁴ [1965] 2 O.R. 730.

¹⁵ [1974] 2 All E.R. 287.

¹⁴ [1965] 2 O.R. 730.

¹⁵ [1974] 2 All E.R. 287.

element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

In sharp contrast, "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the *actus reus* of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such.

Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent.

Public welfare offences evolved in mid-nineteenth century Britain: (*R. v. Woodrow*¹⁶ and *R. v. Stephens*¹⁷) as a means of doing away with the requirement of *mens rea* for petty police offences. The concept was a judicial creation, founded on expediency. That concept is now firmly imbedded in the concrete of Anglo-American and Canadian jurisprudence, its importance heightened by the every-increasing complexities of modern society.

Various arguments are advanced in justification of absolute liability in public welfare offences. Two predominate. Firstly, it is argued that the protection of social interests requires a high standard of care and attention on the part of those who follow certain pursuits and such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them. The removal of any possible loophole acts, it is said, as an incentive to take precaution-

pour qu'il y ait condamnation exclut la simple négligence. Dans le contexte d'une poursuite criminelle, est innocente aux yeux de la loi la personne qui néglige de demander les renseignements dont s'enquerrait quelqu'un de raisonnable et de prudent ou qui ne connaît pas des faits qu'elle devrait connaître.

Par contre la «responsabilité absolue» entraîne condamnation sur la simple preuve que le défendeur a commis l'acte prohibé qui constitue l'*actus reus* de l'infraction. Aucun élément moral n'est nécessaire. On ne peut plaider que l'accusé n'a commis aucune faute. Il peut être moralement innocent sous tous rapports et malgré cela être traité de criminel et puni comme tel.

Les infractions contre le bien-être public mettent manifestement en jeu des valeurs contradictoires. Il est essentiel que la société maintienne, par un contrôle efficace, un haut niveau d'hygiène et de sécurité publiques. Il faut sérieusement prendre en considération les victimes potentielles de ceux qui exercent des activités comportant un danger latent. En revanche, on répugne généralement à punir celui qui est moralement innocent.

Les infractions contre le bien-être public sont nées en Angleterre au milieu du 19^e siècle (*R. v. Woodrow*¹⁶ et *R. v. Stephens*¹⁷) comme moyens de se débarrasser de la *mens rea* en matière de contraventions de simple police. Le concept était une création judiciaire fondée sur des raisons de commodité. Il est maintenant fermement ancré dans les jurisprudences anglo-américaine et canadienne et son importance s'est accrue avec la complexité grandissante de la société moderne.

On avance divers arguments pour justifier la responsabilité absolue en matière d'infractions contre le bien-être public. Deux d'entre eux prédominent. Premièrement, on allègue que la protection des intérêts sociaux exige que les personnes qui poursuivent certaines activités respectent des normes élevées de diligence et de prudence, et qu'elles seront probablement incitées à les respecter si elles savent que l'ignorance ou l'erreur ne les excuseront pas. On dit que la suppression de toute

¹⁶ (1846), 15 M. & W. 404.

¹⁷ (1866), L.R. 1 Q.B. 702.

¹⁶ (1846), 15 M. & W. 404.

¹⁷ (1866), L.R. 1 Q.B. 702.

TAB 80

A-106-05
2006 FCA 233

A-106-05
2006 CAF 233

Commissioner of Competition (*Appellant*)

La commissaire de la concurrence (*appelante*)

v.

c.

Canada Pipe Company Ltd./Tuyauteries Canada Ltée (*Respondent*)

Tuyauteries Canada Ltée/Canada Pipe Company Ltd. (*intimée*)

INDEXED AS: CANADA (COMMISSIONER OF COMPETITION) v. CANADA PIPE CO. (F.C.A.)

RÉPERTORIÉ: CANADA (COMMISSAIRE DE LA CONCURRENCE) c. TUYAUTERIES CANADA LTÉE (C.A.F.)

Federal Court of Appeal, Desjardins, Létourneau and Pelletier JJ.A.—Ottawa, February 7, 9 and June 23, 2006.

Cour d'appel fédérale, juges Desjardins, Létourneau et Pelletier, J.C.A.—Ottawa, 7 et 9 février et 23 juin 2006.

Competition — Appeal from Competition Tribunal's decision dismissing application by Competition Commissioner for order prohibiting respondent from engaging in certain acts, practices — Respondent offering loyalty rebate program — Appellant arguing this program constituting practice of exclusive dealing (Competition Act, s. 77(2)), anti-competitive acts leading to abuse of dominant position (Act, s. 79(1)) — Appeal allowed — With respect to abuse of dominant position, Tribunal erring as to test applicable under s. 79(1)(c) — Tribunal conducted analysis from narrow, absolute perspective of whether program prevented entry, competition when should have addressed whether competitiveness substantially lessened in presence of program — Tribunal also wrong to say s. 79(1)(b) (engaging in anti-competitive acts) requiring causal link between impugned act and decrease in competition — S. 79(1)(b) concerning narrower focus of impugned act's effects on competitors — Valid business justification for impugned act not established — As to question of exclusive dealing, Tribunal adopting same approach as under s. 79(1) — As such, findings re: errors of law made under s. 79(1) also applying under s. 77(2).

This was an appeal from a decision of the Competition Tribunal dismissing an application by the Commissioner of Competition (Commissioner) under sections 77 and 79 of the *Competition Act* for an order prohibiting the respondent (Canada Pipe) from engaging in the practice of anti-competitive acts leading to an abuse of dominant position (section 79), and prohibiting the respondent from continuing to engage in the practice of exclusive dealing (section 77).

Concurrence — Appel d'une décision par laquelle le Tribunal de la concurrence a rejeté la demande formée par la commissaire de la concurrence en vue d'obtenir une ordonnance interdisant à l'intimée de se livrer à certaines pratiques — L'intimée offrait un programme de fidélisation de sa clientèle — L'appelante affirmait que ce programme constituait une pratique d'exclusivité (art. 77(2) de la Loi sur la concurrence) ainsi qu'une pratique d'agissements anti-concurrentiels constituant un abus de position dominante (art. 79(1) de la Loi) — Appel accueilli — Pour ce qui concerne l'abus de position dominante, le Tribunal a commis une erreur dans son approche du critère juridique applicable sous le régime de l'art. 79(1)c) — Le Tribunal a effectué son analyse du point de vue étroit et absolu de la question de savoir si le programme avait empêché l'entrée et la concurrence lorsqu'il aurait dû orienter son attention vers la question de savoir si la concurrence se trouvait sensiblement diminuée avec le programme — Le Tribunal a également déclaré à tort que l'art. 79(1)b) (agissements anti-concurrentiels) exigeait un lien de causalité entre la pratique attaquée et une diminution de la concurrence — L'art. 79(1)b) est orienté vers les effets de l'agissement sur les concurrents — Il n'y avait pas de justification commerciale valable — Pour ce qui concerne la pratique d'exclusivité, le Tribunal a adopté la même approche que celle qu'il a appliquée à l'art. 79(1) — Ainsi, les conclusions quant aux erreurs de droit commises dans le contexte de l'art. 79(1) s'appliquaient aussi relativement à l'art. 77(2).

Il s'agissait d'un appel d'une décision par laquelle le Tribunal de la concurrence a rejeté la demande formée par la commissaire de la concurrence (la commissaire) sous le régime des articles 77 et 79 de la *Loi sur la concurrence* en vue d'obtenir une ordonnance interdisant à l'intimée (Tuyauteries Canada) de se livrer à une pratique comprenant des agissements anti-concurrentiels et constituant un abus de position dominante (article 79), et lui interdisant de continuer à se livrer à la pratique de l'exclusivité (article 77).

these effects do not manifest through a negative effect on a competitor. It is important to recognize that “anti-competitive” therefore has a restricted meaning within the context of paragraph 79(1)(b). While, for the Act as a whole, “competition” has many facets as enumerated in section 1.1, for the particular purposes of paragraph 79(1)(b), “anti-competitive” refers to an act whose purpose is a negative effect on a competitor.

[69] Adopting this interpretive approach to section 79, it is conceivable that a practice might be found to be composed of anti-competitive acts within the meaning of paragraph 79(1)(b), but at the same time, for the purposes of paragraph 79(1)(c), be held not to have the effect of preventing or lessening competition substantially in the market in question.

[70] A final comment should be made with respect to the evidence required to establish an anti-competitive purpose within the meaning of paragraph 79(1)(b). It is clear from the legislative history of paragraph 79(1)(b) that evidence of subjective intent, although certainly probative if available, is not required in order to find that a given act is anti-competitive within the meaning of paragraph 79(1)(b). When Bill C-91, which eventually became the *Competition Act*, was first introduced in Parliament in December 1985, the text of paragraph (b) of the abuse of dominance provision (then section 51) read as follows:

51. (1) Where, on application by the Commissioner, the Tribunal finds that

...

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and the object of the practice is to lessen competition, and [Emphasis added.]

Perceived problems with the subjective intent requirement implied by the latter part of the proposed

s'ensuit que certains types d'effets sur la concurrence dans le marché pourraient se révéler dénués de pertinence pour l'application de l'alinéa 79(1)b), s'ils ne se traduisent pas par un effet négatif sur un concurrent. Il est important de bien voir que le terme « anti-concurrentiel » revêt par conséquent une signification restreinte dans le contexte de l'alinéa 79(1)b). Si, au regard de l'ensemble de la Loi, la « concurrence » présente de multiples aspects comme en témoignent les objets énumérés à son article 1.1, le terme « anti-concurrentiel », pour l'application particulière de l'alinéa 79(1)b), qualifie un agissement ayant pour but ou pour objet un effet négatif sur un concurrent (*competitor*).

[69] Suivant cette manière d'interpréter l'article 79, il est concevable qu'une pratique puisse être déclarée composée d'agissements anti-concurrentiels au sens de l'alinéa 79(1)b), mais être dite en même temps, pour l'application de l'alinéa 79(1)c), ne pas avoir pour effet d'empêcher ou de diminuer sensiblement la concurrence sur le marché en question.

[70] Une dernière remarque s'impose touchant la preuve nécessaire pour établir l'existence d'un but anti-concurrentiel sous le régime de l'alinéa 79(1)b). Il ressort à l'évidence de la genèse de l'alinéa 79(1)b) que, bien que de tels éléments soient certes probants si l'on en produit, il n'est pas nécessaire de disposer de preuve tendant à établir l'intention subjective pour conclure qu'un comportement donné est un agissement anti-concurrentiel au sens de l'alinéa 79(1)b). Au moment de la première présentation du projet de loi C-91, qui allait devenir la *Loi sur la concurrence*, au Parlement en décembre 1985, l'alinéa b) de l'article relatif à l'abus de position dominante (alors l'article 51) était libellé comme suit :

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

[...]

b) que cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels dont le but est de réduire la concurrence, et [Non souligné dans l'original.]

Les personnes appelées à témoigner devant le Comité législatif sur le projet de loi C-91 ont été nombreuses à

paragraph (b) were frequently raised in testimony before the House of Commons Legislative Committee on Bill C-91 (see Canada, House of Commons, *Minutes of the Proceedings and Evidence of the Legislative Committee on Bill C-91*, First session of 33rd Parliament, 1986 at pages 2:8-9, 3:7-9, 3:17, 5:13, 5:15, 5:63-64, 6:9-10; 9:20-21; note also the contrary view expressed at pages 4:55-56, 6:57-58; 7:55-57, 7:60-63 (*Minutes of the Committee on Bill C-91*)). In response, the reference to “the object of the practice” was deleted in paragraph (b), in order to remove any subjective intent requirement from the statutory test for abuse of dominant position (see *Minutes of the Committee on Bill C-91*, at pages 11:3 and 11:32-33).

[71] On the basis of this legislative history, I would endorse the following comment by the Tribunal in *Laidlaw*, at page 342, with respect to the proper role of evidence concerning subjective intent within paragraph 79(1)(b):

Proof of subjective intention on the part of a respondent is not necessary in order to find that a practice of anti-competitive acts has occurred. Such intention is almost impossible of proof in many cases involving corporate entities unless one stumbles upon what is known as a “smoking gun”. (A document which makes it clear that the purpose of the conduct in question was to exclude competitors from the market.) Section 79 of the Act provides for a civil proceeding and civil remedies. In that context corporate actors and individuals are deemed to intend the effects of their actions.

[72] Proof of the intended nature of the negative effect on a competitor can thus be established directly through evidence of subjective intent, or indirectly by reference to the reasonably foreseeable consequences of the acts themselves and the circumstances surrounding their commission, or both.

[73] Even though evidence of subjective intent is neither required nor determinative, intention remains an important ingredient of paragraph 79(1)(b). In particular, intention is relevant in the sense that while a

évoquer les problèmes que poserait selon elles la condition de l'intention subjective impliquée par la dernière partie du texte proposé de l'alinéa b); voir Canada, Chambre des communes, *Procès-verbaux et témoignages du Comité législatif sur le Projet de loi C-91*, 1^{re} session du 33^e Parlement, 1986 (*Procès-verbaux du Comité sur le projet de loi C-91*), aux pages 2:8-9, 3:7-9, 3:17, 5:13, 5:15, 5:63-64, 6:9-10 et 9:20-21; voir aussi les pages 4:55-56, 6:57-58; 7:55-57, 7:60-63, où l'opinion contraire est exprimée. Par suite, on a rayé de l'alinéa b) la mention du « but » de la pratique, afin d'alléger de toute condition d'intention subjective le critère juridique relatif à l'abus de position dominante; voir *Procès-verbaux du Comité sur le projet de loi C-91*, aux pages 11:3 et 11:32-33.

[71] Me fondant sur cet aspect de la genèse de l'alinéa 79(1)b), j'estime devoir souscrire aux observations suivantes formulées par le Tribunal aux pages 111 et 112 de *Laidlaw*, sur le rôle qu'il convient d'attribuer à la preuve relative à l'intention subjective sous le régime de cet alinéa :

La démonstration de l'intention subjective de la défenderesse ne s'impose pas afin de conclure qu'il y a eu pratique d'agissements anticoncurrentiels. Démontrer qu'il y a eu intention subjective est souvent presque impossible lorsqu'on a affaire à de grandes entreprises, à moins de disposer d'éléments de preuve péremptoirs (par exemple, un document qui établit, sans ambiguïté, que le but visé par la pratique en question est d'évincer des concurrents du marché). L'article 79 de la Loi prévoit et des poursuites et des redressements au civil. Dans ce contexte, qu'il s'agisse d'entreprises ou d'individus, ils sont réputés avoir eu l'intention de tirer profit des effets découlant de leurs agissements.

[72] On peut donc faire la preuve de la nature intentionnelle de l'effet négatif sur un concurrent soit directement, au moyen d'éléments établissant l'intention subjective, soit indirectement, en se fondant sur les conséquences raisonnablement prévisibles des agissements eux-mêmes et/ou sur les circonstances de ceux-ci.

[73] Même si la preuve de l'intention subjective n'est ni requise ni déterminante, l'intention reste un élément important de l'alinéa 79(1)b). Plus précisément, l'intention est pertinente dans la mesure où, s'il ne peut

respondent cannot disavow responsibility for the reasonably foreseeable consequences of its acts, a respondent might nevertheless be able to establish that such consequences should not, in the context of the paragraph 79(1)(b) inquiry, be considered the intended “purpose” or “overall character” of the acts in question. In appropriate circumstances, proof of a valid business justification for the conduct in question can overcome the deemed intention arising from the actual or foreseeable effects of the conduct, by showing that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In essence, a valid business justification provides an alternative explanation as to why the impugned act was performed. To be relevant in the context of paragraph 79(1)(b), a business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts. The appropriate application of the valid business justification doctrine in the context of paragraph 79(1)(b) will be further considered below, in my discussion of the Tribunal’s analysis in the case at bar.

(2) The Tribunal’s paragraph 79(1)(b) decision

[74] In the case at bar, it would appear that the Tribunal correctly articulated the legal test. At paragraph 171 of its reasons, at the outset of its review of the Tribunal’s definition of “anti-competitive acts” in its previous cases, the Tribunal stated:

In order to determine whether acts are anti-competitive, the Tribunal must consider the nature and purpose of the acts in question, as well as the impact they have or may have on the relevant market. (*Nielsen* at 257; *Laidlaw* at 333; *NutraSweet* at 34) In both *Tele-Direct* and *Laidlaw*, the Tribunal assessed the alleged anti-competitive practices by taking into account what effect they had had on competitors. [Emphasis added.]

In the course of quoting a longer passage from *Tele-Direct*, the Tribunal reproduced (at paragraph 178)

se décharger de la responsabilité des conséquences raisonnablement prévisibles de ses actes, le défendeur pourrait néanmoins se révéler capable d’établir que ces conséquences, dans le contexte de l’analyse que commande l’alinéa 79(1)b), ne devraient pas être considérées comme le « but », l’« objet » ou la « nature générale » des actes en question. Si le contexte s’y prête, la preuve d’une justification commerciale valable du comportement en cause peut l’emporter sur l’intention réputée découlant des effets réels ou prévisibles de ce comportement, en montrant que ces effets anti-concurrentiels ne constituent pas en fait l’objet prépondérant dudit comportement. Essentiellement, la justification commerciale valable forme une autre explication possible des motifs du comportement attaqué. Pour être pertinente dans le contexte de l’alinéa 79(1)b), la justification commerciale doit être une raison fondée sur l’efficience ou proconcurrentielle du comportement en question, raison attribuable au défendeur, qui se rapporte aux effets anti-concurrentiels et/ou à l’intention subjective de ce comportement et leur fait contrepoids. Je reviendrai plus loin sur l’application appropriée de la doctrine de la justification commerciale valable au contexte de l’alinéa 79(1)b) lorsque j’examinerai l’analyse effectuée par le Tribunal dans la présente affaire.

2) La décision rendue par le Tribunal sous le régime de l’alinéa 79(1)b)

[74] Dans la présente espèce, il semblerait que le Tribunal ait correctement formulé le critère juridique applicable. On peut lire ce qui suit au paragraphe 171 de l’exposé de ses motifs, au début de son examen de la définition que donne sa jurisprudence de l’expression « agissements anti-concurrentiels » :

Pour établir si des agissements donnés sont anti-concurrentiels, le Tribunal doit prendre en considération la nature et l’objet de ces agissements, ainsi que l’incidence qu’ils ont ou peuvent avoir sur le marché pertinent. (*Nielsen*, à la page 257; *Laidlaw*, à la page 333; et *NutraSweet*, à la page 34.) Dans *Télé-Direct* aussi bien que *Laidlaw*, le Tribunal a évalué les agissements dont on alléguait le caractère anti-concurrentiel en tenant compte de leurs effets sur les concurrents. [Non souligné dans l’original.]

Citant un long passage de *Télé-Direct*, le Tribunal a reproduit (au paragraphe 178) la phrase clé qu’on trouve

TAB 81

Competition Tribunal



Tribunal de la Concurrence

PUBLIC VERSION

Reference: *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7

File No.: CT-2011-003

Registry Document No.: 385

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Toronto Real Estate Board
(respondent)

and

Canadian Real Estate Association
(intervenor)



Dates of hearing: 20120910 to 20120914, 20120918 to 20120919, 20120924 to 20120925, 20120927 to 20120928, 20121002 to 20121003, 20121009 to 20121010, and 20121017 to 20121018 (Initial hearing); 20150921 to 20150924, 20151005 to 20151007, and 20151102 (Redetermination hearing)

Before: P. Crampton C.J., D. Gascon (Chairperson) and Dr. W. Askanas

Date of reasons and order: April 27, 2016

REASONS FOR ORDER AND ORDER

(1) Analytical framework

(a) *The purpose-focused assessment*

[270] The second element of the Canadian abuse of dominance provision is the “abuse” dimension of the conduct contemplated by section 79. Pursuant to paragraph 79(1)(b), this is expressed in terms of whether the person or persons in question have engaged or are engaging in a “practice of anti-competitive acts.”

[271] Almost two decades ago, the Tribunal observed that “distinguishing between competition on the merits and anti-competitive conduct ... is not an easy task” (*Tele-Direct* at p.179). That remains as true today as it was then. However, an analytical framework has gradually emerged.

[272] The Federal Court of Appeal dealt extensively with this element in *Canada Pipe FCA*. As a result, it is now settled law that the focus of the assessment under paragraph 79(1)(b) of the Act is upon the purpose of the impugned practice, and specifically upon whether that practice was or is intended to have a predatory, exclusionary or disciplinary negative effect on a competitor (*Canada Pipe FCA* at paras 67-72 and 77).

[273] The term “practice” in paragraph 79(1)(b) is generally understood to contemplate more than an isolated act, but may include an ongoing, sustained and systemic act, or an act that has had a lasting impact on competition (*Canada Pipe FCA* at para 60). In addition, different individual anti-competitive acts taken together may constitute a “practice” (*NutraSweet* at p. 35).

[274] In this context, subjective intent will be probative and informative, if it is available, but it is not required to be demonstrated (*Canada Pipe FCA* at para 70; *Laidlaw* at p. 334). Instead, the Tribunal will assess and weigh all relevant factors, including the “reasonably foreseeable or expected objective effects” of the conduct, in attempting to discern the “overall character” of the conduct (*Canada Pipe FCA* at para 67). In making this assessment, the respondent will be deemed to have intended the effects of its actions (*Canada Pipe FCA* at paras 67-70; *Nielsen* at p. 257).

[275] It bears underscoring that the assessment is focused on determining whether the respondent subjectively or objectively intended a predatory, exclusionary or disciplinary negative effect on a competitor, as opposed to on competition. While adverse effects on competition can be relevant in determining the overall character or objective purpose of an impugned practice, it is not necessary to ascertain an actual negative impact on competition in order to conclude that the practice is anti-competitive, within the meaning contemplated by paragraph 79(1)(b). The focus at this stage is upon whether there is the requisite subjective or objective intended negative impact on one or more competitors. An assessment of the actual or likely impact of the impugned practice on competition is reserved for the final stage of the analysis, contemplated by paragraph 79(1)(c) (*Canada Pipe FCA* at paras 74-78).

TAB 82



Competition Bureau
Canada

PUBLIC
Bureau de la concurrence
Canada

pg 614

Abuse of Dominance

Enforcement Guidelines



Canada

- ix. When enforcing section 79, a significant consideration for the Bureau is to avoid chilling or deterring pro-competitive or efficiency-enhancing conduct. The Bureau recognizes that it is often challenging to distinguish anti-competitive conduct from aggressive competition on the merits, as in many cases the goal of aggressive competition is to marginalize rivals or eliminate them from a market. The Bureau recognizes that firms may acquire a dominant position by simply out-competing their rivals, for example, by offering higher quality products to consumers at a lower price. In these cases, sanctioning firms for simply being dominant would undermine incentives to innovate, outperform rivals and engage in vigorous competition. Such vigorous competition is the sort of competitive dynamic that the Act is designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources.
- x. In considering enforcement action under section 79 of the Act, the Bureau carefully evaluates allegations of abuse of dominance on a case-by-case basis, in the context of structural and other market-specific characteristics. In the course of an examination or inquiry, the Bureau will typically afford parties the opportunity to respond to the Bureau's concerns regarding alleged contraventions of section 79 and discuss an appropriate resolution to address them.

TAB 83

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

**MOTION RECORD
VOLUME 6 OF 29**

EXPERT REPORT OF RUPERT YOUNGER

May 6, 2025

21. In addition to my academic work, I have sat on various boards as a trustee, including most recently The HALO Trust, a humanitarian demining and weapons decommissioning charity that operates in over 25 countries around the world. In that role, I chaired the Governance and Nominating Committee for five years and am now an international ambassador for the charity.
22. I am also a member of the Royal Company of Archers, the UK Sovereign's Body Guard for Scotland, and was appointed as High Sherriff of Hampshire by the late Queen Elizabeth II for the year 2013-2014. As High Sherriff, I was the Queen's legal representative in Hampshire.
23. A copy of my curriculum vitae is attached to this report as **Appendix B**.

Summary of Opinions

24. My analysis in respect of the questions I have been asked to address is set out below. In conducting my analysis and reaching my conclusions, I draw on several peer reviewed scholarly papers and reports, as well as insights published in practitioner focused journals such as the Harvard Business Review & the California Management Review. A list of materials referred to in this Report is attached to this Report as **Appendix C**.
25. I have also reviewed the Affidavits sworn by affiants of Google. Based on my review of those Affidavits, I understand that the financial penalty the Commissioner seeks to have the Competition Tribunal impose on Google might be measured in the billions of dollars. I am advised by Davies that, if imposed, this would likely be the largest financial penalty ever rendered in Canada against either a corporation, individual, or other entity, including in respect of hardcore criminal offences such as fraud, bid-rigging, or conspiracy, and certainly the largest financial penalty ever imposed against an organisation in the history of the Competition Tribunal.
26. In brief, my opinions may be summarised as follows:
 - (a) corporations, including Google, have multiple capability and character reputations; capability reputations are anchored on perceptions of a corporation's competence and ability, while character reputations relate to perceptions about how an organisation acts;
 - (b) if the financial penalty sought by the Commissioner were to be imposed and the allegation of the Commissioner that Google has "abused" a position of dominance in Canada were to be upheld, Google would likely suffer significant incremental harm to its various character reputations in Canada;
 - (c) if imposed, the unprecedented size of the financial penalty sought by the Commissioner in this proceeding, together with the allegation by the Commissioner that Google has "abused" a position of dominance, is likely to

negatively impact Google in Canada in terms of human, organisational, and financial capital; and

(d) the financial penalty sought by the Commissioner, if imposed, together with the allegation by the Commissioner that Google has “abused” a position of dominance in Canada, may result in Google becoming stigmatised in its dealings with a number of its most important stakeholder groups in Canada.

27. It is important to emphasise that the reputational harm Google may have already experienced due to regulatory findings and penalties in other jurisdictions does not preclude the possibility of further significant reputational damage, including, in particular, in Canada. Any harm to Google’s reputation to date would be compounded if it were to receive the largest financial penalty ever imposed in Canadian history. In my opinion, under such circumstances, Google risks being subject to stigma, particularly in Canada.

Overview of Report

28. I have divided this Report into three main parts.
29. In Part I, I explain foundational concepts in the study of corporate reputations. My focus in this Part I is to explain key concepts in the study of corporate reputations that are relevant to my analysis and opinions. These concepts include: (i) reputation capital; (ii) sentiment; (iii) multiplicity of reputations; (iv) expectation frames; (v) the lack of ownership or control over reputation; (vi) capability reputations; (vii) character reputations; (viii) reputational networks; and (ix) narrative factors. Among these, the concepts of character and capability reputations in the study of corporate reputations are particularly important to the opinions I express in this Report.
30. In Part II, I explain how, when these corporate reputation concepts are applied to the proceeding brought by the Commissioner, Google will likely experience significant incremental harm to its character reputations in Canada if the financial penalty sought by the Commissioner were to be imposed and the allegation of the Commissioner that Google has “abused” a position of dominance in Canada were to be upheld. I further explain how this adverse impact to Google’s character reputations in Canada will likely harm Google’s relationships with third parties, including suppliers, employees, and distributors.
31. In Part III, I explain that the financial penalty sought, and the abuse of dominance alleged by the Commissioner, if established, may also result in the stigmatisation of Google. In the study of corporate reputations, the stigmatisation of a corporation means the labelling of the corporation as deeply flawed and discredited. The stigmatisation of Google would amplify the negative reputational impact on Google’s relationships with third parties, including suppliers, employees, and distributors.

Part I – Overview of Relevant Core Reputation Concepts

32. I will first outline key concepts in the study of corporate reputations that are relevant to my analysis and opinions. These concepts include: (i) reputation capital; (ii) sentiment; (iii) multiplicity of reputations; (iv) expectation frames; (v) the lack of ownership or control over reputation; (vi) capability reputations; (vii) character reputations; (viii) reputational networks; and (ix) narrative factors.
33. The study of corporate reputations has shown that if a firm were to suffer reputational harm related to its business conduct, such reputational harm would tend to increase co-party friction, increase costs, inhibit the generation of revenues, and/or cause other ‘harms’ to organisations, including with the following stakeholders: (i) customers; (ii) employees; (iii) investors; (iv) suppliers and distributors; and (v) regulators².

Reputation Capital

34. Reputation is defined in the Oxford Dictionary as “*The condition, quality, or fact of being highly regarded or esteemed; credit, fame, distinction; respectability, good report.*” Other derivative definitions include “*The honour, credit, good name, or fame of a particular person or thing*” and “*The general opinion or estimate of a person's character or other qualities; the relative esteem in which a person or thing is held. In phrases indicating the type of esteem.*”
35. These definitions highlight some core points that underpin any rigorous analysis of reputation as follows:
 - (a) that reputation relates to perceptions, not necessarily facts (“good esteem”);
 - (b) that reputational assessments centre on perceptions of integrity (“good name, character”); and
 - (c) that reputations are contextual (“the relative esteem”).
36. Reputations are based on perceptions. While perceptions can be anchored on facts, it is not often the case that reputations are created, sustained, destroyed or rebuilt based on any commonly agreed facts.
37. Perceptions may be formed in several different ways. The foremost of these are behavioural signals, cognitive biases, network structures, and narrative strategies. In this analysis, I draw from many sources, many of which are referenced in my book *The Reputation Game* (Oneworld, 2017) as well as various

² Timothy G. Pollock, Kisha Lashley, Violina P. Rindova and Jung-Hoon Han, *Which of these things are not like the others? Comparing the rational, emotional, and moral aspects of reputation, status, celebrity, and stigma*. (Academy of Management Annals, Vol 13, No 2, 2019), 444–478.

stake, and different stakeholders will make assessments of the firm and its behaviours through multiple lenses¹⁵.

54. **Google has multiple reputations for something with someone. This is, in my opinion, important when it comes to an evaluation of the potential harm that could arise from this litigation in view of the extraordinary financial penalty sought by the Commissioner.**

Expectation Frames

55. Reputations are contextual, set against what we expect to see from an organisation or its leadership team. If we expect an organisation to supply poor quality products or to behave badly, when it does so this merely confirms the existing reputations that the organisation or its leadership team has. Expectations therefore frame reputations.
56. Likewise, when an organisation with a good set of reputations for being a good corporate citizen behaves well, observers tend to simply regard this as normal and attach no positive reputational capital to it. It would take a decision to behave badly from a usually well-regarded company for this to deliver a change in reputation capital¹⁶.
57. Given that, as discussed above, Google generally has positive reputation capital, this is the benchmark against which its different reputations are assessed. In particular, the reputational dimension that is at risk in this case is Google's various character reputations given that the Commissioner has alleged that Google has engaged in poor corporate conduct by "abusing" an alleged position of dominance in the online advertising technology sector. This speaks directly to intent – and to Google's character reputations with various important stakeholders, including customers, distributors, existing and potential employees, investors, and regulators. These allegations, coupled with the imposition by the Competition Tribunal of what would be the most significant financial penalty ever imposed in Canada, would likely result in a negative change in Google's reputation for good character, thereby undermining its reputation capital, particularly in Canada.
58. **In short, how people expect Google to behave sets the benchmark against which reputation capital is either formed, impaired, or even destroyed. Given Google's generally positive reputations, in my view, should the Competition Tribunal find that Google "abused" a position of alleged dominance and impose the extraordinary financial penalty sought by the Commissioner, it is**

¹⁵ Jonathan Bundy, Farhan Iqbal and Michael D. Pfarrer, Reputations in flux: how a firm defends its multiple reputations in response to different violations, (Strategic Management Journal, Vol 42, No 1, 2021), 1109-1138.

¹⁶ Luís Cabral, *Living up to Expectations: Corporate Reputation and Persistence of Firm Performance*, (Strategy Science, Vol 1, No 1, 2016), 2-11.

the extraordinary financial penalty sought by the Commission were to be imposed by the Competition Tribunal, Google would likely experience a significant incremental hit to its reputation capital in Canada.

The Two Central Dimensions of Reputation

64. The fact that organisations and individuals have multiple reputations for something with someone sits alongside an important complementary finding that organisations and individuals can be evaluated along two-dimensional frames. Each of these aggregates a number of specific reputations for something with someone. These two frames are perceptions of capability, and perceptions of character.^{22 23.}

Capability Reputations

65. Capability reputations are anchored on perceptions of the organisation's, or individual's, competence, and ability. This dimension sees us evaluating the ability of an organisation to attract and deploy the assets at their disposal successfully. Examples of good capability reputations abound – for example, the Magic Circle or White Shoe Law Firms, the Global Bulge Bracket Investment Banks, and The Big Four Accounting Firms. Each of the firms in these groupings tend to be perceived as experts and highly capable in their field.
66. Capability reputations are remarkably stable. It takes a long time, and multiple consistently observable proof points to achieve a good capability reputation. For example, a newly established oil and gas company would not achieve a high capability reputation the first time they strike oil. Perhaps not also the second or the third. Doubts might remain that they had just been lucky. But once a pattern of success emerges, so too does the perception of a highly capable company.
67. Likewise, it takes a lot to destroy high capability reputations. When an organisation that is perceived as capable makes a mistake that undermines that capability, we tend to give them the benefit of the doubt before writing off their capability reputations.
68. Capability reputations are typically the most salient with customers. As a general matter, customers tend to care the most about the quality and utility of the product or service that they buy. There has been much interest in, and work done on, environmental product marketing and the idea that consumers are starting to care about the environmental credentials of the firms that they buy goods and services from (character reputations). In sectors where the products are hard to distinguish (telecoms, professional services), and where there are high levels of

²² Yuri Mishina, Emily S. Block and Michael J. Mannor, *The Path Dependence of Organizational Reputation*, (Strategic Management Journal, Vol 33, No 5, 2012), 459-477.

²³ Brian Park and Michelle Rogan, *Capability Reputation, Character Reputation and Exchange Partners Reactions to Adverse Events*, (Academy of Management Journal, Vol 62, No 2, 2019), 553-578.

competition, there is some evidence that this is the case. But, to date, it is limited. Firms that source cheap products from third world countries regularly get accused of poor labour practices but continue to sell well into the market.

69. This is not to say that other stakeholders do not care at all about capability reputations. Regulators care that a company is competent as a bulwark against bad behaviour; investors care that an organisation is capable in evaluating its financial prospects; and employees and suppliers, as well as distributors, care about the capability of the organisation they either supply to or work for, as these reflect in turn onto them.
70. I have assumed in preparing my opinion that Google has a set of strong capability reputations. This assumption is confirmed by, among other things, the Pearce Affidavit. As set out in the Pearce Affidavit, Google enjoys positive reputations with Canadians as delivering innovative and helpful products and services that improve their lives.
71. **In my opinion, Google has a valuable set of *capability* reputations, including, in Canada, which would most likely be mostly unaffected by this litigation and the financial penalty sought by the Commissioner. However, as discussed below, the financial penalty sought by the Commissioner and this litigation would most likely have a very different effect on Google's character reputations.**

Character Reputations

72. **Character reputations relate to perceptions about *how* an organisation or leader acts. These perceptions are mostly unrelated and uncorrelated to capability reputations. Character assessments focus on the governance of an organisation, and how it behaves when it operates – in good times or in bad. Examples of bad character reputations might be a firm that when it is facing tough trading environments decides to unilaterally extend supplier payment terms from 60 days to 120 days; or a firm that is inconsiderate of employees that are ill or have family problems to attend to.**
73. Character reputations are volatile. Stakeholders react quickly to character traits that violate expectations.
74. Character reputations are most salient with current and potential employees, suppliers, distributors, investors, regulators, politicians, and NGOs – a wide grouping of important stakeholders. This group of stakeholders tend to be in a repeated and wide set of relationships with the organisations that they are linked with – unlike customers who tend to have a transactional relationship linked to a specific purchase or use of a product or service. It follows that these stakeholders are, therefore, more interested in what to expect from future interactions with the organisation – whether that be a potential employee interested in understanding if the organisation will provide her with the opportunity of meaningful work, the

100. *Consumer backlash* – while news of an unprecedented financial penalty would likely be picked up by consumers, in my opinion there will likely be little or no real harm done to Google in the consumer marketplace as a result of that penalty being imposed. This does not reflect the seriousness of the issue, nor the fact that consumers will be motivated (as they will) to speak negatively about Google, but the fact that consumers tend to prioritise functionality over provenance when it comes to the goods and services they buy. This intuition follows from the analysis and research findings referred to above that consumers care most about perceptions of capability when purchasing products or services.
101. *Supplier and Distributor Tightening* – many businesses that transact with a company that has been subjected to a “mega” financial penalty may implicitly tighten the terms upon which they do business with the penalised entity. This is a logical reaction from suppliers and distributors to a perception of increased financial burdens within their client firms. Likewise, at least some firms that have been subject to large financial penalties are more likely to have to consider improving credit terms when it comes to their purchasing activities. By way of example, a 2021 paper in the *Journal of Business Ethics* finds clear evidence of this phenomenon in the context of Chinese listed firms²⁸.
102. *Increased Regulatory Scrutiny* – a “mega” financial penalty against a company in one setting, particularly when it is imposed in the context of a proceeding where an organisation’s conduct is alleged to be abusive of market participants, will typically attract the attention of other regulators in other spheres or jurisdictions that are responsible for investigating the penalised entity for conduct that would not otherwise have attracted attention. Legal actions and regulatory proceedings against firms are perceived as highlighting or signalling corporate governance failures, leading to concerns among regulators and political audiences pertaining to a wider malaise or questionable business practices. In one paper, Bennett, Stulz, and Wang argue that while greater scrutiny does have pro-social effects, greater scrutiny can have adverse effects, such as pushing managers to cater to public pressures and to refrain from controversial actions that would increase shareholder wealth. They go on to note that greater public scrutiny can force managers to spend more time with the media, investors, analysts, regulators, policymakers, and other segments of the public to explain and justify their actions, which would make managers less efficient and more conservative²⁹. Regulators around the globe also pay particular heed to the reputations of organisations in their purview – examples include the UK Financial Conduct Authority (FIT 2.1 Honesty, integrity and reputation)³⁰ and the Canadian Office of

²⁸ Sirui Wu, Guangming Gong, Xin Huang and Haowen Tian, *The Interaction Between Suppliers and Fraudulent Customer Firms: Evidence from Trade Credit Financing of Chinese Listed Firms*, (*Journal of Business Ethics*, Volume 179, 2022), 531-550.

²⁹ Benjamin Bennett, René Stulz and Zexi Wang, *Does greater public scrutiny hurt a firm’s performance?* (National Bureau of Economic Research, 2023).

³⁰ Financial Conduct Authority, FCA Handbook, FIT 2.1.

the Superintendent of Financial Institutions (Sound Business and Financial Practices Guideline)³¹.

103. *Hiring Difficulties* – many existing and potential employees care deeply about the reputations of firms they work for or are considering joining. Various studies have explored this phenomenon from different perspectives. In academia, Gartenberg et al link employee performance to positive perceptions of corporate purpose³²; in practice, a report from global HR consultancy Kelly Services stated that “[m]ajor public issues such as a company’s reputation for strong ethical practices have become critical factors in choosing where to work, even to the point where many employees are prepared to sacrifice pay or promotion in order to work for organizations that are actively engaged in good social responsibility practices. More specifically, concerns about ethical behavior outweigh concerns about the environment by all generations, when making employment choices.”³³ The authors go on to assess particular aspects of reputation, concluding that specific reputational factors (“corporate, workplace, and social”) account for between 11.1% and 16.3% of the value of the total employment contract, depending on the person considering it (MBA vs non-MBA).
104. Employees tend also to respond negatively to perceived ethical transgressions by their employers. As a result, retaining employees in the wake of actions perceived as ethically transgressive can be problematic. Deonance theory – which posits that people experience moral emotions, such as anger and guilt, in response to behaviours they consider blameworthy, even when they are not the direct victims of these moral transgressions – serves as one of the most commonly used theoretical frames for studies on this issue. In a recent (2024) study, Cen April Yue, Baobao Song, Weiting Tao, and Minjeong Kang use this theory, and found empirical evidence that employees trust organisations less after an ethical violation³⁴.
105. *Cost of Capital* – research suggests that the future cost of equity can significantly increase following damage to the character reputation of a corporation for integrity and proper business conduct. A study of German businesses published in the journal *Business Research* in 2020 by three authors, Benjamin Pfister, Manfred Schwaiger and Tobias Morath found that “*reputational damages lead to a significant increase in the future cost of equity within 6 months*”³⁵. Likewise, a

³¹ Office of the Superintendent of Financial Institutions, Integrity and Security Guideline (2024).

³² Claudine Gartenberg, Andrea Prat and George Serafeim, *Corporate Purpose and Financial Performance*, (Organization Science, Vol 30, No 1, 2019).

³³ Pat Auger et al., *How Much Does A Company’s Reputation Matter in Recruiting*, (MIT Sloan Management Review, Vol 54, No 3, 2013).

³⁴ Cen April Yue, Baobao Song, Weiting Tao and Minjeong Kang, *Irresponsible to others but responsible to me: testing employees responses to external corporate social irresponsibility and internal corporate social responsibility*, (Corporate Social Responsibility and Environmental Management, Vol 31, No 6, 2024), 5427–5445.

³⁵ Benjamin Pfister, Manfred Schwaiger and Tobias Morath, *Corporate reputation and the future cost of equity*, (Business Research, 2020).

different study (2014) in the Journal of Financial and Quantitative Analysis finds that “*defendant firms pay higher loan spreads and up-front charges, experience more financial covenants, and are more likely to have a collateral requirement*” following litigation³⁶.

106. *Financial harm* – the reactions of investors to the imposition of an extraordinary financial penalty can be significantly larger than the actual amount of the financial penalty itself due to the reputational harm associated with the denunciatory impact of the penalty. Various academic studies have examined such reputational sanctions – including one by John Armour, Andrea Polo, and Colin Mayer which found that stock price reactions to corporate misconduct could amount to up to nine times the monetary value of the financial penalty itself³⁷. The setting of the study – the UK – allowed the authors to assess the specific reputational implications of the financial penalty rather than the potentially larger risk of financial losses through secondary litigation as is more commonly found in North American litigation. As the authors state, “*the immediate inclusion of information about the size of financial payments and the absence of class-action claims mean that no assumptions need be made about the accuracy of the market’s estimates of future financial penalties.*”
107. **In my opinion, given the unprecedented quantum of the financial penalty sought by the Commissioner in this proceeding, against the backdrop where Google’s conduct is alleged to have been abusive of market participants in Canada, Google is very likely to experience significant incremental harm to its character reputations with various key stakeholder groups in Canada if the significant financial penalty sought by the Commissioner is imposed by the Competition Tribunal.**

Part III – The Unprecedented Quantum of the ‘Mega’ Financial Penalty Sought by the Commissioner may also Result in the Stigmatisation of Google

108. The Oxford English Dictionary defines stigma as “*A mark of disgrace or infamy; a sign of severe censure or condemnation, regarded as impressed on a person or thing*”.³⁸ In my book *The Reputation Game* (OneWorld, 2017), I define stigma in an organisational context as “*a label that evokes a collective perception that the organization is deeply flawed and discredited*”.³⁹ In academia, one of the most frequently cited scholars studying stigma, Erving Goffman, defines stigma as “*an attribute that is deeply discrediting*” (Goffman, 1963)⁴⁰. More recent scholars

³⁶ Saiying Deng, Richard H. Willis and Li Xu, *Shareholder litigation, reputational loss and bank loan contracting*, (Journal of Financial and Quantitative Analysis, Vol 49, No 4, 2014).

³⁷ John Armour, Colin Mayer and Andrea Polo, *Regulatory Sanctions and Reputational Damage in Financial Markets*, (Journal of Financial and Quantitative Analysis, Vol 52, No 4, 2017).

³⁸ Oxford English Dictionary, Online.

³⁹ Rupert Younger, *The Reputation Game*, (London: Oneworld Publications, 2017).

⁴⁰ Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity*, (Englewood Cliffs, NJ: Prentice Hall, 1963).

studying stigma update this, including Devers et al., who define stigma as “a label that evokes a collective stakeholder group-specific perception that an organization possesses a fundamental deep-seated flaw that deindividuates and discredits the organization”.⁴¹

109. Stigmatisation can happen to industries, firms, or individuals. Consider, for example, the tobacco industry. The causes of stigma can emerge gradually over time (e.g., energy firms today) or specifically in response to individual firm or leader transgressions that are perceived to signal bad character. Hudson (2008) proposes that two distinct types of organisational-level stigmas may exist: (i) event stigmas that result from a “discrete, anomalous, episodic” event; and (ii) core stigmas that are based on the “nature of the organisation’s core attributes—who it is, what it does, and whom it serves”.⁴²
110. In the case of corporations such as Google, stigma is almost always associated with perceptions of poor corporate intent or character. The exception to this would be an organisation or leader who becomes stigmatised from perceptions that they are inept. This can happen but is much rarer than stigma that emerges due to issues of poor conduct or character. Stigmatisation often occurs when stakeholders experience an emotional rather than a rational reaction to corporate action. For example, a firm that is found to have bullied its employees can experience stigmatisation as stakeholders – internal and external to the company – respond with feelings of disgust at the abuse of power that such activity may reflect.
111. Stakeholder responses to stigmatisation can be severe. Existing employees can become tarnished for their perceived involvement in organisational misconduct in traditional and social media⁴³; organisations can become pressured to divest of otherwise attractive but stigmatised assets⁴⁴; investors can divest and remove support for a company⁴⁵; and regulatory and lobbying costs can increase due to the increase in supervisory activity that accompanies stigmatised industries and firms – Zingales (2015) highlights the huge amount of money (\$369m on 2014 alone) still being spent by the stigmatised finance sector on lobbying more than five years after the financial crisis of 2007-2008⁴⁶.

⁴¹ Cynthia E. Devers, Todd Dewett, Yuri Mishina, Carrie A. Belsito, *A General Theory of Organizational Stigma*, (Organization Science, Vol 20, No 1, 2009) 154-171.

⁴² Bryant Ashley Hudson, *Against all odds: a consideration of core-stigmatised organisations*, (Academy of Management Review, Vol 33, No 1, 2008), 252-266.

⁴³ Timothy G. Pollock, Kisha Lashley, Violina P. Rindova and Jung-Hoon Han, *Which of these things are not like the others? Comparing the rational, emotional, and moral aspects of reputation, status, celebrity, and stigma*. (Academy of Management Annals, Vol 13, No 2, 2019), 444-478.

⁴⁴ Rodolphe Durand, Jean-Philippe Vergne, *Asset divestment as a response to media attacks in stigmatised industries*, (Strategic Management Journal, Vol 36, No 8, 2015), 1205-1223.

⁴⁵ Michael Jensen, *Should we stay or should we go? Accountability, status anxiety, and client defections*, (Administrative Science Quarterly, 2006).

⁴⁶ Luigi Zingales, *Presidential Address: Does Finance Benefit Society?* (The Journal of Finance, Vol 70, No 4, 2015), 1327-1363.

112. Companies in the financial sector, as well as in many other industries, that have faced charges of organisational wrongdoing have been subjected to intense negative media scrutiny.^{47 48} Media scrutiny activates other stakeholders, drawing out or precipitating opinions and views that might otherwise have been left unspoken, and also crystallising opinions usually around negative opinions of the organisation. These examples illustrate that omnipresent media exposure can quickly escalate findings of corporate wrongdoing into a more serious stigmatisation of organisations.
113. If Google were to receive an unprecedented financial penalty in the proceedings commenced by the Commissioner measured in the billions of dollars, it is likely that several of its most important stakeholders will react negatively, and that stigma may result, particularly in Canada. This is because the imposition of a financial penalty of this nature and magnitude would signal to stakeholders that Google has engaged in serious, unlawful, and reprehensible conduct. This stigma would be compounded by the fact that this mega financial penalty would be imposed in a proceeding where Google's conduct has been framed as being abusive of market participants. In such circumstances, stakeholders would likely view Google as deserving of reputational sanction such that Google could become stigmatised.
114. As a result of being subject to stigmatisation, Google would likely face significant prejudice, including: (i) Google's regulatory costs are likely to increase significantly; (ii) it is likely to face enhanced negative media coverage that will activate other stakeholders to behave more negatively towards the Company, perpetuating its stigmatisation; (iii) suppliers to the Company and distributors may increase their vigilance on the Company and demand enhanced or more costly financial terms; and (iv) Google may well face challenges in retaining and recruiting talented employees. People who would otherwise have applied to join Google may choose not to do so or may become more expensive to hire.
115. Stigmatisation, once it has occurred, tends to remain in place over extended time periods. This rests on several factors, most saliently the change in stakeholder expectations that results from stigma; and the role of the media and other third parties who are more likely to continue to refer to the stigmatised organisation in negative terms over longer time frames. The more negative views of Google that may result from the successful imposition of such an enormous financial penalty could persist over time, among some of its most valuable and important stakeholders. This stigmatised view of Google would rest mainly on a perception of poor organisational character, underpinned by a potential notion, no matter how incorrect, that Google is an opportunist rent-seeking monopsonist that cares

⁴⁷ Thomas Roulet, "What good is Wall Street?" *Institutional contradiction and the diffusion of the stigma over the finance industry*, (Journal of Business Ethics, Vol 130, No 2, 2015), 389–402.

⁴⁸ Donald Palmer, Kristin Smith-Crowe and Royston Greenwood, *Organizational Wrongdoing: Key Perspectives and New Directions*, (Cambridge: Cambridge University Press, 2016).

little how it secures its income, even if that is at the expense of other market participants.

116. **Accordingly, in my opinion, Google risks becoming a stigmatised company in Canada should a financial penalty in the order of magnitude sought by the Commissioner be imposed against it by the Competition Tribunal**

Conclusion

117. In conclusion, I believe that the imposition by the Competition Tribunal of an unprecedented financial penalty that could be measured in the billions of dollars is likely to result in significant incremental harm to Google's character reputations, particularly in Canada. Further, I believe these incremental reputational harms could rise to the level of stigmatising Google. This reputational harm, and potential stigma, will be attached to perceptions that Google has poor corporate character and poor corporate governance, leading to reputational sanctions from an important set of stakeholders that Google relies on to pursue its business activities not only in Canada, but around the world.

TAB 84

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CT-2024-010

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

--- This is the Cross-Examination of RUPERT YOUNGER
upon his Expert Reports sworn May 6th, 2025, and
July 22nd, 2025, respectively, conducted virtually
by Veritext Legal Solutions, with all participants
attending virtually, on August 8th, 2025.

1 reputation, sir, you agree with me that corporate
2 reputations can be worldwide; correct?

3 A. They can be.

4 64 Q. Yeah. And there can be
5 differences in how a company is perceived by
6 stakeholders across different countries; is that
7 correct, sir?

8 A. That is correct.

9 65 Q. And so a corporation that owns,
10 for instance, a positive -- or enjoys a positive
11 reputation in, let's say, Europe may not
12 necessarily enjoy a positive reputation in Canada
13 and vice versa; correct?

14 A. Correct.

15 66 Q. And so it stands to reason, if I'm
16 correct, is that an adverse decision in -- or an
17 adverse antitrust decision with a corresponding
18 penalty from the European Union, for instance, can
19 have reputational harm worldwide; correct?

20 A. It can do --

21 67 Q. Yeah.

22 A. -- but may I add one extra bit to
23 that, which is that the salience of any decision
24 tends to be larger in the jurisdiction it's granted
25 rather than elsewhere.

1 68 Q. Okay. And we know that Google has
2 received a number of adverse decisions with large
3 penalties; is that correct?

4 A. That's correct.

5 69 Q. Both from the EU and other
6 jurisdictions across the globe; correct?

7 A. Correct.

8 70 Q. Now, sir, you haven't referenced
9 any of these decisions in your report, have you?

10 A. No, I haven't.

11 71 Q. And you haven't discussed in your
12 report how these decisions, which would have
13 included large fines, have affected Google's
14 reputation worldwide or in the jurisdiction in
15 which they were granted; correct?

16 A. That's correct.

17 72 Q. And your evidence, sir, is that
18 Google enjoys a positive or a good reputation in
19 Canada; correct?

20 A. Correct. But I draw on that from
21 the sworn affidavit from one of the Google
22 representatives who's come up with their own
23 assessment of the reputation capital that Google
24 enjoys in Canada and also my own reading of various
25 different publicly available reports.

1 "Android: In July 2018, the EC
2 announced its decision that certain
3 provisions in Google's
4 Android-related distribution
5 agreements infringed European
6 antitrust laws, imposed a
7 [€]4.3 billion fine, and directed
8 the termination of the conduct at
9 issue."

10 Sir, were you aware that there was a
11 decision by the European Union where it imposed a
12 fine of \$4.3 billion on Google for antitrust
13 matters?

14 A. Again, I remember, at the time,
15 reading about various different EC decisions. The
16 specifics of these, I can't recall in detail, but I
17 do remember there being certain fines which were
18 announced by the EC as well as certain appeals,
19 some of which were upheld, I see, by the EC against
20 any decisions.

21 173 Q. Fair enough. But you didn't
22 reference the Android decision in your report, did
23 you, sir?

24 A. I didn't reference any of these
25 previous issues in my report, nor was I asked to.

1 174 Q. And nor did you assess the
2 reputational impact of these decisions on Google,
3 did you, sir?

4 A. No.

5 175 Q. And, sir --

6 A. [Indiscernible].

7 176 Q. I'm sorry, I don't mean to
8 interrupt. There's a delay, and I don't want to
9 interrupt you. If you have something to say, I'm
10 happy to hear you.

11 A. My apologies for overtalking you,
12 but I wanted to say that nor was I asked to do so.
13 My -- the request was to discuss the concept of
14 reputational sanction, reputational harm, and
15 stigma.

16 177 Q. Okay. And, sir:
17 "In September 2022, the
18 General Court affirmed the EC
19 decision but reduced the fine from
20 [€]4.3 billion to [€]4.1 billion."
21 Do you see that, sir?

22 A. I do see that.

23 178 Q. And that event you haven't
24 referenced in your report, either, have you, sir?

25 A. No, I haven't.

1 difference between the tangible assets acquired in
2 a business and the price paid, which may exceed the
3 tangible assets acquired.

4 215 Q. That's actually correct. You're
5 absolutely correct. You're fluent, and I
6 appreciate that because that is exactly the
7 definition I have taken from the accounting books
8 as well. So I thank you for that.

9 So it includes customer loyalty;
10 correct?

11 A. Correct, but it includes a number
12 of things traditionally related to brand strength,
13 which might include IP, repeat customer loyalty in
14 as much as they're routine clients or repeat
15 customers, et cetera.

16 216 Q. Okay. That's correct, and thank
17 you very much. That's exactly where I was going,
18 and you've answered my question in advance of me
19 asking it, so that's helpful.

20 Now, sir, you didn't make mention of
21 the value of Google's goodwill anywhere in your
22 report, did you, sir?

23 A. No, I did not because goodwill --
24 in the field that I work in, goodwill is more
25 normally associated with brand equity as opposed to

70

1 introduce it as an exhibit, and to the extent that
2 it is inaccurate, I'm happy to have you tell me at
3 some point.

4 MR. THOMSON: Why don't we just mark
5 it, Alex, and if we have any issue with the
6 accuracy of your chart, we'll let you know.

7 MR. GAY: Okay. Fair enough.

8 EXHIBIT NO. A-2: Goodwill Chart of
9 Form 10-K Information from 2016 to
10 2024.

11 BY MR. GAY:

12 242 Q. Mr. Younger -- and, again, this is
13 a chart that's taken directly from the 10-Ks
14 spanning from 2016, I believe, until 2024.

15 And as we go through this chart, you
16 can see, sir, and I'll take you to that, the
17 reporting of the goodwill has gone from 15,869 to a
18 maximum, and maybe go to the last page of 2024,
19 2025 to 31,885. And if I said to you, sir, that
20 there is absolutely no decline in goodwill for the
21 period 2015 to 2024, you would agree with me, sir,
22 that, based on this chart, that that is the case?

23 A. Based on this chart, that is the
24 case.

25 MR. GAY: Okay. And maybe what I've

1 graph is an upward trajectory, more or less, during
2 the period of 2015 to 2024?

3 A. I would agree with that.

4 244 Q. And so goodwill hasn't declined in
5 any -- or there hasn't been any decline in goodwill
6 between the period of 2015 to 2024 from what you
7 see on this graph; correct?

8 A. Well, I can see between 2022 and
9 2023, it looks relatively flat, so I can't confirm
10 if it's --

11 245 Q. Right.

12 A. But I'll take your --

13 246 Q. Right. So I didn't ask whether it
14 was flat. "Decline" is what I asked. But you're
15 quite right, there is a flat portion in 2022 to
16 2023.

17 Now, sir, I think I had asked you to
18 keep certain dates in mind, and that is June of
19 2017 and 2018 and 2019, and those are the sort of
20 very large fines that we went through a moment ago
21 that I had taken you through on the 10-K. And
22 you'd agree with me, sir, that certainly in 2017,
23 there's no decline in goodwill; correct?

24 A. There's no decline in goodwill on
25 this sheet, but I'm --

1 247 Q. Mm-hm.

2 A. -- struggling to find a link
3 between that and the question you're putting --

4 248 Q. That's okay. I get to ask the
5 questions, Mr. Younger. And so there is no decline
6 in goodwill in 2018, either; correct?

7 A. Correct.

8 249 Q. And there's no decline in 2019 of
9 goodwill; correct?

10 A. Correct.

11 250 Q. And, again, these corresponding
12 dates, 2'17, 2'18, and 2'19, are dates that I had
13 given to you in relation to the fines that had been
14 imposed by various regulatory authorities that I'd
15 asked you to keep in your back pocket; correct?

16 A. You did ask me to keep them in the
17 back pocket. May I add something to my answer or
18 not?

19 251 Q. No. That'll be for -- you can
20 discuss that with your lawyer later if your counsel
21 wishes to add.

22 So let's turn to employment for a
23 moment. And so you'd agree with me, sir, that
24 employment is also a matrix that's generally
25 reported on in the 10-K; correct?

1 So, first, I guess, certainly from
2 2016, from the beginning of what this chart says
3 right up until 2025, there has been a steady growth
4 in the employment levels for the company; correct?

5 A. There has been growth over the
6 period, yeah.

7 259 Q. Yeah, okay. And just to be fair
8 to counsel, there is a slight decline between
9 twenty-twenty -- ah, go up. I think there was one
10 more. It was 190,000.

11 So from 2023 to 2024, there was a
12 slight decline of 7,000 employees or a little more,
13 8,000, but, by and large, I think we can say that
14 it has been on the steady increase from 2016 from
15 where the chart begins; correct?

16 A. Yeah. With the caveat that you
17 make, yeah.

18 260 Q. And, sir, you agree with me that,
19 as we look at this chart and we looked at the
20 employment levels between 2016 and 2017, there is
21 no decline?

22 A. Well, you've just said that
23 there's a decline in two years, but, yes. Yes.

24 261 Q. But now I'm interested in the 2016
25 and 2017. There's no decline there, is there, sir?

1 A. No, there's not.

2 262 Q. And this would have come or the --
3 I think we've already established the Google
4 shopping fine of €2.4 billion was announced in June
5 of 2017; correct?

6 A. Correct.

7 263 Q. And, again, if we look at the
8 period of 2017 and maybe even 2018, you'd agree
9 with me, sir, that there's no decline in
10 employment, either, is there, sir?

11 A. There's no decline.

12 264 Q. And even though the decision, the
13 Android decision, which we've established and I'd
14 ask you to keep in your back pocket, which came out
15 in 2018, there was still no decline despite the
16 issuance of such a decision; correct?

17 A. That's correct.

18 265 Q. And, again, there's no decline
19 following the issuance of the decision in AdSense
20 where there was a \$1.9 billion fine, which would
21 have happened in 2019; correct?

22 A. Correct. And may I also just make
23 it clear that I'm not accepting the link between
24 the fine and the employee levels.

25 266 Q. That's not my question. You're

81

1 273 Q. 2005, fine. I apologize, I can't
2 see that. But you'd agree with me that, okay, from
3 2005 up until 2025, or the last ten years, it's
4 been an upward trajectory of the Alphabet Inc.
5 stock price; correct?

6 A. Except for, obviously, in the
7 years twenty -- roughly, 2022 to 2023, that period
8 where you see a fall and then a small fall in 2025,
9 at the beginning of 2025.

10 274 Q. Right, so -- and that's correct.
11 Because stock markets, the price of their stocks
12 fluctuate and vary for various different reasons,
13 including interest rates and market fundamentals;
14 correct?

15 A. Correct.

16 275 Q. But generally speaking, you'd
17 agree with me that it has been on an upward
18 trajectory; correct?

19 A. Correct.

20 276 Q. Okay. Turn to -- and we'll
21 enter -- we've already marked that as Exhibit A-6,
22 but let's move into the first A-6-A there. Okay.

23 So, sir, here, what I've done is I've
24 actually pulled the date of the decision that was
25 issued in June 2017, the date that I've asked you

TAB 85

1

CT-2024-010

THE COMPETITION TRIBUNAL

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

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:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

--- This is the Cross-Examination on Affidavit of
Laura Pearce, via Veritext Legal Solutions' virtual
Zoom platform, with all participants attending
virtually, on August 15, 2025.

1 formal educational institution. That's right.

2 MR. THOMSON: Okay. So against that
3 backdrop, put your question again.

4 BY MR. KUMBHARE:

5 19 Q. You have no formal education,
6 bearing in mind the backdrop that Mr. Thomson has
7 just enumerated, in branding or reputation; is that
8 correct?

9 A. Yes.

10 20 Q. You have no formal education in
11 economics; is that correct?

12 A. That's correct.

13 21 Q. And you have no formal education
14 in antitrust; is that correct?

15 A. Yes, that's correct.

16 22 Q. So, Ms. Pearce, I don't see a
17 publications section listed in your LinkedIn
18 profile. You don't have any academic publications
19 in a reputable journal; is that correct?

20 A. Can I just clarify specific to
21 marketing or just in general?

22 23 Q. Let's start with general.

23 A. Well, my masters thesis would have
24 been in a publication, but other than that you are
25 correct. I don't have any formal academic

1 publishings.

2 24 Q. So let's then make this more
3 specific: So you have no formal academic
4 publications in the area of marketing; is that
5 correct?

6 A. That is correct.

7 25 Q. You have no formal academic
8 publications in the areas of branding or corporate
9 reputation; correct?

10 A. That is correct.

11 26 Q. And you have no formal
12 education -- you have no formal academic
13 publications, sorry, in the area of antitrust; is
14 that correct?

15 A. That is correct.

16 27 Q. And you have no formal academic
17 publications in the areas of penalties or
18 regulatory sanctions; correct?

19 A. Yes.

20 28 Q. Thank you. Okay. So we're going
21 to speak a little bit now about your experience.

22 Ms. Cooke, if you could scroll up.

23 Thank you.

24 So you started your career as a
25 marketing manager for Dell Canada; is that correct?

1 an expression at Google: Know the user, know the
2 magic, connect the two. That's our marketing sort
3 of mantra, so I'm really looking at the user and
4 how they interact with our products, what their
5 needs are, and then I craft the marketing strategy
6 based on that.

7 It -- we of course look in the
8 marketplace to see what other marketers and other
9 players in the space are doing, but we are not
10 necessarily specifically using that information to
11 craft our marketing strategy.

12 79 Q. Okay. That's helpful. Thank you.
13 So I don't expect the list that we've just come up
14 with to be totally exhaustive, but is there
15 anything that you would be primarily responsible in
16 your day-to-day that we have missed, that we
17 haven't discussed?

18 A. I don't believe so. Just to be
19 super clear, as -- you know, I look after all of
20 the marketing efforts that happen in Canada to
21 consumers and customers with the exception of
22 Google Cloud.

23 80 Q. And so because it was -- we did
24 not discuss it, and it was not in the list, you'd
25 agree with me that the assessment of any crises or

1 events involving negative publicity would be
2 handled by someone else in the company; is that
3 correct?

4 A. Not exactly, because we have a
5 communications team that would be frontline when
6 there would be any press inquiries, but you know, I
7 work collaboratively with our comms team each and
8 every day, and we are continuing to work together
9 to address anything that may require addressing,
10 and also to, you know, work on, you know, driving
11 awareness of our various marketing initiatives.

12 81 Q. But you are not a member of the
13 communications team; is that correct?

14 A. That is correct.

15 82 Q. Okay. So we're going to move on.
16 I'm going to ask Ms. Cooke to put a chart on the
17 screen, but before -- we're going to go through
18 this chart together. It's a chart of news
19 articles. But before we do, we're just going to
20 talk about one quick housekeeping item with respect
21 to this chart.

22 So I had the benefit of watching some
23 of the previous examinations, and where charts like
24 the one on the screen have been made, your counsel,
25 and I suspect that he'll speak up, has suggested

1 Thomson, which is a Canadian-based organization, so
2 I'll just correct my earlier --

3 MR. THOMSON: That's correct.

4 MR. KUMBHARE: So I'll correct my
5 earlier statement to that.

6 MR. THOMSON: That's fine. That's
7 consistent with our understanding.

8 MR. KUMBHARE: Okay. Thank you. Thank
9 you. I just wanted to make sure that was all
10 cleared up before we moved forward.

11 MR. THOMSON: Sure.

12 BY MR. KUMBHARE:

13 250 Q. So, Ms. Pearce, in your day to day
14 you would keep track of business news; correct?

15 A. I'm sorry, can you repeat the last
16 two words, of business?

17 251 Q. Business news, so news in the
18 business world?

19 A. Potentially, yes.

20 252 Q. And that would involve keeping
21 track of business news about Google; correct?

22 A. Well, as we've stated I'm not on
23 the communications team, so it's not part of my
24 everyday job responsibilities to track news about
25 Google, but I would be broadly aware of news

1 the most influential brand in Canada study; is that
2 correct?

3 A. Yes, this is a study that's been
4 done for 13 consecutive years, and it is well
5 regarded and followed by members of the marketing
6 profession including myself and many other of top
7 Canadian and global brands.

8 256 Q. And you indicate in your affidavit
9 also at paragraph 5 that Google was the most
10 influential brand in Canada for the last 13 years
11 straight; is that correct?

12 A. That is what's stated in the Ipsos
13 study, yes.

14 257 Q. Would you agree with me that
15 Google's ranking in the most influential brands
16 study did not fall as a result of any of the fines
17 that we discussed before the break?

18 A. Well, not exactly. I would agree
19 that Google's ranking did not fall based on the
20 Ipsos report. As we discussed I'm not aware of
21 whether any of those articles were carried in the
22 Canadian press, and as we saw -- you know, as I
23 said myself, you know, I -- this is a Canadian --
24 I'm working in Canada. I'm focused on the Canadian
25 market, and this is a Canadian study based on

118

1 A. Yeah, that's what you've indicated
2 it shows.

3 296 Q. And you would agree with me that
4 Google did not drop out of the top ten in any of
5 the years from 2015 to 2025?

6 A. That's correct based on this
7 chart.

8 297 Q. And so you would agree with me
9 that as a result of the fines that we discussed
10 before the break, Google has not dropped out of the
11 top ten most admired companies in Canada according
12 to Leger?

13 MR. THOMSON: I think it may be a
14 phrasing issue. You said that as a result of those
15 fines Google has not dropped out of the top ten. I
16 don't think that's what you mean. Maybe it is what
17 you mean. But I assume what you're asking is that
18 notwithstanding those fines, Google has not dropped
19 out of the ranking demonstrated in this chart
20 between 2015 and 2025.

21 MR. KUMBHARE: Thank you. That is what
22 I'm asking, yes.

23 THE AFFIANT: Yes, I don't think that's
24 surprising, though, because as we discussed when we
25 reviewed those articles, none of those articles

TAB 86

Her Majesty The Queen *Appellant;*

and

Big M Drug Mart Ltd. *Respondent;*

and

**The Attorney General of Canada, the
Attorney General of New Brunswick and the
Attorney General of Saskatchewan**
Interveners.

File No.: 18125.

1984: March 6, 7; 1985: April 24.

Present: Ritchie*, Dickson, Beetz, McIntyre,
Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
ALBERTA

Constitutional law — Canadian Charter of Rights and Freedoms — Freedom of conscience and religion — Lord's Day Act and Sunday observance — Whether or not Lord's Day Act in violation of Charter guarantee of freedom of conscience and religion — Whether or not Act a reasonable limit demonstrably justifiable in a free and democratic society — Whether or not Act enacted pursuant to criminal law power — Canadian Charter of Rights and Freedoms, ss. 1, 2(a), 24(1), 27, 32(1) — Constitution Act, 1867, ss. 91, 92, 93 — Constitution Act, 1982, s. 52(1) — Lord's Day Act, R.S.C. 1970, c. L-13, s. 4.

The respondent, Big M Drug Mart Ltd., was charged with unlawfully carrying on the sale of goods on a Sunday contrary to the *Lord's Day Act*. Respondent was acquitted at trial. The Court of Appeal dismissed the appeal. The constitutional questions before this Court were whether the *Lord's Day Act*, and especially s. 4, (i) infringed the right to freedom of conscience and religion guaranteed in the *Charter*; (ii) were justified by s. 1 of the *Charter*; and (iii) were enacted pursuant to the criminal law power (s. 91(27)) of the *Constitution Act, 1867*.

Held: The appeal should be dismissed.

Per Dickson, Beetz, McIntyre, Chouinard and Lamer JJ.: Respondent is entitled to challenge the validity of the *Lord's Day Act* on the basis that it violates the *Charter* guarantee of freedom of conscience and religion. Recourse to s. 24 is unnecessary where the chal-

* Ritchie J. took no part in the judgment.

Sa Majesté La Reine *Appelante;*

et

Big M Drug Mart Ltd. *Intimée;*

^a

et

**Le procureur général du Canada, le procureur
général du Nouveau-Brunswick et le
procureur général de la Saskatchewan**
^b *Intervenants.*

N° du greffe: 18125.

1984: 6, 7 mars; 1985: 24 avril.

^c Présents: Les juges Ritchie*, Dickson, Beetz, McIntyre, Chouinard, Lamer et Wilson.

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

^d *Droit constitutionnel — Charte canadienne des droits et libertés — Liberté de conscience et de religion — Loi sur le dimanche et observance du dimanche — La Loi sur le dimanche viole-t-elle la liberté de conscience et de religion garantie par la Charte? — La Loi constitue-t-elle une limite raisonnable dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique? — La Loi a-t-elle été adoptée conformément à la compétence en matière de droit criminel? — Charte canadienne des droits et libertés, art. 1, 2a), 24(1), 27, 32(1) — Loi constitutionnelle de 1867, art. 91, 92, 93 — Loi constitutionnelle de 1982, art. 52(1) — Loi sur le dimanche, S.R.C. 1970, chap. L-13, art. 4.*

^e Big M Drug Mart Ltd. a été accusée de s'être livrée illégalement à la vente de marchandises le dimanche contrairement à la *Loi sur le dimanche*. L'intimée a été acquittée en première instance. La Cour d'appel a rejeté l'appel. Les questions constitutionnelles dont est saisie la Cour consistent à déterminer si la *Loi sur le dimanche*, et en particulier son art. 4, (i) empiète sur la liberté de conscience et de religion garantie par la *Charte*, (ii) si elle est justifiée compte tenu de l'art. 1 de la *Charte* et (iii) si elle relève du pouvoir en matière de droit criminel que confère le par. 91(27) de la *Loi constitutionnelle de 1867*.

^f *Arrêt:* Le pourvoi est rejeté.

^g Les juges Dickson, Beetz, McIntyre, Chouinard et Lamer: L'intimée a le droit de contester la validité de la *Loi sur le dimanche* pour le motif qu'elle porte atteinte à la liberté de conscience et de religion garantie par la *Charte*. Lorsque la contestation est fondée sur l'inconsti-

* Le juge Ritchie n'a pas pris part au jugement.

have, however, been repealed and they have been replaced by s. 52(1) of the *Constitution Act, 1982*. The Attorney General submitted that only a court of superior jurisdiction has the prerogative powers to make a declaratory order under s. 52.

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*.

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.

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 fulfill the status requirements laid down by this Court in the trilogy of "standing" cases (*Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575) but that was not the reason for its appearance in Court.

Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitu-

1931, S.R.C. 1970, app. II, n° 26. Cependant, ces dispositions ont été abrogées et remplacées par le par. 52(1) de la *Loi constitutionnelle de 1982*. Selon le procureur général, seule une cour de juridiction supérieure a le pouvoir de rendre une ordonnance déclaratoire en vertu de l'art. 52.

Lorsqu'il s'agit de contester la validité d'une loi en vertu de laquelle on fait l'objet de poursuites, il est sans importance, en ce qui concerne la qualité pour agir et la compétence du tribunal, que la contestation soit fondée sur les art. 91 et 92 de la *Loi constitutionnelle de 1867* ou sur les restrictions imposées aux corps législatifs par la *Loi constitutionnelle de 1982*.

Le paragraphe 24(1) prévoit un redressement pour les personnes, aussi bien physiques que morales, qui ont été victimes d'une atteinte aux droits qui leurs sont garantis par la *Charte*. Toutefois, il ne s'agit pas là du seul recours qui s'offre face à une loi inconstitutionnelle. Lorsque, comme c'est le cas en l'espèce, la contestation est fondée sur l'inconstitutionnalité d'une loi, il n'est pas nécessaire de recourir à l'art. 24 et l'effet particulier qu'elle a sur l'auteur de la contestation est sans importance.

L'article 52 énonce le principe fondamental du droit constitutionnel, savoir la suprématie de la Constitution. De ce principe il découle indubitablement que nul ne peut être déclaré coupable d'une infraction à une loi inconstitutionnelle. Ce n'est pas volontairement, à titre de citoyen intéressé qui demande qu'une loi soit déclarée inconstitutionnelle, que l'intimée se trouve devant les tribunaux. S'il s'était agi de ce genre de "litige d'intérêt public", elle aurait eu à satisfaire aux exigences relatives à la qualité pour agir que cette Cour a établies dans les trois arrêts suivants: *Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138, *Nova Scotia Board of Censors c. McNeil*, [1976] 2 R.C.S. 265 et *Ministre de la Justice du Canada c. Borowski*, [1981] 2 R.C.S. 575. Toutefois, ce n'est pas la raison pour laquelle elle s'est présentée en Cour.

Tout accusé, que ce soit une personne morale ou une personne physique, peut contester une accusation criminelle en faisant valoir que la loi en vertu

tionally 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.

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.

The argument that the respondent, by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights under s. 2(a) of the *Charter*, confuses the nature of this appeal. A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the *Charter* and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue. As Mr. Justice Laycraft observed in the Alberta Court of Appeal at p. 636:

The task of the court is to see whether all or part of the Lord's Day Act is inconsistent with freedom of conscience and religion and therefore of no force or effect. It does not affect that task that a person charged has no religion or even that he has no feelings of conscience.

Mr. Justice Cartwright, dissenting in *Robertson and Rosetanni*, *supra*, though not in conflict with the majority of the Court on this point, stated at p. 661:

It was argued that, in any event, in the case at bar the appeal must fail because there is no evidence that the

de laquelle l'accusation est portée est inconstitutionnelle. Big M soutient que la loi en vertu de laquelle elle est accusée est incompatible avec l'al. 2a) de la *Charte* et qu'elle est inopérante en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*.

La question de savoir si une personne morale peut jouir de la liberté de religion est donc sans importance. L'intimée soutient que la loi en cause est inconstitutionnelle parce qu'elle porte atteinte à la liberté de religion—si cette loi porte atteinte à la liberté de religion, il n'importe pas de se demander si la compagnie peut avoir des croyances religieuses. Un athée pourrait tout autant contester une accusation portée en vertu de la Loi. Cette question ne pourrait être pertinente que si l'al. 2a) était interprété comme ne protégeant que les personnes qui peuvent démontrer qu'elles ont véritablement des croyances religieuses. Je ne vois rien qui permet de limiter ainsi la portée de l'al. 2a) en l'espèce.

L'argument portant que l'intimée, parce qu'elle est une personne morale, est incapable d'avoir des croyances religieuses et, par conséquent, incapable d'invoquer des droits en vertu de l'al. 2a) de la *Charte* a pour effet de brouiller la nature de ce pourvoi. La loi qui porte atteinte à la liberté de religion est, de ce seul fait, incompatible avec l'al. 2a) de la *Charte* et il n'importe pas de savoir si l'accusé est chrétien, juif, musulman, hindou, bouddhiste, athée ou agnostique, ou s'il s'agit d'une personne physique ou morale. C'est la nature de la loi, et non pas le statut de l'accusé, qui est en question. Comme le fait remarquer le juge Laycraft de la Cour d'appel de l'Alberta, à la p. 636:

[TRADUCTION] La cour a pour tâche de déterminer si la Loi sur le dimanche est en totalité ou en partie incompatible avec la liberté de conscience et de religion et, partant, inopérante. Le fait que l'accusé n'ait pas de religion ni même de conscience ne change rien à cette tâche.

Le juge Cartwright, qui a exprimé une opinion dissidente dans l'arrêt *Robertson and Rosetanni*, précité, quoique non incompatible avec celle de la Cour à la majorité sur ce point, affirme à la p. 661:

[TRADUCTION] On a fait valoir qu'en tout cas il fallait rejeter l'appel dans la présente affaire car il n'y a

appellants do not hold the religious belief that they are under no obligation to observe Sunday. In my view such evidence would be irrelevant. The task of the Court is to determine whether s. 4 of the Act infringes freedom of religion. This does not depend on the religious persuasion, if any, of the individual prosecuted but on the nature of the law. To give an extreme example, a law providing that every person in Canada should, on pain of fine or imprisonment, attend divine service in an Anglican church on at least one Sunday in every month would, in my opinion, infringe the religious freedom of every Anglican as well as that of every other citizen.

As the respondent submits, if the legislation under review had a secular purpose and the accused was claiming that it interfered with his religious freedom, the status of the accused and the nature of his belief might be relevant: it is one thing to claim that the legislation is itself unconstitutional, it is quite another to claim a "constitutional exemption" from otherwise valid legislation, which offends one's religious tenets.

In my view there can be no question that the respondent is entitled to challenge the validity of the *Lord's Day Act* on the basis that it violates the *Charter* guarantee of freedom of conscience and religion.

The second objection is to the jurisdiction of the Provincial Court regarding the exercise of a prerogative power to declare legislation invalid. It must also be rejected. There are two prevailing views as to the meaning of "court of competent jurisdiction" in s. 24(1) of the *Charter*. On one view, the competent court in which to bring a constitutional challenge is the court with jurisdiction over the remedy sought: Gibson, "Enforcement of the Canadian Charter of Rights and Freedoms" in *The Canadian Charter of Rights and Freedoms: Commentary*, Tarnopolsky and Beaudoin, eds., (Toronto 1982), at p. 500. In contrast is the view that the competent court is that which has jurisdiction over the subject matter being litigated: Hogg, *Canada Act, 1982, Annotated* (Toronto, 1982), at p. 65.

Advancing the first view, the Crown argues that Big M should not have been able to bring a s. 52

aucune preuve portant que les appelants n'ont pas la conviction religieuse, qu'ils n'ont pas l'obligation d'observer le dimanche. À mon avis, aucune preuve de ce genre ne serait pertinente. Le devoir de la Cour est de décider si l'art. 4 de la Loi enfreint la liberté de religion. Ceci ne dépend pas de la conviction religieuse, s'il en est, de la personne poursuivie, mais de la nature de la loi en cause. Donnons un exemple extrême: une loi prévoyant que tout le monde au Canada doit, sous peine d'amende ou d'emprisonnement, assister au service religieux dans une église anglicane au moins un dimanche par mois enfreindrait, à mon avis, la liberté de religion de chaque anglican aussi bien que celle de tous les autres citoyens.

Comme le soutient l'intimée, si la loi examinée avait un objet laïque et si l'accusé faisait valoir qu'elle porte atteinte à sa liberté de religion, le statut de l'accusé et la nature de ses croyances religieuses pourraient peut-être alors être pertinents: c'est une chose que de prétendre que la loi est elle-même inconstitutionnelle, mais c'est tout autre chose que de réclamer une «exemption constitutionnelle» de l'application d'une loi par ailleurs valide qui va à l'encontre de ses principes religieux.

À mon avis, il ne fait pas de doute que l'intimée a le droit de contester la validité de la *Loi sur le dimanche* pour le motif qu'elle porte atteinte à la liberté de conscience et de religion garantie par la *Charte*.

Le second moyen soulevé porte sur la compétence de la Cour provinciale pour déclarer une loi invalide. Ce moyen doit aussi être rejeté. Il existe deux points de vue dominants quant au sens des mots «tribunal compétent» que l'on trouve au par. 24(1) de la *Charte*. Selon un point de vue, lorsqu'il s'agit de contester la constitutionnalité d'une loi, le tribunal compétent est celui qui a le pouvoir d'accorder le redressement demandé: Gibson, «Enforcement of the Canadian Charter of Rights and Freedoms», dans *The Canadian Charter of Rights and Freedoms: Commentary*, Tarnopolsky et Beaudoin (eds.), (Toronto 1982), à la p. 500. Selon l'autre point de vue par contre, le tribunal compétent est celui qui a compétence sur l'objet du litige: Hogg, *Canada Act, 1982, Annotated* (Toronto, 1982), à la p. 65.

Le ministère public a adopté le premier point de vue en faisant valoir que Big M n'aurait pas dû

TAB 87

**Her Majesty The Queen in Right of Canada,
as represented by the Minister of Public
Works Appellant**

v.

**Dywidag Systems International, Canada
Limited, a body corporate Respondent**

and

**Zutphen Brothers Construction Limited, a
body corporate Respondent**

and

**The Attorney General for Ontario, the
Attorney General of Quebec and the Attorney
General for Alberta Interveners**

INDEXED AS: DYWIDAG SYSTEMS INTERNATIONAL,
CANADA LTD. v. ZUTPHEN BROTHERS CONSTRUCTION
LTD.

File No.: 20333.

1990: January 24; 1990: March 29.

Present: Dickson C.J. and Wilson, L'Heureux-Dubé,
Sopinka, Gonthier, Cory and McLachlin JJ.

ON APPEAL FROM THE NOVA SCOTIA SUPREME
COURT, APPEAL DIVISION

*Constitutional law — Charter of Rights — Life,
liberty and security of person — Defendant corporation
applying to add Crown as a third party to action
brought before the provincial superior court — Federal
legislation conferring exclusive jurisdiction on Federal
Court in relation to all claims against Crown in right of
Canada — Whether federal legislation contravenes s. 7
of the Canadian Charter of Rights and Freedoms —
Whether corporation may invoke s. 7 of the Charter —
Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s.
17(1), (2) — Crown Liability Act, R.S.C. 1970, c. C-38,
s. 7(1).*

*Constitutional law — Charter of Rights — Equality
before the law — Defendant corporation applying to
add Crown as a third party to action brought before the
provincial superior court — Federal legislation confer-
ring exclusive jurisdiction on Federal Court in relation
to all claims against Crown in right of Canada —
Whether federal legislation contravenes s. 15(1) of the
Canadian Charter of Rights and Freedoms — Federal*

**Sa Majesté la Reine du chef du Canada,
représentée par le ministre des Travaux
publics Appelant**

a c.

**Dywidag Systems International, Canada
Limited, personne morale Intimée**

et

b

**Zutphen Brothers Construction Limited,
personne morale Intimée**

et

c

**Le procureur général de l'Ontario, le
procureur général du Québec et le procureur
général de l'Alberta Intervenants**

d

RÉPERTORIÉ: DYWIDAG SYSTEMS INTERNATIONAL,
CANADA LTD. c. ZUTPHEN BROTHERS CONSTRUCTION
LTD.

N° du greffe: 20333.

1990: 24 janvier; 1990: 29 mars.

e

Présents: Le juge en chef Dickson et les juges Wilson,
L'Heureux-Dubé, Sopinka, Gonthier, Cory et
McLachlin.

f

EN APPEL DE LA COUR SUPRÊME DE LA
NOUVELLE-ÉCOSSE, DIVISION D'APPEL

g

*Droit constitutionnel — Charte des droits — Vie,
liberté et sécurité de la personne — La société défende-
resse demande d'ajouter la Couronne à titre de mise en
cause dans l'action intentée devant la cour supérieure
de la province — Loi fédérale conférant compétence
exclusive à la Cour fédérale relativement à toutes les
réclamations contre la Couronne du chef du Canada —
La loi fédérale porte-t-elle atteinte à l'art. 7 de la
Charte canadienne des droits et libertés? — Une société
peut-elle invoquer l'art. 7 de la Charte? — Loi sur la
Cour fédérale, S.R.C. 1970 (2^e supp.), ch. 10, art. 17(1),
(2) — Loi sur la responsabilité de la Couronne, S.R.C.
1970, ch. C-38, art. 7(1).*

i

*Droit constitutionnel — Charte des droits — Égalité
devant la loi — La société défenderesse demande
d'ajouter la Couronne à titre de mise en cause dans
l'action intentée devant la cour supérieure de la pro-
vince — Loi fédérale conférant à la Cour fédérale
compétence exclusive relativement à toutes les réclama-
tions contre la Couronne du chef du Canada — La loi
fédérale porte-t-elle atteinte à l'art. 15(1) de la Charte*

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 s. 7 of the *Charter*

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, 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 page 1004 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.

It is true that there is an exception to this general principle that was established in *R. v. 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 invalid" (pp. 313-14). Here no penal proceedings are pending and the exception is obviously not applicable.

Section 15 of the *Charter*

With regard to s. 15(1) of the *Charter*, for the reasons expressed in *Wolff*, the impugned provi-

responsabilité de la Couronne sur le fondement qu'elles portaient atteinte à l'art. 15 de la *Charte*. Il a conclu que les dispositions contestées de ces lois violaient le par. 15(1) parce qu'elles plaçaient la Couronne dans une situation privilégiée par rapport aux autres parties. Finalement, il a conclu que cette violation ne pouvait être justifiée aux termes de l'article premier de la *Charte* étant donné que la Couronne n'avait pas démontré que la compétence exclusive de la Cour fédérale était nécessaire dans ce cas ni qu'elle se rapportait à des préoccupations urgentes et réelles.

L'applicabilité de l'art. 7 de la *Charte*

On ne peut plus douter maintenant qu'une société ne peut se prévaloir de la protection de l'art. 7 de la *Charte*. Dans l'arrêt *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, notre Cour à la majorité a conclu qu'une société ne peut être privée de la vie, de la liberté et de la sécurité de la personne et par conséquent ne peut se prévaloir de la protection de l'art. 7 de la *Charte*. À la page 1004, il est déclaré:

... il nous semble que [l'art. 7] avait pour but d'accorder une protection à un niveau individuel seulement. Une lecture ordinaire, conforme au bon sens, de la phrase «Chacun a droit à la vie, à la liberté et à la sécurité de sa personne» fait ressortir l'élément humain visé; seul un être humain peut avoir ces droits. Le terme «chacun» doit donc être lu en fonction du reste de l'article et défini de façon à exclure les sociétés et autres entités qui ne peuvent jouir de la vie, de la liberté et de la sécurité de la personne, et de façon à ne comprendre que les êtres humains.

Il est vrai qu'il existe une exception à ce principe général qui a été établie dans l'arrêt *R. c. Big M Drug Mart*, précité, où la Cour a conclu que «[t]out accusé, que ce soit une personne morale ou une personne physique, peut contester une accusation criminelle en faisant valoir que la loi en vertu de laquelle l'accusation est portée est inconstitutionnelle» (pp. 313 et 314). En l'espèce, il n'y pas de poursuite pénale et de toute évidence l'exception ne s'applique pas.

L'article 15 de la *Charte*

En ce qui concerne le par. 15(1) de la *Charte*, selon les motifs prononcés dans l'arrêt *Wolff*, les

TAB 88

The Wholesale Travel Group Inc. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Attorney General for Alberta, Ellis-Don Limited and Rocco Morra *Intervenors*

and between

Her Majesty The Queen *Appellant*

v.

The Wholesale Travel Group Inc. *Respondent*

and

The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Attorney General for Alberta, Ellis-Don Limited and Rocco Morra *Intervenors*

INDEXED AS: R. v. WHOLESALE TRAVEL GROUP INC.

File Nos.: 21779, 21786.

1991: February 18; 1991: October 24.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

The Wholesale Travel Group Inc. *Appelante*

c.

^a **Sa Majesté la Reine** *Intimée*

et

^b **Le procureur général de l'Ontario, le procureur général du Québec, le procureur général du Nouveau-Brunswick, le procureur général du Manitoba, le procureur général de la Saskatchewan, le procureur général de l'Alberta, Ellis-Don Limited et Rocco Morra** *Intervenants*

^d et entre

Sa Majesté la Reine *Appelante*

c.

^e

The Wholesale Travel Group Inc. *Intimée*

^f et

^g **Le procureur général de l'Ontario, le procureur général du Québec, le procureur général du Nouveau-Brunswick, le procureur général du Manitoba, le procureur général de la Saskatchewan, le procureur général de l'Alberta, Ellis-Don Limited et Rocco Morra** *Intervenants*

^h

RÉPERTORIÉ : R. c. WHOLESALE TRAVEL GROUP INC.

Nos du greffe: 21779, 21786.

ⁱ 1991: 18 février; 1991: 24 octobre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson et Iacobucci.

^j

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

entitled to benefit from a finding that the provisions violate a human being's constitutional rights?

Did the Ontario Court of Appeal err in "rewriting" the offence in that it struck down only paras. (c) and (d) of s. 37.3(2) and deleted the words "he establishes that" rather than declaring the entire provision to be of no force or effect?

Analysis

Does Wholesale Travel Group Inc. Have Standing to Raise the Constitutional Issue and can it Benefit From a Finding of Unconstitutionality?

This Court has held on a number of occasions that a corporation charged with an offence has "standing" to challenge the constitutionality of the offence (as it applies to a human being) as part of its own defence. In *R. v. Big M Drug Mart Ltd.*, *supra*, a corporation which was charged with unlawfully carrying on the sale of goods on a Sunday contrary to the *Lord's Day Act*, R.S.C. 1970, c. L-13, successfully invoked s. 2(a) of the *Charter* to strike down the Act and was acquitted on the basis that the Act was, pursuant to s. 52(1) of the *Constitution Act, 1982*, of no force or effect. The majority, *per* Dickson C.J., acknowledged that a corporation could not exercise or enjoy freedom of religion, but stated that this was irrelevant to the disposition of the case. Dickson C.J. stated, at pp. 313-14:

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 fulfill the status requirements laid down by this Court in the trilogy of "standing" cases . . . but that was not the reason for its appearance in Court.

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. [Emphasis added.]

échéant, peut-elle bénéficier de la conclusion selon laquelle les dispositions portent atteinte aux droits constitutionnels d'une personne physique?

a La Cour d'appel de l'Ontario a-t-elle commis une erreur en «reformulant» l'infraction, c'est-à-dire en n'invalidant que les al. c) et d) du par. 37.3(2) et en supprimant les mots «elle prouve que» plutôt que de déclarer toute la disposition inopérante?

b

Analyse

Wholesale Travel Group Inc. a-t-elle qualité pour soulever la question constitutionnelle et peut-elle bénéficier de la déclaration d'inconstitutionnalité?

Notre Cour a conclu à maintes reprises qu'une personne morale accusée d'une infraction a «qualité» pour contester la constitutionnalité de l'infraction (applicable à une personne physique) pour sa propre défense. Dans l'arrêt *R. v. Big M Drug Mart Ltd.*, précité, une personne morale accusée de s'être illégalement livrée à la vente de marchandises le dimanche, infraction prévue à la *Loi sur le dimanche*, S.R.C. 1970, ch. L-13, a invoqué avec succès l'al. 2a) de la *Charte* pour faire invalider la Loi et a été acquittée parce que la Loi, conformément au par. 52(1) de la *Loi constitutionnelle de 1982*, était inopérante. La majorité, par la voix du juge en chef Dickson, a reconnu qu'une personne morale ne pouvait pas jouir de la liberté de religion, mais elle a déclaré que cela était sans importance quant au fond de l'affaire. Le juge en chef Dickson dit, aux pp. 313 et 314:

L'article 52 énonce le principe fondamental du droit constitutionnel, savoir la suprématie de la Constitution. De ce principe il découle indubitablement que nul ne peut être déclaré coupable d'une infraction à une loi inconstitutionnelle. Ce n'est pas volontairement, à titre de citoyen intéressé qui demande qu'une loi soit déclarée inconstitutionnelle, que l'intimée se trouve devant les tribunaux. S'il s'était agi de ce genre de «litige d'intérêt public», elle aurait eu à satisfaire aux exigences relatives à la qualité pour agir que cette Cour a établies dans les trois arrêts suivants [. . .] Toutefois, ce n'est pas la raison pour laquelle elle s'est présentée en Cour.

Tout accusé, que ce soit une personne morale ou une personne physique, peut contester une accusation criminelle en faisant valoir que la loi en vertu de laquelle l'accusation est portée est inconstitutionnelle. [Je souligne.]

Thus, in *R. v. Big M Drug Mart Ltd.*, the corporation clearly benefitted from the holding that the *Lord's Day Act* was constitutionally invalid because it violated an individual's right to freedom of religion.

In *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*, this Court held that only human beings can enjoy the right to life, liberty and security of the person guaranteed by s. 7 of the *Charter*, and that a corporation was therefore unable to seek a declaration that certain provisions of the *Consumer Protection Act* infringed s. 7 of the *Charter* and could not be upheld under s. 1 of the *Charter*. However, the majority was careful to note that there were no penal proceedings pending in the case and that the principle enunciated in *R. v. Big M Drug Mart Ltd.* was therefore not involved.

Finally, in this Court's recent decision in *Dywidag Systems International, Canada Ltd. v. Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705, Justice Cory (for the Court) referred at p. 709 to the holding in *R. v. Big M Drug Mart Ltd.* as an "exception to this general principle" that a corporation cannot avail itself of the protection offered by s. 7 of the *Charter*.

A number of parties contended, in oral argument, that while this Court has held that a corporation which has been charged with a penal provision has standing to challenge the constitutionality of that provision, this does not necessarily mean that the corporation can benefit from a finding that the provision violates a human being's constitutional rights. In other words, when a corporation's constitutional challenge gives rise to a finding that a statutory provision violates a human being's *Charter* rights, the appropriate remedy under s. 52(1) of the *Constitution Act, 1982* is that the provision is of no force or effect with respect to human beings (because this is the extent of the inconsistency between the Constitution and the law), but the provision remains of force and effect with respect to corporations (because the provi-

Ainsi, dans l'arrêt *R. c. Big M Drug Mart Ltd.*, la société a nettement pu bénéficier de la conclusion selon laquelle la *Loi sur le dimanche* était inconstitutionnelle parce qu'elle violait le droit d'une personne physique à la liberté de religion.

Dans l'arrêt *Irwin Toy Ltd. c. Québec (Procureur général)*, précité, notre Cour a décidé que seuls les êtres humains pouvaient jouir du droit à la vie, à la liberté et la sécurité de la personne garanti à l'art. 7 de la *Charte* et qu'une personne morale ne pouvait donc pas demander que le tribunal déclare que certaines dispositions de la *Loi sur la protection du consommateur*, portent atteinte à l'art. 7 de la *Charte* et ne peuvent être déclarées valides en vertu de l'article premier de la *Charte*. Toutefois, la majorité a pris soin de souligner qu'il n'y avait pas de poursuite pénale en cours et que le principe formulé dans l'arrêt *R. c. Big M Drug Mart Ltd.* n'entraînait donc pas en jeu.

En dernier lieu, dans l'arrêt récent de notre Cour *Dywidag Systems International, Canada Ltd. c. Zutphen Brothers Construction Ltd.*, [1990] 1 R.C.S. 705, le juge Cory (au nom de la Cour) qualifie, à la p. 709, la conclusion tirée dans l'arrêt *R. c. Big M Drug Mart Ltd.* d'«exception à ce principe général» qui veut qu'une personne morale ne puisse pas se prévaloir de la protection de l'art. 7 de la *Charte*.

Plusieurs parties ont soutenu au cours des débats que si notre Cour a conclu qu'une personne morale inculpée en vertu d'une disposition pénale a qualité pour contester la constitutionnalité de cette disposition, cela ne signifie pas nécessairement qu'une personne morale peut bénéficier de la conclusion selon laquelle la disposition porte atteinte aux droits constitutionnels d'une personne physique. Autrement dit, si par suite de la demande de déclaration d'inconstitutionnalité présentée par une personne morale, le tribunal conclut qu'une disposition de la loi porte atteinte aux droits d'une personne physique garantis par la *Charte*, la réparation qui s'impose aux termes du par. 52(1) de la *Loi constitutionnelle de 1982*, est que la disposition est inopérante en ce qui concerne les personnes physiques (parce que c'est dans cette mesure que la règle de droit est incompatible avec la Constitution), mais qu'elle reste opérante au regard

sion as applied to corporations is not inconsistent with the Constitution).

Such an interpretation of the words "to the extent of the inconsistency" contained in s. 52(1) would be inconsistent with this Court's holding in *R. v. Big M Drug Mart Ltd.*, *supra*, and would not accord with this Court's general approach to s. 52(1). For example, in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, this Court restored Dr. Morgentaler's acquittal on the basis that s. 251 (the abortion provision) of the *Criminal Code*, R.S.C. 1970, c. C-34, limited women's rights under s. 7 of the *Charter*, could not be upheld under s. 1 and was therefore of no force or effect. Dr. Morgentaler, as an accused person, was entitled to challenge the constitutionality of s. 251 on the basis that it violated women's *Charter* rights. Moreover, he was entitled to benefit from the finding that the provision was inconsistent with the Constitution and was, therefore, of no force or effect. I am not prepared to depart from this approach to s. 52(1).

Thus, it is my view that Wholesale Travel does have standing to challenge the constitutionality of the false/misleading advertising provisions under ss. 7 and 11(d) of the *Charter* and may benefit from a finding that these provisions are unconstitutional. However, this is not to say that if the same provisions were enacted so as to apply exclusively to corporations, a corporation would be entitled to raise the *Charter* arguments which have been raised in the case at bar. The problem with ss. 36(1) and 37.3(2) of the *Competition Act* is that they are worded so as to encompass both individual and corporate accused; in this sense, they are "over-inclusive". Therefore, if the provisions violate an individual's *Charter* rights they must be struck down (to the extent of the inconsistency) under s. 52(1). Once the provisions are held to be of no force or effect, they cannot apply to any accused, whether corporate or individual. While this result must follow from a finding that an over-inclusive statutory provision violates *Charter* rights, I do not wish to be taken as having ruled on the issue of the appropriate remedy where an under-inclusive statutory provision (e.g., one which confers a benefit to some but not to others) is found to violate *Charter*

des personnes morales (parce que la disposition appliquée aux personnes morales n'est pas incompatible avec la Constitution).

Cette interprétation du mot «incompatible» employé au par. 52(1) contredirait l'arrêt de notre Cour *R. c. Big M Drug Mart Ltd.*, précité, et ne s'accorderait pas avec l'analyse du par. 52(1) qu'a faite notre Cour. Par exemple, dans l'arrêt *R. c. Morgentaler*, [1988] 1 R.C.S. 30, notre Cour a rétabli l'acquiescement du Dr Morgentaler parce que l'art. 251 (la disposition relative à l'avortement) du *Code criminel*, S.R.C. 1970, ch. C-34, limitait les droits garantis aux femmes à l'art. 7 de la *Charte*, qu'il ne pouvait pas être justifié en vertu de l'article premier et qu'il était donc inopérant. Le Dr Morgentaler, à titre d'inculpé, avait le droit de contester la constitutionnalité de l'art. 251 pour la raison qu'il violait les droits des femmes garantis par la *Charte*. En outre, il avait le droit de bénéficier de la conclusion du tribunal selon laquelle la disposition était incompatible avec la Constitution et donc inopérante. Je ne suis pas disposé à m'écarter de cette interprétation du par. 52(1).

Je suis donc d'avis que Wholesale Travel a qualité pour contester la constitutionnalité des dispositions relatives à la publicité fausse ou trompeuse en vertu de l'art. 7 et de l'al. 11d) de la *Charte* et peut bénéficier de la déclaration d'inconstitutionnalité de ces dispositions. Toutefois, cela ne signifie pas que si ces mêmes dispositions visaient uniquement les personnes morales, une personne morale aurait le droit de faire valoir les arguments fondés sur la *Charte* qui ont été avancés en l'espèce. Le problème que posent les par. 36(1) et 37.3(2) de la *Loi sur la concurrence*, est qu'ils visent tant les personnes physiques que les personnes morales; en ce sens, ils constituent des dispositions «de portée excessive». Par conséquent, si les dispositions portent atteinte aux droits d'une personne physique garantis par la *Charte*, elles doivent être invalidées (dans la mesure de l'incompatibilité) aux termes du par. 52(1). Une fois déclarées inopérantes, les dispositions ne peuvent s'appliquer à aucun inculpé, personne morale ou physique. C'est le résultat qui doit découler d'une conclusion selon laquelle une disposition de portée excessive viole les droits garantis par la *Charte*, mais je ne veux pas que l'on en déduise que j'ai tranché la question de la

rights. The question of the appropriate *Charter* remedy in such circumstances will be decided when the facts of the case raise the issue and the matter is fully argued before the Court.

As I have said, these provisions apply to both individual and corporate accused. However, if the provisions in question applied only to corporations, the *Charter* analysis would, in my view, be very different. For example, provisions which applied exclusively to corporations could not be challenged on the basis that they combined absolute liability with imprisonment, for the simple reason that a corporation cannot be imprisoned. Furthermore, as I stated in *Re B.C. Motor Vehicle Act*, *supra*, at p. 518:

Even if it be decided that s. 7 does extend to corporations, I think the balancing under s. 1 of the public interest against the financial interests of a corporation would give very different results from that of balancing public interest and the liberty or security of the person of a human being.

In my opinion, when the criminal law is applied to a corporation, it loses much of its "criminal" nature and becomes, in essence, a "vigorous" form of administrative law. With the possibility of imprisonment removed, and the stigma which attaches to conviction effectively reduced to loss of money, the corporation is in a completely different situation than is an individual. While it might be argued that in closely held corporations, where there are only two or three shareholders who themselves manage the company, the stigma which attaches to the corporation will carry over to those individuals and will, therefore, affect human interests, it is my view that this consideration should not alter the analysis. The corporate form of business organization is chosen by individuals because of its numerous advantages (legal and otherwise). Those who cloak themselves in the corporate veil, and who rely on the legal distinction between themselves and the corporate entity when it

réparation appropriée dans le cas où le tribunal jugerait qu'une disposition de portée restreinte (p. ex. une disposition qui accorde un avantage à certains mais non à d'autres) porte atteinte à des droits garantis par la *Charte*. La question de la réparation appropriée sous le régime de la *Charte* eu égard à de telles circonstances sera tranchée quand les faits de l'espèce soulèveront cette question et que notre Cour aura entendu le débat complet sur l'affaire.

Je le répète, ces dispositions s'appliquent aux personnes accusées tant physiques que morales. Toutefois, si elles ne visaient que les personnes morales, l'analyse fondée sur la *Charte* serait, à mon sens, très différente. Par exemple, les dispositions qui ne s'appliqueraient qu'aux personnes morales ne pourraient être attaquées au motif qu'elles conjuguent responsabilité absolue et emprisonnement, pour la simple raison qu'une personne morale ne peut pas être emprisonnée. Au surplus, comme je l'ai dit dans le *Renvoi: Motor Vehicle Act de la C.-B.*, précité, à la p. 518:

Même si l'on décidait que l'art. 7 s'applique aux personnes morales, je crois que l'équilibre à réaliser, en vertu de l'article premier, entre l'intérêt public et les intérêts financiers d'une société donnerait des résultats très différents de ceux de l'équilibre à réaliser entre l'intérêt public et la liberté ou la sécurité d'une personne physique.

À mon avis, lorsque le droit pénal s'applique à une personne morale, il perd dans une large mesure son caractère «pénal» et devient, essentiellement, une forme «énergique» de droit administratif. Si la possibilité de l'emprisonnement est supprimée et si les stigmates qui se rattachent à la déclaration de culpabilité sont effectivement réduits à la perte d'argent, la personne morale se trouve dans une situation tout à fait différente de celle d'une personne physique. On pourrait certes soutenir que, dans le cas d'une société ayant peu d'actionnaires, soit deux ou trois personnes qui l'administrent elles-mêmes, les stigmates qui s'impriment sur la société sont reportés sur ces individus et ont un effet sur les droits de personnes physiques, mais, à mon avis, ce facteur ne doit pas modifier l'analyse. Les particuliers choisissent la constitution d'une société par actions parce qu'elle comporte de nombreux avantages (juridiques et autres). Ceux qui recourent au paravent de la person-

is to their benefit to do so, should not be allowed to deny this distinction in these circumstances (where the distinction is not to their benefit).

In summary, given that the false/misleading advertising provisions encompass both individual and corporate accused and given this Court's interpretation of s. 52(1), Wholesale Travel does have standing to challenge these provisions under ss. 7 and 11(d) of the *Charter* and is entitled to benefit from a finding that the provisions violate a human being's constitutional rights.

Do ss. 36(1)(a) and 37.3(2) of the Competition Act Violate the Charter?

Section 7

In *Re B.C. Motor Vehicle Act*, *supra*, this Court held that the combination of absolute liability and possible imprisonment violates s. 7 of the *Charter* and will rarely be upheld under s. 1. This is because an absolute liability offence has the potential of convicting a person who really has done nothing wrong (i.e., has acted neither intentionally nor negligently). In *R. v. Vaillancourt*, *supra*, I stated that whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of a law, even a mere provincial regulatory offence, there is, as a principle of fundamental justice, a minimum mental state (or fault requirement) which is an essential element of the offence. *Re B.C. Motor Vehicle Act* inferentially decided that even for a mere provincial regulatory offence at least negligence is required, in that at least a defence of due diligence must always be open to an accused who risks imprisonment upon conviction. The rationale for elevating *mens rea* from a presumed element in *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, to a constitutionally required element, was that it is a principle of fundamental justice that the penalty imposed on an accused and the stigma which attaches to that penalty and/or to the conviction itself, necessitate a level of fault which reflects the particular nature of the crime. In *Vaillancourt*,

nalité morale et qui invoquent la distinction juridique entre eux-mêmes et la personne morale quand ils peuvent en tirer profit, ne doivent pas être autorisés à nier cette distinction dans les circonstances qui nous occupent (lorsque la distinction n'opère pas à leur avantage).

En résumé, étant donné que les dispositions relatives à la publicité fausse ou trompeuse visent tous les accusés, les personnes tant physiques que morales, et étant donné l'interprétation que notre Cour a donnée au par. 52(1), Wholesale Travel a qualité pour contester ces dispositions en vertu de l'art. 7 et de l'al. 11d) de la *Charte* et a le droit de bénéficier de la conclusion selon laquelle les dispositions portent atteinte aux droits constitutionnels d'une personne physique.

L'alinéa 36(1)a) et le par. 37.3(2) de la Loi sur la concurrence violent-ils la Charte?

L'article 7

Dans le *Renvoi: Motor Vehicle Act de la C.-B.*, précité, notre Cour a décidé que la conjugaison de la responsabilité absolue et de l'emprisonnement violait l'art. 7 de la *Charte* et sera rarement justifiée en vertu de l'article premier. C'est que l'infraction de responsabilité absolue risque d'entraîner la déclaration de culpabilité d'une personne qui n'a réellement rien fait de mal (c'est-à-dire qu'elle n'a pas accompli d'acte intentionnel ou par négligence). Dans *R. c. Vaillancourt*, précité, j'ai dit que dans tous les cas où l'État recourt à une mesure privative de liberté, comme l'emprisonnement, pour assurer le respect de la loi, même s'il ne s'agit que d'une simple infraction à une réglementation provinciale, la justice fondamentale exige que la présence d'un état d'esprit minimal (ou d'une faute) chez l'accusé constitue un élément essentiel de l'infraction. Dans le *Renvoi: Motor Vehicle Act de la C.-B.*, on établit indirectement que, même dans le cas d'une infraction à une réglementation provinciale, la négligence au moins est requise, en ce sens que l'accusé qui risque d'être condamné à l'emprisonnement s'il est déclaré coupable doit toujours pouvoir invoquer au moins un moyen de défense fondé sur la diligence raisonnable. Si, de l'élément présumé qu'elle était dans l'arrêt *R. c. Ville de Sault Ste-Marie*, [1978] 2 R.C.S. 1299, la *mens*

Counsel for Wholesale Travel argued that the stigma attaching to a conviction of false/misleading advertising is akin to the stigma of dishonesty which attaches to a conviction of theft. Given that the stigma attaching to theft was explicitly contemplated in *Vaillancourt* as one which may well necessitate a subjective *mens rea*, it was argued that the offence of false/misleading advertising also requires an element of subjective *mens rea* in order to comply with the principles of fundamental justice. In my view, while a conviction for false/misleading advertising carries some stigma, in the sense that it is not morally neutral behaviour, it cannot be said that the stigma associated with this offence is analogous to the stigma of dishonesty which attaches to a conviction for theft. A conviction for false/misleading advertising will rest on a variety of facts, many of which will not reveal any dishonesty but, rather, carelessness and the conviction of same does not brand the accused as being dishonest. In my opinion, the same cannot be said for a conviction for theft.

Thus, while it is clear that there are some offences for which the special stigma attaching to conviction is such that subjective *mens rea* is necessary in order to establish the moral blameworthiness which justifies the stigma and sentence, the offence of false/misleading advertising is not such an offence. I note that the general question of the appropriate standard of fault was recently addressed, in relation to provincial offences, by the Ontario Law Reform Commission in its *Report on the Basis of Liability for Provincial Offences* (1990). The Commission was of the view that "mere carelessness should not result in a prison sentence" (at p. 46) and recommended that where the possibility of imprisonment arises upon conviction of a provincial offence, the standard of fault must be more than ordinary negligence and must be either an aware state of mind (subjective *mens rea*) or a "marked and substantial departure from the standard of care expected of a reasonably prudent person in the circumstances" (at p. 46). The Law Reform Com-

L'avocat de Wholesale Travel a soutenu que les stigmates liés à une déclaration de culpabilité, dans le cas de l'infraction de publicité fausse ou trompeuse, ressemblent à ceux qui sont associés à la malhonnêteté et qui se rattachent à une déclaration de culpabilité dans le cas d'un vol. Étant donné que les stigmates qui se rattachent au vol ont été explicitement rangés, dans l'arrêt *Vaillancourt*, parmi ceux qui peuvent bien commander une *mens rea* subjective, il a affirmé que l'infraction de publicité fausse ou trompeuse exige aussi qu'une *mens rea* subjective soit un élément de l'infraction afin que les principes de justice fondamentale soient respectés. À mon avis, si une déclaration de culpabilité à l'égard de la publicité fausse ou trompeuse entraîne certains stigmates, en ce sens qu'il ne s'agit pas d'une conduite moralement neutre, on ne saurait cependant affirmer que les stigmates liés à cette infraction sont analogues à ceux de la malhonnêteté, qui se rattachent à une déclaration de culpabilité à l'égard d'un vol. Dans le cas de la publicité fausse ou trompeuse, la déclaration de culpabilité repose sur divers faits, dont un bon nombre ne participent pas de la malhonnêteté, mais plutôt de l'insouciance, et la déclaration de culpabilité à cet égard ne donne pas à l'accusé l'étiquette de la malhonnêteté. Selon moi, on ne peut pas en dire autant de la déclaration de culpabilité à l'égard d'un vol.

Par conséquent, il y a de toute évidence certaines infractions pour lesquelles les stigmates particuliers liés à la déclaration de culpabilité sont de telle nature qu'il faut une *mens rea* subjective pour établir la réprobation morale qui justifie les stigmates et la peine, mais l'infraction de publicité fausse ou trompeuse ne peut pas être classée dans cette catégorie. Je remarque que la question générale de la norme de faute appropriée a été étudiée récemment, à propos des infractions provinciales, par la Commission de réforme du droit de l'Ontario dans son *Report on the Basis of Liability for Provincial Offences* (1990). La Commission a estimé que [TRADUCTION] «la simple insouciance ne doit pas entraîner de peine d'emprisonnement» (à la p. 46) et elle a recommandé que, dans les cas où une déclaration de culpabilité à l'égard d'une infraction provinciale risque d'entraîner l'emprisonnement, la norme de faute doit dépasser la négligence ordinaire et doit consister soit dans la conscience (*mens rea* subjective) soit dans un [TRA-

throughout our lives. The more complex the activity, the greater the need for and the greater our reliance upon regulation and its enforcement. For example, most people would have no idea what regulations are required for air transport or how they should be enforced. Of necessity, society relies on government regulation for its safety.

II

The Offence in the Present Case*Competition Legislation Generally*

The offence of misleading advertising with which Wholesale Travel is charged is found in the Act. This Act, like its predecessor, the *Combines Investigation Act*, R.S.C. 1970, c. C-23, is aimed at regulating unacceptable business activity. In *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, Dickson C.J. held that the Act embodied a complex scheme of economic regulation, the purpose of which is to eliminate activities that reduce competition in the marketplace.

The nature and purpose of the Act was considered in greater detail in *Thomson Newspapers Ltd.*, *supra*. La Forest J. pointed out that the Act is aimed at regulating the economy and business with a view to preserving competitive conditions which are crucial to the operation of a free market economy. He observed that the Act was not concerned with "real crimes" but with regulatory or public welfare offences. He put the position this way, at p. 510:

At bottom, the Act is really aimed at the regulation of the economy and business, with a view to the preservation of the competitive conditions which are crucial to the operation of a free market economy. This goal has obvious implications for Canada's material prosperity. It also has broad political overtones in that it is aimed at preventing concentration of power It must be remembered that private organizations can be just as oppressive as the state when they gain such a dominant

le fonctionnement efficace de la société. Elles sont justifiées dans tous les aspects de notre vie. Plus une activité est complexe et plus nous avons besoin des dispositions réglementaires et de leur mise en application. Par exemple, la plupart des gens ignorent quelles dispositions réglementaires sont nécessaires en matière de transport aérien ou comment elles devraient être appliquées. Par la force des choses, la société se fie à la réglementation gouvernementale pour assurer sa sécurité.

II

L'infraction dont il est question en l'espèce*Les considérations générales sur la législation relative à la concurrence*

L'infraction de publicité trompeuse dont est accusée Wholesale Travel est prévue dans la Loi. Cette loi, comme celle qui l'a précédée, la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, ch. C-23, est destinée à réglementer les activités commerciales inacceptables. Dans l'arrêt *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641, le juge en chef Dickson a statué que la Loi comportait un système de réglementation économique complexe dont l'objet était d'éliminer les activités qui diminuent la concurrence sur le marché.

La nature et l'objet de la Loi ont été examinés plus en détail dans l'arrêt *Thomson Newspapers Ltd.*, précité. Le juge La Forest y signale que la Loi vise à réglementer l'économie et le commerce en vue de protéger les conditions de concurrence cruciales au fonctionnement d'une économie de libre marché. Il fait remarquer que la Loi ne porte pas sur des «crimes proprement dits» mais sur des infractions de nature réglementaire ou contre le bien-être public. Il exprime son point de vue de la manière suivante, à la p. 510:

Au fond, la Loi vise réellement la réglementation de l'économie et du commerce en vue de protéger les conditions de concurrence cruciales au fonctionnement d'une économie de libre marché. Cet objectif comporte évidemment des conséquences pour la prospérité matérielle du Canada. Il comporte également des incidences politiques importantes en ce qu'il vise à prévenir la concentration du pouvoir [. . .] Rappelons que des organismes privés peuvent être tout aussi oppressifs que l'État

position within their sphere of operations that they can effectively force their will upon others.

The conduct regulated or prohibited by the Act is not conduct which is by its very nature morally or socially reprehensible. It is instead conduct we wish to discourage because of our desire to maintain an economic system which is at once productive and consistent with our values of individual liberty. It is, in short, not conduct which would be generally regarded as by its very nature criminal and worthy of criminal sanction. It is conduct which is only criminal in the sense that it is in fact prohibited by law. One's view of whether it should be so proscribed is likely to be functional or utilitarian, in the sense that it will be based on an assessment of the desirability of the economic goals to which combines legislation is directed or its potential effectiveness in achieving those goals. It is conduct which is made criminal for strictly instrumental reasons. [Emphasis added.]

These decisions make it clear that the Act in all its aspects is regulatory in character.

The Offence of False or Misleading Advertising

Is the offence of false or misleading advertising regulatory in nature? It seems to me that the fact that the provision is located within a comprehensive regulatory framework would ordinarily be sufficient to demonstrate its regulatory nature. Several other considerations point to the same conclusion.

The offence of misleading advertising has existed in Canada since 1914. It is not without significance that it was, in 1969, transferred from the *Criminal Code* to the *Combines Investigation Act*, a step which confirms the regulatory nature of the offence. The provision was amended in 1975 to provide for a defence of due diligence, converting the offence from absolute to strict liability.

It is true that the availability of imprisonment as a sanction for breach of a statute might be taken to indicate that the provision is criminal in nature. However, this fact is not itself dispositive of the character of an offence. Rather, one must consider the conduct addressed by the legislation and the purposes for

lorsqu'ils acquièrent un statut tellement important dans leur milieu qu'ils peuvent effectivement imposer leur volonté aux autres.

La conduite réglementée ou interdite par la Loi n'est pas en soi moralement ou socialement répréhensible. Il s'agit plutôt d'une conduite que nous voulons décourager en raison de notre volonté de maintenir un système économique qui soit productif et conforme à nos valeurs de liberté individuelle. Bref, ce n'est pas une conduite qui, de par sa nature même, serait généralement considérée comme criminelle et passible de sanctions criminelles. C'est une conduite qui n'est criminelle que parce qu'elle est effectivement interdite par la loi. Une opinion quant à savoir si elle devrait être ainsi interdite sera vraisemblablement fonctionnelle ou utilitaire, en ce sens qu'elle sera fondée sur une évaluation du caractère souhaitable des objectifs économiques visés par la loi relative aux coalitions ou de son efficacité possible dans la poursuite de ces objectifs. C'est une conduite qui est rendue criminelle pour des raisons strictement pratiques. [Je souligne.]

Ces arrêts indiquent clairement que la Loi est à tous les égards de nature réglementaire.

L'infraction de publicité fausse ou trompeuse

L'infraction de publicité fausse ou trompeuse est-elle de nature réglementaire? Il me semble que la présence de cette disposition dans un cadre réglementaire général suffirait normalement à démontrer sa nature réglementaire. Diverses autres considérations amènent la même conclusion.

L'infraction de publicité trompeuse existe au Canada depuis 1914. Ce n'est pas pour rien que la disposition qui prévoit cette infraction est passée, en 1969, du *Code criminel* à la *Loi relative aux enquêtes sur les coalitions*, mesure qui confirme la nature réglementaire de l'infraction. Cette disposition a été modifiée en 1975 afin d'y insérer une défense de diligence, ce qui a transformé cette infraction de responsabilité absolue en infraction de responsabilité stricte.

On pourrait, il est vrai, considérer que la possibilité d'infliger une peine d'emprisonnement pour violation d'une loi indique que la disposition est de nature criminelle. Cependant, cela ne détermine pas en soi la nature d'une infraction. Il faut plutôt examiner la conduite visée par la loi et les raisons pour lesquelles

which such conduct is regulated. This view was most recently expressed by La Forest J. in *Thomson Newspapers Ltd.*, *supra*, at p. 509. He noted that many regulatory offences provide for imprisonment in order to ensure compliance with the terms of the statute and thereby achieve the regulatory goal.

The appellant has argued that conviction for the offence of false advertising carries a stigma of dishonesty, with the inference that the accused falsely advertised for the purposes of obtaining economic advantage. It is said that nothing could be more damaging to a business than the implication that it has made dishonest representations. In my view, however, the offence does not focus on dishonesty but rather on the harmful consequences of otherwise lawful conduct. Conviction suggests only that the defendant has made a representation to the public which was in fact misleading and that the defendant was unable to establish the exercise of due diligence in preventing the error. This connotes a fault element of negligence rather than one involving moral turpitude. Thus, any stigma that might flow from a conviction is very considerably diminished.

In summary, the offence of false advertising possesses the essential characteristics which distinguish regulatory offences from those which are truly criminal. Accordingly, it should be considered to be a regulatory offence rather than a crime in the ordinary sense.

III

A Contextual Approach to Charter Interpretation

A. The Importance of Considering Charter Rights in Context

In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, Dickson J. (as he then was) set out the general approach to *Charter* interpretation and the basic principles to be applied. One of his central premises was the need to consider context in order to render the rights and freedoms guaranteed in the

celle-ci est conçue pour réglementer cette conduite. C'est le point de vue qu'a exprimé tout récemment le juge La Forest dans l'arrêt *Thomson Newspapers Ltd.*, précité, à la p. 509. Il a souligné que des peines d'emprisonnement sont prévues dans le cas de nombreuses infractions réglementaires afin d'assurer l'exécution des dispositions de la loi et d'atteindre ainsi l'objectif de la réglementation.

L'appelante a soutenu qu'une déclaration de culpabilité de fausse publicité comporte un stigmate de malhonnêteté qui amène à conclure que l'accusé a fait une fausse publicité dans le but de tirer un avantage économique. Il est allégué que rien ne peut être plus dommageable à une entreprise que l'insinuation qu'elle a donné au public des indications malhonnêtes. Toutefois, à mon avis, l'infraction ne repose pas sur la malhonnêteté, mais plutôt sur les conséquences préjudiciables d'une conduite par ailleurs légale. La déclaration de culpabilité du défendeur laisse simplement supposer que celui-ci a donné au public des indications qui étaient en fait trompeuses et qu'il a été incapable de prouver qu'il avait fait preuve de diligence pour prévenir l'erreur. Cela dénote la négligence plutôt que la turpitude morale. Ce qui, en conséquence, atténue considérablement l'importance de tout stigmate pouvant découler d'une déclaration de culpabilité.

En résumé, l'infraction de fausse publicité possède les caractéristiques essentielles qui distinguent les infractions réglementaires des infractions criminelles proprement dites. On devrait par conséquent considérer qu'il s'agit d'une infraction réglementaire plutôt que d'un crime au sens ordinaire de ce terme.

III

Une méthode contextuelle d'interprétation de la Charte

A. L'importance d'examiner les droits garantis par la Charte dans leur contexte

Dans l'arrêt *R. c. Big M. Drug Mart Ltd.*, [1985] 1 R.C.S. 295, le juge Dickson (alors juge puîné) a énoncé la manière générale d'interpréter la *Charte* et les principes fondamentaux à appliquer. L'une de ses principales prémisses était la nécessité d'examiner le contexte afin de donner tout leur sens et toute leur

these assumptions which the licensing justification challenges.

Criminal law is rooted in the concepts of individual autonomy and free will and the corollary that each individual is responsible for his or her conduct. It assumes that all persons are free actors, at liberty to choose how to regulate their own actions in relation to others. The criminal law fixes the outer limits of acceptable conduct, constraining individual freedom to a limited degree in order to preserve the freedom of others. Thus, the basis of criminal responsibility is that the accused person has made a deliberate and conscious choice to engage in activity prohibited by the *Criminal Code*. The accused person who is convicted of an offence will be held responsible for his or her actions, with the result that the opprobrium of society will attach to those acts and any punishment imposed will be considered to be deserved.

The licensing argument is directed to this question of choice. Thus, while in the criminal context, the essential question to be determined is whether the accused has made the choice to act in the manner alleged in the indictment, the regulated defendant is, by virtue of the licensing argument, assumed to have made the choice to engage in the regulated activity. The question then becomes not whether the defendant chose to enter the regulated sphere but whether, having done so, the defendant has fulfilled the responsibilities attending that decision. Professor Richardson puts the position this way in "Strict Liability for Regulatory Crime: the Empirical Research," [1987] *Crim. L.R.* 295, at pp. 295-96:

... it can be argued that the strict liability regulatory offender is not a "blameless innocent". By indulging in the regulated activity she has voluntarily adopted the risks of regulatory infraction and her supposed "innocence" flows from the law's traditional tendency to view

subordination et le sacrifice de la personne accusée d'une infraction réglementaire aux intérêts de la collectivité en général. Une telle position, affirme-t-on, est incompatible avec notre préoccupation fondamentale pour la dignité de l'individu et avec notre croyance dans l'importance de ce dernier. Ce sont ces conceptions que remet en cause la théorie de l'acceptation des conditions.

Le droit pénal repose sur les concepts du libre arbitre et de l'autonomie de l'individu ainsi que sur le corollaire voulant que chaque individu est responsable de sa conduite. Il suppose que toutes les personnes sont libres d'agir et ont la liberté de choisir comment réglementer leurs actes par rapport à autrui. Le droit pénal fixe les limites de ce qui constitue une conduite acceptable, restreignant dans une certaine mesure la liberté individuelle afin de préserver la liberté d'autrui. La responsabilité pénale repose donc sur le postulat suivant: l'accusé a choisi délibérément et consciemment de se livrer à l'activité prohibée par le *Code criminel*. L'accusé reconnu coupable d'une infraction sera tenu responsable de ses actes et, en conséquence, ce sont ces actes qui feront l'objet de la réprobation sociale et tout châtiment qui pourra être infligé sera jugé mérité.

L'argument reposant sur l'acceptation des conditions concerne cette question du choix. Alors que, dans le contexte pénal, la question essentielle consiste à déterminer si l'accusé a choisi d'agir de la manière alléguée dans l'acte d'accusation, la personne accusée d'une infraction réglementaire est, en vertu de l'argument fondé sur l'acceptation des conditions, présumée avoir choisi de se livrer à l'activité réglementée. Il ne s'agit donc pas de déterminer si le défendeur a choisi d'exercer l'activité réglementée mais plutôt si, ce faisant, il a assumé les responsabilités afférentes à sa décision. Le professeur Richardson explique cette position de la manière suivante dans «Strict Liability for Regulatory Crime: the Empirical Research,» [1987] *Crim. L.R.* 295, aux pp. 295 et 296:

[TRADUCTION] ... on peut alléguer que la contrevenante à la réglementation de responsabilité stricte n'est pas une «innocente n'ayant rien à se reprocher». En se livrant à l'activité réglementée, elle a volontairement choisi d'accepter les risques de commettre une infrac-

TAB 89

Thomson Newspapers Limited, Brian W. Slaughter, Peter T. Bogart and Paul E. Weeks
Appellants

v.

Director of Investigation and Research, Combines Investigation Act, Restrictive Trade Practices Commission and the Attorney General of Canada *Respondents*

and

The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for New Brunswick and the Attorney General for Alberta *Intervenors*

INDEXED AS: THOMSON NEWSPAPERS LTD. v. CANADA
(DIRECTOR OF INVESTIGATION AND RESEARCH,
RESTRICTIVE TRADE PRACTICES COMMISSION)

File No.: 20228.

1988: November 1; 1990: March 29.

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

ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

Constitutional law — Charter of Rights — Fundamental justice — Self-incrimination — Right to remain silent — Derivative evidence — Combines investigation — Corporation suspected of predatory pricing — Corporate officers ordered to testify under oath and to produce documents pursuant to s. 17 of the Combines Investigation Act — Failure to comply with a s. 17 order subject to legal consequences — Whether s. 7 of the Canadian Charter of Rights and Freedoms can be invoked — Whether s. 17 infringes s. 7 of the Charter — If so, whether s. 17 justifiable under s. 1 of the Charter — Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(c), 13.

Constitutional law — Charter of Rights — Unreasonable search and seizure — Combines investigation — Corporation suspected of predatory pricing — Corporate officers ordered to testify under oath and to produce documents pursuant to s. 17 of the Combines Investigation Act — Whether s. 17 infringes s. 8 of the

Thomson Newspapers Limited, Brian W. Slaughter, Peter T. Bogart et Paul E. Weeks
Appellants

a c.

Directeur des enquêtes et recherches, Loi relative aux enquêtes sur les coalitions, Commission sur les pratiques restrictives du commerce et le procureur général du Canada
Intimés

b

et

Le procureur général de l'Ontario, le procureur général du Québec, le procureur général du Nouveau-Brunswick et le procureur général de l'Alberta *Intervenants*

c

RÉPERTORIÉ: THOMSON NEWSPAPERS LTD. c. CANADA
(DIRECTEUR DES ENQUÊTES ET RECHERCHES,
COMMISSION SUR LES PRATIQUES RESTRICTIVES DU
COMMERCE)

d

N° du greffe: 20228.

e 1988: 1^{er} novembre; 1990: 29 mars.

Présents: Les juges Lamer, Wilson, La Forest,
L'Heureux-Dubé et Sopinka.

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

f

Droit constitutionnel — Charte des droits — Justice fondamentale — Auto-incrimination — Droit de garder le silence — Preuve dérivée — Enquêtes sur les coalitions — Société commerciale soupçonnée de fixation de prix déraisonnablement bas — Dirigeants de la société enjoins de témoigner sous serment et de produire des documents en vertu de l'art. 17 de la Loi relative aux enquêtes sur les coalitions — Le refus de se conformer à une ordonnance rendue en vertu de l'art. 17 entraîne des sanctions légales — L'article 7 de la Charte canadienne des droits et libertés peut-il être invoqué? — L'article 17 viole-t-il l'art. 7 de la Charte? — Dans l'affirmative, l'art. 17 est-il justifiable en vertu de l'article premier de la Charte? — Charte canadienne des droits et libertés, art. 1, 7, 11(c), 13.

Droit constitutionnel — Charte des droits — Fouilles, perquisitions et saisies abusives — Enquêtes sur les coalitions — Société commerciale soupçonnée de fixation de prix déraisonnablement bas — Dirigeants de la société enjoins de témoigner sous serment et de produire des documents en vertu de l'art. 17 de la Loi

in *Hunter*. These provisions are also not saved under s. 1 of the *Charter*.

6. Disposition

I would allow the appeal and declare s. 17 of the *Combines Investigation Act* to be inconsistent with ss. 7 and 8 of the *Charter* and of no force or effect under s. 52(1) to the extent of the inconsistency. I would declare the orders to appear made pursuant to the section to be likewise of no force or effect. I would award the appellants their costs both here and in the Court of Appeal and I would answer the constitutional question in the affirmative.

The following are the reasons delivered by

LA FOREST J.—This appeal raises the issue whether s. 17 of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, which permits the examination under oath of witnesses and the production of business records in the course of carrying on an investigation under the Act violates s. 7 or s. 8 of the *Canadian Charter of Rights and Freedoms*. Section 7, of course, guarantees everyone the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 8 accords everyone the right to be secure against unreasonable search or seizure.

I have had the advantage of reading the reasons of my colleagues, Lamer, Wilson, L'Heureux-Dubé and Sopinka JJ. It says something about the complexities of the issues that I have also felt constrained to write.

Facts

The facts and judicial history of this appeal are fully set forth in the reasons of my colleague Wilson J., and it is sufficient for me to refer only to such of these matters as are essential to an understanding of what follows.

The corporate appellant, Thomson Newspapers Limited, and several of its officers, the individual appellants, were served with orders, pursuant to s. 17 of the *Combines Investigation Act*, to appear to

énoncées dans l'arrêt *Hunter*. Ces dispositions non plus ne sont pas sauvegardées par l'article premier de la *Charte*.

a 6. Dispositif

Je suis d'avis d'accueillir le pourvoi et de déclarer l'art. 17 de la *Loi relative aux enquêtes sur les coalitions* incompatible avec les art. 7 et 8 de la *Charte* et, partant, inopérant en vertu du par. 52(1). Je suis d'avis de déclarer inexécutoires également les ordonnances de comparution délivrées en vertu de cette disposition. Je suis d'avis d'accorder aux appelants leurs dépens tant en notre Cour qu'en Cour d'appel et de répondre à la question constitutionnelle par l'affirmative.

Version française des motifs rendus par

LE JUGE LA FOREST—Ce pourvoi porte sur la question de savoir si l'art. 17 de la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, ch. C-23, qui permet l'interrogatoire sous serment de témoins et la production de documents de l'entreprise au cours d'une enquête tenue en vertu de la Loi, viole les art. 7 et 8 de la *Charte canadienne des droits et libertés*. L'article 7 garantit évidemment à chacun le droit à la vie, à la liberté et à la sécurité de sa personne et prévoit qu'il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale. L'article 8 reconnaît à chacun le droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

J'ai eu l'avantage de lire les motifs de mes collègues les juges Lamer, Wilson, L'Heureux-Dubé et Sopinka. Ils nous donnent une idée de la complexité des questions en litige sur lesquelles j'ai cru devoir me prononcer également.

h Les faits

Les faits et l'historique judiciaire de ce pourvoi sont exposés en détail dans les motifs de ma collègue le juge Wilson et il suffit que je rappelle seulement les points essentiels à la compréhension de ce qui suit.

Conformément à l'art. 17 de la *Loi relative aux enquêtes sur les coalitions*, des ordonnances de comparution ont été signifiées à la société appelante, Thomson Newspapers Limited, et à plu-

be examined under oath and to produce documents described in the orders in connection with an inquiry to determine whether there was evidence that the corporation or its subsidiaries had committed the offence of predatory pricing contrary to s. 34(1)(c) of the Act.

The appellants then sought a declaration before J. Holland J. of the Ontario High Court that s. 17 and the orders to appear violated ss. 7 and 8 of the *Charter*. For reasons set forth in Wilson J.'s reasons, J. Holland J. held that in so far as s. 17 authorized the compulsory production of documents, it was in violation of s. 8 of the *Charter*, but that it did not violate s. 7: (1986), 54 O.R. (2d) 143. However, the Ontario Court of Appeal, for reasons also set forth in my colleague's reasons, held that s. 17 violated neither of these provisions: (1986), 57 O.R. (2d) 257.

Leave to appeal to this Court was sought and granted, [1987] 1 S.C.R. xiv, and the following constitutional question was set:

1. Is section 17 of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, inconsistent with the provisions of ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*, and therefore of no force or effect?

The impugned provision reads as follows:

17. (1) On *ex parte* application of the Director, or on his own motion, a member of the Commission may order that any person resident or present in Canada be examined upon oath before, or make production of books, papers, records or other documents to such member or before or to any other person named for the purpose by the order of such member and may make such orders as seem to him to be proper for securing the attendance of such witness and his examination, and the production by him of books, papers, records or other documents and may otherwise exercise, for the enforcement of such orders or punishment for disobedience thereof, all powers that are exercised by any superior court in Canada for the enforcement of subpoenas to witnesses or punishment of disobedience thereof.

sieurs de ses dirigeants, les personnes physiques appelantes, leur enjoignant de comparaître afin d'être interrogées sous serment et de produire les documents décrits dans les ordonnances, relativement à une enquête tenue en vue de déterminer s'il existait des éléments de preuve établissant que la société ou ses filiales avaient commis l'infraction de fixation de prix déraisonnablement bas, contrairement à l'al. 34(1)c) de la Loi.

Les appelants ont alors sollicité auprès du juge J. Holland de la Haute Cour de l'Ontario un jugement déclarant que l'art. 17 et les ordonnances de comparution violaient les art. 7 et 8 de la *Charte*. Pour les raisons exposées dans les motifs du juge Wilson, le juge Holland a conclu que, dans la mesure où l'art. 17 permettait la production obligatoire de documents, il violait l'art. 8 de la *Charte* mais non l'art. 7: (1986), 54 O.R. (2d) 143. Toujours pour les raisons exposées dans les motifs de ma collègue, la Cour d'appel de l'Ontario a cependant conclu que l'art. 17 ne violait ni l'une ni l'autre de ces dispositions: (1986), 57 O.R. (2d) 257.

Notre Cour a accueilli la demande d'autorisation de pourvoi, [1987] 1 R.C.S. xiv, et la question constitutionnelle suivante a été formulée:

1. L'article 17 de la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, ch. C-23, est-il incompatible avec les dispositions des art. 7 et 8 de la *Charte canadienne des droits et libertés* et donc inopérant?

La disposition contestée se lit ainsi:

17. (1) Sur demande *ex parte* du directeur, ou de sa propre initiative, un membre de la Commission peut ordonner que toute personne résidant ou présente au Canada soit interrogée sous serment devant lui ou devant toute autre personne nommée à cette fin par l'ordonnance de ce membre, ou produire à ce membre ou à cette autre personne des livres, documents, archives ou autres pièces, et peut rendre les ordonnances qu'il estime propres à assurer la comparution et l'interrogatoire de ce témoin et la production par ce dernier de livres, documents, archives ou autres pièces, et il peut autrement exercer, en vue de l'exécution de ces ordonnances ou de la punition pour défaut de s'y conformer, les pleins pouvoirs exercés par toute cour supérieure au Canada quant à l'exécution des brefs d'assignation ou à la punition en cas de défaut de s'y conformer.

(2) Any person summoned under subsection (1) is competent and may be compelled to give evidence as a witness.

(3) A member of the Commission shall not exercise power to penalize any person pursuant to this Act, whether for contempt or otherwise, unless, on the application of the member, a judge of the Federal Court of Canada or of a superior or county court has certified, as such judge may, that the power may be exercised in the matter disclosed in the application, and the member has given to such person twenty-four hours notice of the hearing of the application or such shorter notice as the judge deems reasonable.

(4) Any books, papers, records, or other documents produced voluntarily or in pursuance of an order under subsection (1) shall within thirty days thereafter be delivered to the Director, who is thereafter responsible for their custody, and within sixty days after the receipt of such books, papers, records or other documents by him the Director shall deliver the original or a copy thereof to the person from whom such books, papers, records or other documents were received.

(5) A justice before whom any thing seized pursuant to a search warrant issued with reference to an offence against this Act is brought may, on the application of the Director, order that such thing be delivered to the Director, and the Director shall deal with any thing so delivered to him as if delivery of it had been made to him pursuant to subsection (4).

(6) Every person summoned to attend pursuant to this section 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 he is summoned to attend.

(7) The Minister may issue commissions to take evidence in another country, and may make all proper orders for the purpose and for the return and use of evidence so obtained.

(8) Orders to witnesses issued pursuant to this section shall be signed by a member of the Commission.

It should be noted that s. 20 of the Act provides for a number of safeguards for witnesses and persons being investigated. Of particular relevance is s. 20(2) dealing with incriminating evidence, which in Wilson J.'s view affords insufficient pro-

(2) Toute personne assignée sous le régime du paragraphe (1) est habile à agir comme témoin et peut être contrainte à rendre témoignage.

(3) Un membre de la Commission ne doit pas exercer le pouvoir d'infliger une peine à quelque personne en vertu de la présente loi, pour désobéissance ou autrement, à moins que, sur requête de ce membre, un juge de la Cour fédérale du Canada ou d'une cour supérieure ou d'une cour de comté, n'ait certifié, comme un tel juge peut le faire, que ce pouvoir peut être exercé en la matière révélée dans la requête, et que ce membre n'ait donné à cette personne un avis de vingt-quatre heures de l'audition de la requête ou tel avis plus court que le juge estimera raisonnable.

(4) Tous les livres, pièces, archives ou autres documents produits volontairement ou en conformité d'une ordonnance rendue sous le régime du paragraphe (1) doivent, dans les trente jours, être livrés au directeur, lequel, par la suite, sera responsable de leur garde et devra, dans les soixante jours après les avoir reçus, en remettre l'original ou une copie à la personne de qui ils ont été reçus.

(5) Un juge de paix devant qui est produite une chose saisie en conformité d'un mandat de perquisition décerné à l'égard d'une infraction à la présente loi, peut, sur requête du directeur, ordonner que cette chose soit livrée au directeur, et ce dernier doit disposer de toute chose qui lui est ainsi livrée comme si la livraison de la chose en question lui avait été faite selon le paragraphe (4).

(6) Toute personne assignée en conformité du présent article a droit aux mêmes honoraires et allocations pour ce faire que si elle avait été assignée à comparaître devant une cour supérieure de la province où elle est ainsi assignée.

(7) Le Ministre peut décerner des commissions en vue de recueillir des témoignages dans un autre pays, et il peut rendre toutes ordonnances appropriées à cette fin et pour le renvoi et l'utilisation des témoignages ainsi obtenus.

(8) Les ordonnances aux témoins décernées en conformité du présent article doivent être signées par un membre de la Commission.

Il convient de souligner que l'art. 20 de la Loi accorde aux témoins et aux personnes qui font l'objet d'une enquête un certain nombre de garanties. Je souligne l'importance particulière du par. 20(2) portant sur les témoignages incriminants,

tection to witnesses to permit s. 17 to withstand *Charter* scrutiny. That provision reads as follows:

20. ...

(2) No person shall be excused from attending and giving evidence and producing books, papers, records or other documents, in obedience to the order of a member of the Commission, on the ground that the oral evidence or documents required of him may tend to criminate him or subject him to any proceeding or penalty, but no oral evidence so required shall be used or receivable against such person in any criminal proceedings thereafter instituted against him, other than a prosecution under section 121 of the *Criminal Code* for perjury in giving such evidence or a prosecution under section 124 of the *Criminal Code* in respect of such evidence.

Section 8 of the *Charter*

I shall deal first with s. 8 of the *Charter*. I agree with Wilson J. that that provision grants the right to be secure not only against searches, but against seizures as well. I so stated in *R. v. Dymont*, [1988] 2 S.C.R. 417, at p. 431, where I went on to add that the essence of a seizure was the taking of a thing from a person by a public official without that person's consent. I see little difference between taking a thing and forcing a person to give it up. I thus also agree with Wilson J. that an order to produce documents under s. 17 of the Act constitutes a seizure within the meaning of s. 8 of the *Charter*. The real question under s. 8, therefore, is whether a seizure made under s. 17 can be considered a reasonable seizure.

Reasonableness and the Nature of the Legislation

The difficulty of this question is brought sharply into focus by the opposing reasons of Wilson and L'Heureux-Dubé JJ. Underlying their different approaches to the constitutionality of s. 17 is a disagreement as to the juristic character of the Act. Whereas Wilson J. views it essentially as criminal law, L'Heureux-Dubé J. views it as

qui, de l'avis du juge Wilson, ne protège pas suffisamment les témoins pour permettre à l'art. 17 de résister à un examen fondé sur la *Charte*. Cette disposition se lit ainsi:

a 20. ...

(2) Nul n'est dispensé de comparaître et de rendre témoignage et de produire des livres, documents, archives ou autres pièces en conformité avec l'ordonnance d'un membre de la Commission, pour le motif que le témoignage verbal ou les documents requis de lui peuvent tendre à l'incriminer ou à l'exposer à quelque procédure ou pénalité, mais nul témoignage oral ainsi exigé ne peut être utilisé ni n'est recevable contre cette personne dans toutes poursuites criminelles intentées par la suite contre elle, sauf dans une poursuite pour parjure en application de l'article 121 du *Code criminel* pour parjure dans le cadre de ce témoignage ou dans une poursuite en application de l'article 124 du *Code criminel* à l'égard de ce témoignage.

d

L'article 8 de la *Charte*

Je vais d'abord traiter de l'art. 8 de la *Charte*. Je partage l'avis du juge Wilson que cette disposition reconnaît le droit à la protection non seulement contre les perquisitions et les fouilles, mais aussi contre les saisies. C'est d'ailleurs ce que j'ai dit dans l'arrêt *R. c. Dymont*, [1988] 2 R.C.S. 417, à la p. 431, où j'ai ajouté qu'il y a saisie lorsque les autorités prennent quelque chose appartenant à une personne sans son consentement. Je ne vois pas vraiment de différence entre le fait de prendre une chose et le fait d'obliger une personne à la remettre. Je suis donc également d'accord avec le juge Wilson qu'une ordonnance de production de documents rendue en vertu de l'art. 17 de la Loi constitue une saisie au sens de l'art. 8 de la *Charte*. La véritable question que soulève ce pourvoi à l'égard de l'art. 8 est donc de savoir si une saisie pratiquée en vertu de l'art. 17 peut être considérée comme raisonnable.

Le caractère raisonnable et la nature de la Loi

Le problème que présente cette question est clairement mis en évidence dans les motifs divergents des juges Wilson et L'Heureux-Dubé. On dénote à la base de leur façon différente d'aborder la constitutionnalité de l'art. 17 un désaccord quant à la nature juridique de la Loi. Alors que le juge Wilson estime que la Loi est essentiellement

regulatory, and hence as part of our administrative law. The resolution of this issue is crucial to the disposition of this appeal. Since the adoption of the *Charter*, Canadian courts have on numerous occasions taken the view that the standard of reasonableness which prevails in the case of a search or seizure made in the course of enforcement of the criminal law will not usually be appropriate to a determination of reasonableness in the administrative or regulatory context; see *Re Alberta Human Rights Commission and Alberta Blue Cross Plan* (1983), 1 D.L.R. (4th) 301 (Alta. C.A.), at p. 307; *R. v. Rao* (1984), 46 O.R. (2d) 80 (C.A.), at p. 96; *Re Belgoma Transportation Ltd. and Director of Employment Standards* (1985), 51 O.R. (2d) 509 (C.A.), at p. 512; *R. v. Quesnel* (1985), 12 O.A.C. 165, at p. 169; *Bertram S. Miller Ltd. v. R.*, [1986] 3 F.C. 291 (C.A.), at pp. 319, 324 and 341-43; *R. v. Bichel*, [1986] 5 W.W.R. 261 (B.C.C.A.), at pp. 271-73. The same approach underlies the decision of this Court in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, released concurrently, in which an order to produce documents issued under s. 231(3) of the *Income Tax Act* is viewed as administrative and held to be not unreasonable under s. 8 of the *Charter*.

The application of a less strenuous and more flexible standard of reasonableness in the case of administrative or regulatory searches and seizures is fully consistent with a purposive approach to the elaboration of s. 8. As Dickson J. made clear in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, the purpose of s. 8 is the protection of the citizen's reasonable expectation of privacy (p. 159). But the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is

de nature criminelle, le juge L'Heureux-Dubé estime qu'elle est de nature réglementaire et qu'elle fait donc partie de notre droit administratif. La décision qui sera prise à cet égard est essentielle à la résolution de ce pourvoi. Depuis l'adoption de la *Charte*, les tribunaux canadiens ont répété à maintes reprises que la norme du caractère raisonnable applicable dans le cas des fouilles, des perquisitions ou des saisies effectuées dans le cadre de la mise en application du droit criminel ne sera généralement pas appropriée pour déterminer le caractère raisonnable dans le contexte administratif ou réglementaire; voir *Re Alberta Human Rights Commission and Alberta Blue Cross Plan* (1983), 1 D.L.R. (4th) 301 (C.A. Alb.), à la p. 307; *R. v. Rao* (1984), 46 O.R. (2d) 80 (C.A.), à la p. 96; *Re Belgoma Transportation Ltd. and Director of Employment Standards* (1985), 51 O.R. (2d) 509 (C.A.), à la p. 512; *R. v. Quesnel* (1985), 12 O.A.C. 165, à la p. 169; *Bertram S. Miller Ltd. c. R.*, [1986] 3 C.F. 291 (C.A.), aux pp. 319, 324 et 341 à 343; *R. v. Bichel*, [1986] 5 W.W.R. 261 (C.A.C.-B.), aux pp. 271 à 273. Le même raisonnement sous-tend l'arrêt de notre Cour *R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627 rendu en même temps que le présent arrêt, dans lequel une ordonnance de production de documents rendue en vertu du par. 231(3) de la *Loi de l'impôt sur le revenu*, est considérée comme étant de nature administrative et ne pas être abusive au sens de l'art. 8 de la *Charte*.

L'application d'une norme du caractère raisonnable moins sévère et plus souple dans le cas des fouilles, des perquisitions et des saisies en matière administrative ou réglementaire est tout à fait conforme à une interprétation fondée sur l'objet de l'art. 8. Comme le juge Dickson l'a dit clairement dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, l'objet de l'art. 8 est de protéger les attentes raisonnables des citoyens en matière de vie privée (p. 159). Mais ce degré de vie privée auquel le citoyen peut raisonnablement s'attendre peut varier considérablement selon les activités qui le mettent en contact avec l'État. Dans une société industrielle moderne, on reconnaît généralement que de nombreuses activités auxquelles peuvent se livrer des particuliers doivent malgré tout être plus

compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records.

It follows that there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature of participation in such activity. As A. D. Reid and A. H. Young point out in their article "Administrative Search and Seizure Under the Charter" (1985), 10 *Queen's L.J.* 392, at p. 399, there is a "large circle of social and business activity in which there is a very low expectation of privacy", and in which the "issue is not *whether*, but rather when, how much, and under what conditions information must be disclosed to satisfy the state's legitimate requirements" (emphasis in original).

The situation is, of course, quite different when the state seeks information, not in the course of regulating a lawful social or business activity, but in the course of investigating a criminal offence. For reasons that go to the very core of our legal

ou moins réglementées par l'État pour veiller à ce que la poursuite des intérêts des particuliers soit compatible avec les intérêts de la collectivité dans la réalisation des buts et des aspirations collectifs.

- a Dans de nombreux cas, cette réglementation doit nécessairement comporter l'inspection de lieux ou de documents de nature privée par des fonctionnaires de l'État. Pour vérifier si le restaurateur se conforme à la réglementation sur la santé publique, si l'employeur se conforme à la législation sur les normes et la sécurité du travail et si le promoteur ou le propriétaire se conforme au code du bâtiment ou aux règlements de zonage, il n'existe que l'inspection des lieux, et encore celle qui est faite à l'improviste. De même, il arrive fréquemment que le respect des lois sur le salaire minimum, sur l'équité en matière d'emploi et sur les droits de la personne ne puisse être vérifié que par
- d inspection des dossiers et archives de l'employeur.

Il s'ensuit que les attentes des particuliers ne peuvent être très élevées quant au respect de leur droit à la vie privée dans le cas de lieux ou de documents utilisés ou produits dans l'exercice d'activités qui, bien que légales, sont normalement réglementées par l'État. Dans une société où l'on reconnaît le besoin de réglementer efficacement certains domaines d'activités privées et où l'on y donne suite, l'inspection de lieux et de documents par l'État est un aspect routinier auquel les particuliers s'attendent en exerçant cette activité. Comme A. D. Reid et A. H. Young le soulignent dans leur article «Administrative Search and Seizure Under the Charter» (1985), 10 *Queen's L.J.* 392, à la p. 399, il existe un [TRADUCTION] «large éventail d'activités sociales et commerciales dans lesquelles on s'attend très peu au respect de la vie privée», et où la [TRADUCTION] «question n'est pas de savoir *si* les renseignements doivent être divulgués pour satisfaire aux exigences légitimes de l'État, mais plutôt de déterminer le moment, l'étendue et les conditions de la divulgation» (en italique dans l'original).

La situation est évidemment très différente lorsque l'État cherche à obtenir des renseignements non pas dans le cadre de la réglementation d'une activité sociale ou commerciale légale, mais au cours d'une enquête relative à une infraction crimi-

tradition, it is generally accepted that the citizen has a very high expectation of privacy in respect of such investigations. The suspicion cast on persons who are made the subject of a criminal investigation can seriously, and perhaps permanently, lower their standing in the community. This alone would entitle the citizen to expect that his or her privacy would be invaded only when the state has shown that it has serious grounds to suspect guilt. This expectation is strengthened by virtue of the central position of the presumption of innocence in our criminal law. The stigma inherent in a criminal investigation requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of the powers of search and seizure by those responsible for the enforcement of the criminal law. The requirement of a warrant, based on a showing of reasonable and probable grounds to believe that an offence has been committed and evidence relevant to its investigation will be obtained, is designed to provide this protection.

The Juristic Character of Combines Legislation

Applying the above distinction to this appeal, I think the initial question can be stated in the following form: what degree of privacy can those subject to investigation under the *Combines Investigation Act* reasonably expect in respect of the activities and matters with which such investigation may be concerned? In approaching this question, I would first of all point out that I do not regard the fact that the Act and its predecessors were characterized as criminal law for the purposes of division-of-powers analysis as at all determinative. That characterization depended largely on the restrictive reading given by the Privy Council to the trade and commerce power, a reading which has since been largely modified; see *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at pp. 658-63. Quite apart from this, even if the Act may legitimately be looked upon as falling under the criminal law power for the purposes of s. 91 of the *Constitution*

nelle. Pour des raisons qui relèvent du fondement même de nos traditions juridiques, on comprend généralement que les attentes du citoyen sont très grandes quant au respect de son droit à la vie privée dans le cadre de ces enquêtes. Le soupçon qui pèse sur les personnes qui font l'objet d'une enquête criminelle peut compromettre sérieusement et peut-être même de façon permanente leur statut dans la collectivité. Cet aspect à lui seul permettrait au citoyen de s'attendre à ce qu'on porte atteinte à son droit à la vie privée seulement lorsque l'État a démontré qu'il a des motifs sérieux de soupçonner qu'il est coupable. Cette attente est renforcée par le rôle central de la présomption d'innocence dans notre droit criminel. Les stigmates inhérents aux enquêtes criminelles exigent que ceux qui n'ont commis aucun délit soient protégés contre l'exercice excessif ou téméraire des pouvoirs de fouille, de perquisition et de saisie que détiennent les responsables de l'application du droit criminel. L'obligation d'avoir un mandat, fondée sur la preuve de motifs raisonnables et probables de croire qu'une infraction a été commise et que la preuve pertinente à l'enquête y relative sera obtenue, est conçue pour procurer cette protection.

La nature juridique des lois en matière de coalitions

Applicant en l'espèce la distinction précédemment établie, je pense que la première question peut être formulée de la façon suivante: dans quelle mesure les personnes faisant l'objet d'une enquête en vertu de la *Loi relative aux enquêtes sur les coalitions* peuvent-elles raisonnablement s'attendre au respect de leur droit à la vie privée relativement aux activités et aux pratiques pouvant être visées par cette enquête? En abordant cette question, je voudrais d'abord souligner que je ne considère pas comme déterminant le fait que la Loi et les lois antérieures en la matière aient été qualifiées de droit criminel aux fins d'une analyse en fonction du partage des compétences. Cette qualification dépendait en bonne partie de l'interprétation restrictive donnée par le Conseil privé à la compétence en matière d'échanges et de commerce, une interprétation qui a depuis été considérablement modifiée; voir l'arrêt *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1

Act, 1867, this would not preclude alternative characterizations that would place the Act under another head of federal legislative power more germane to the present issue; see *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206; *R. v. Wetmore*, [1983] 2 S.C.R. 284.

Nor do I regard it as determinative that the Act defines offences and provides for the imprisonment of those who commit them. While I recognize that these features give the Act something of the flavour of criminal law, I do not believe that the fact that an Act provides for sanctions usually associated with the criminal law necessarily means that those subject to its operation have the same expectations of privacy as persons suspected of committing what are by their very nature criminal offences. While I will have more to say about this matter later, it is for the present sufficient to observe that there are pragmatic reasons for the inclusion of imprisonment among the sanctions provided for in the Act which do not alter its essential character as regulatory legislation and which are in fact indicative of the activities and matters it is designed to regulate.

What, in my view, is determinative is the nature of the conduct addressed by the legislation and the purposes for which it is designed to regulate that conduct. **There can be little doubt that the conduct prohibited by the Act is far removed from what is the typical concern of the criminal law system, i.e. the "underlining [of] crucial social values"** (emphasis added) where "[t]he sort of things prohibited—acts of violence, dishonesty and so on—are acts violating common sense standards of humanity" which we regard as meriting disapprobation and punishment; see Law Reform Commission of Canada, *Our Criminal Law* (1976), at pp. 3, 5 and 7; see also *R. v. Chiasson* (1982), 135 D.L.R. (3d) 499 (N.B.C.A.), at p. 503; reasons adopted [1984] 1 S.C.R. 266; *R. v. Morgentaler*,

R.C.S. 641, aux pp. 658 à 663. Cette question mise à part, même si l'on peut considérer légitimement que la Loi relève de la compétence en matière de droit criminel aux fins de l'art. 91 de la *a* *Loi constitutionnelle de 1867*, cela n'empêcherait pas de la qualifier autrement, de manière à la rattacher à un autre chef de compétence législative fédérale qui se rapprocherait davantage de la question en l'espèce: voir les arrêts *Procureur général du Canada c. Transports Nationaux du Canada, Ltée*, [1983] 2 R.C.S. 206; *R. c. Wetmore*, [1983] 2 R.C.S. 284.

b Je ne considère pas non plus comme déterminant le fait que la Loi définisse des infractions et prévoit des peines d'emprisonnement pour ceux qui les commettent. Bien que j'admette que ces aspects donnent à la Loi une certaine saveur de droit criminel, je ne crois pas que le fait qu'une loi prévoit des sanctions habituellement associées au droit criminel signifie nécessairement que les personnes assujetties à son application ont les mêmes attentes en matière de respect de leur vie privée que les personnes soupçonnées d'avoir commis ce qui constitue en soi des infractions criminelles. Je reviendrai là-dessus plus loin, il suffit pour l'instant de souligner qu'il existe des raisons pragmatiques de prévoir l'incarcération parmi les sanctions prévues par la Loi, qui ne modifient pas sa nature essentiellement réglementaire et qui révèlent effectivement les activités et pratiques qu'elle a pour but de réglementer.

c À mon avis, ce qui est déterminant, c'est la nature de la conduite visée par la Loi et les raisons pour lesquelles celle-ci est conçue pour réglementer cette conduite. **Il n'y a pas de doute que la conduite interdite par la Loi s'écarte considérablement de ce qui constitue le domaine typique du système de droit criminel, c'est-à-dire la «[mise] en lumière [d]es valeurs sociales fondamentales»** (je souligne) ou «[l]es comportements prohibés, par exemple, les actes de violence ou de malhonnêteté, sont des comportements qui violent des normes humanitaires imposées par le sens commun», et qui justifient qu'on les désapprouve et les sanctionne; voir Commission de réforme du droit du Canada, *Notre droit pénal* (1976), aux pp. 4, 5 et 7; voir également l'arrêt *R. v. Chiasson* (1982), 135

[1988] 1 S.C.R. 30, at p. 70. At bottom, the Act is really aimed at the regulation of the economy and business, with a view to the preservation of the competitive conditions which are crucial to the operation of a free market economy. This goal has obvious implications for Canada's material prosperity. It also has broad political overtones in that it is aimed at preventing concentration of power, of critical importance in the present case as it involves control of the press. It must be remembered that private organizations can be just as oppressive as the state when they gain such a dominant position within their sphere of operations that they can effectively force their will upon others.

The conduct regulated or prohibited by the Act is not conduct which is by its very nature morally or socially reprehensible. It is instead conduct we wish to discourage because of our desire to maintain an economic system which is at once productive and consistent with our values of individual liberty. It is, in short, not conduct which would be generally regarded as by its very nature criminal and worthy of criminal sanction. It is conduct which is only criminal in the sense that it is in fact prohibited by law. One's view of whether it should be so proscribed is likely to be functional or utilitarian, in the sense that it will be based on an assessment of the desirability of the economic goals to which combines legislation is directed or its potential effectiveness in achieving those goals. It is conduct which is made criminal for strictly instrumental reasons.

The Act is thus not concerned with "real crimes" but with what has been called "regulatory" or "public welfare" offences. The distinction is clearly made by the Law Reform Commission of Canada in *Criminal Responsibility for Group Action* (Working Paper 16, 1976), at pp. 11-12. After having defined real crimes as those concerned with the reinforcement of society's fundamental values, the Commission says, at p. 12, that a regulatory offence

D.L.R. (3d) 499 (C.A.N.-B.), à la p. 503; motifs retenus à [1984] 1 R.C.S. 266; *R. c. Morgentaler*, [1988] 1 R.C.S. 30, à la p. 70. Au fond, la Loi vise réellement la réglementation de l'économie et du commerce en vue de protéger les conditions de concurrence cruciales au fonctionnement d'une économie de libre marché. Cet objectif comporte évidemment des conséquences pour la prospérité matérielle du Canada. Il comporte également des incidences politiques importantes en ce qu'il vise à prévenir la concentration du pouvoir, d'importance primordiale ici puisque la présente affaire porte sur le contrôle de la presse. Rappelons que des organismes privés peuvent être tout aussi oppressifs que l'État lorsqu'ils acquièrent un statut tellement important dans leur milieu qu'ils peuvent effectivement imposer leur volonté aux autres.

La conduite réglementée ou interdite par la Loi n'est pas en soi moralement ou socialement répréhensible. Il s'agit plutôt d'une conduite que nous voulons décourager en raison de notre volonté de maintenir un système économique qui soit productif et conforme à nos valeurs de liberté individuelle. Bref, ce n'est pas une conduite qui, de par sa nature même, serait généralement considérée comme criminelle et passible de sanctions criminelles. C'est une conduite qui n'est criminelle que parce qu'elle est effectivement interdite par la loi. Une opinion quant à savoir si elle devrait être ainsi interdite sera vraisemblablement fonctionnelle ou utilitaire, en ce sens qu'elle sera fondée sur une évaluation du caractère souhaitable des objectifs économiques visés par la loi relative aux coalitions ou de son efficacité possible dans la poursuite de ces objectifs. C'est une conduite qui est rendue criminelle pour des raisons strictement pratiques.

La Loi ne porte donc pas sur des «crimes proprement dits» mais sur ce que l'on appelle des infractions de nature «réglementaire» ou contre le «bien-être public». La Commission de réforme du droit du Canada établit clairement cette distinction dans son document de travail *Responsabilité pénale et conduite collective* (document de travail 16, 1976), aux pp. 11 et 12. Après avoir défini les crimes proprement dits comme ceux qui concernent le renforcement des valeurs fondamentales de la société, la Commission affirme, à la p. 12, que dans le cas de l'infraction de nature réglementaire,

is not primarily concerned with values, but with results. While values necessarily underlie all legal prescriptions, the regulatory offence really gives expression to the view that it is expedient for the protection of society and for the orderly use and sharing of society's resources that people act in a prescribed manner in prescribed situations, or that people take prescribed standards of care to avoid risks of injury. The object is to induce compliance with rules for the overall benefit of society.

The regulatory nature of the offences defined in the Act is made clear by even a cursory consideration of the secondary literature on Canadian competition law. That literature concerns itself with the question of whether Canada should have anti-combines legislation as much as with the sufficiency and details of the legislation. The potential effectiveness of combines legislation in achieving the goals I have referred to, and the possible ill-effects the pursuit of these goals may have on our international competitiveness, have been much debated. It is difficult to imagine a similarly pragmatic and instrumental debate in respect of the offences, such as murder, assault, or theft, which we would immediately and unhesitatingly regard as concerned with criminal behaviour and deserving of punishment.

In the judicial sphere, the regulatory character of the Act has recently been recognized by this Court. In *General Motors of Canada Ltd. v. City National Leasing*, *supra*, the Court considered whether s. 31.1 of the Act, which creates a private right of action in respect of loss suffered as a result of conduct contrary to the Act or an order made under it by a court or the Restrictive Trade Practices Commission, was *ultra vires* Parliament. After reviewing and describing the overall structure of the Act, Dickson C.J., speaking for the Court, summarized his findings, at p. 676, as follows:

From this overview of the *Combines Investigation Act* I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities

[i] ne s'agit pas cette fois de respecter des valeurs, mais d'obtenir des résultats. Bien que les «valeurs» soient nécessairement à la base de toute prescription d'ordre juridique, c'est à l'occasion des infractions réglementaires que se développe l'optique suivant laquelle il est pratique pour la protection de la société et l'utilisation et le partage ordonné de ses ressources, que les gens agissent d'une certaine manière dans des situations déterminées, ou qu'ils adoptent des normes de prudence données pour éviter le risque que surviennent certains préjudices. Le but est d'inciter la population à se conformer aux règlements pour le bien général de la société.

La nature réglementaire des infractions définies dans la Loi ressort clairement d'un examen même superficiel des ouvrages de doctrine accessoires sur le droit de la concurrence au Canada. Ces ouvrages portent tout autant sur la question de savoir si le Canada devrait avoir des lois anticoncurrences que sur le caractère suffisant et les détails de la loi. L'efficacité potentielle d'une loi en matière de coalitions, pour ce qui est de réaliser les objectifs que j'ai mentionnés, et les effets néfastes que peut avoir la poursuite de ces objectifs sur notre concurrence sur le plan international ont fait l'objet de nombreux débats. Il est difficile d'imaginer un débat aussi pragmatique et pratique à l'égard des infractions, comme le meurtre, les voies de fait ou le vol, que nous considérerons automatiquement et sans hésitation comme un comportement criminel méritant d'être puni.

Dans le domaine judiciaire, la Cour a récemment reconnu le caractère réglementaire de la Loi. Dans l'arrêt *General Motors of Canada Ltd. c. City National Leasing*, précité, la Cour devait déterminer si l'art. 31.1 de la Loi, qui crée un droit d'action de nature privée en cas de perte subie par suite d'un comportement contraire à la Loi ou du non-respect d'une ordonnance d'un tribunal ou de la Commission sur les pratiques restrictives du commerce, excédait la compétence du Parlement. Après avoir examiné et décrit le régime global de la Loi, le juge en chef Dickson, s'exprimant au nom de la Cour, a résumé ses conclusions de la façon suivante, à la p. 676:

Il m'est facile de conclure de cet aperçu général de la Loi relative aux enquêtes sur les coalitions qu'elle comporte un système de réglementation économique complexe. La Loi a pour objet d'éliminer les activités

that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition. In my view, these three components, elucidation of prohibited conduct, creation of an investigatory procedure, and the establishment of a remedial mechanism, constitute a well-integrated scheme of regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy.

This assessment of the Act is consistent with the above discussion. First and most obviously, it refers to the Act as a “complex scheme of economic regulation” (emphasis added) which is “designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy”. In other words, the Act does not seek to prevent the proscribed conduct as an end in itself, but seeks instead to prevent the results to which it is believed the behaviour will lead. More subtly, in describing the criminal and administrative remedies which the Act provides for as “the establishment of a remedial mechanism”, Dickson C.J. suggests that the use of criminal sanctions in this area is pragmatic or functional in the sense that Parliament has made the determination that such sanctions are necessary to induce compliance with the Act.

This is so, not only of the fines that may be imposed under the Act, but of the sanction of imprisonment that may be imposed in respect of a number of provisions under the Act. For example, a prison sentence of up to five years, with or without an accompanying fine, can be imposed on any individual found guilty of the following offences: conspiracy in respect to various forms of anti-competitive behaviour (s. 32); bid-rigging (s. 32.2); false advertising (s. 36); the making of unsubstantiated representations as to tests and testimonials (s. 36.1); pyramid selling (s. 36.3); referral selling (s. 36.4); offences in relation to the holding of promotional contests (s. 37.2); price maintenance (s. 38); improper refusal to supply (s. 38). In addition, a person can be sentenced to two

qui diminuent la concurrence sur le marché. Toute la Loi est conçue en fonction de cet objet. Elle identifie et définit les pratiques monopolistiques. Elle établit un mécanisme d'enquête en vue d'identifier les activités interdites et prévoit un vaste choix de recours de nature administrative et criminelle contre les sociétés qui s'adonnent à certaines pratiques tendant à diminuer la concurrence. À mon avis, ces trois éléments que sont l'identification de pratiques interdites, la création d'une procédure d'enquête et l'établissement d'un mécanisme de recours constituent un système de réglementation bien intégré qui vise à décourager des formes de pratiques commerciales considérées comme préjudiciables au Canada et à l'économie canadienne.

Cette évaluation de la Loi est conforme à l'analyse précédente. Premièrement et de façon très évidente, elle qualifie la Loi de «système de réglementation économique complexe» (je souligne) qui «vise à décourager des formes de pratiques commerciales considérées comme préjudiciables au Canada et à l'économie canadienne». En d'autres termes, la Loi vise ultimement à prévenir non pas la conduite interdite, mais les résultats que l'on croit découler de celle-ci. De façon plus subtile, en décrivant les recours de nature administrative et criminelle que la Loi prévoit comme «l'établissement d'un mécanisme de recours», le juge en chef Dickson laisse entendre que l'emploi de sanctions criminelles dans ce domaine est pragmatique ou fonctionnel en ce sens que le Parlement a décidé que ces sanctions sont nécessaires pour faire respecter la Loi.

Il en est ainsi non seulement des amendes qui peuvent être imposées en vertu de la Loi, mais de la peine d'incarcération qui peut être imposée relativement à un certain nombre de dispositions de la Loi. Par exemple, un emprisonnement maximal de cinq ans, avec ou sans amende, peut être imposé à quiconque est déclaré coupable des infractions suivantes: complot relatif à diverses formes de comportements contraires à la concurrence (art. 32); truquage des offres (art. 32.2); publicité trompeuse (art. 36); indications non fondées quant à l'épreuve et aux attestations (art. 36.1); système de vente pyramidale (art. 36.3); vente par recommandation (art. 36.4); infractions relatives à la tenue de concours publicitaires (art. 37.2); maintien des prix (art. 38); refus injustifiable de fournir (art.

years in prison under s. 33, which refers to monopolies and mergers, as well as under s. 34, which defines various illegal trade practices. A two-year sentence can also be imposed under any of the sections dealing with false advertising, representations as to tests or testimonials, or pyramid and referral selling, provided that they are prosecuted by way of summary proceeding. Again, such a sentence may be accompanied by a fine. Finally, there are several sections which provide for the penalty of a one-year term in prison, such as s. 37.1 (selling above advertised price).

I should perhaps elaborate on the underlying reasons for these sanctions. In terms of enforcement mechanisms, combines legislation cannot rely on the type of periodic on-site inspection which is characteristic of many other types of regulatory legislation. This is because it regulates economic activity generally, whereas most other types of regulatory legislation are designed to deal only with certain trades or businesses. To undertake the periodic visitation of all or even most businesses operating within Canada would, from a financial and administrative standpoint, be a massive and perhaps impossible task. Even if it could be financed and effectively managed, it would necessarily involve the regular disruption of business activity, which could in turn decrease overall economic efficiency.

For this reason, as both Canadian and American writers have maintained, the effective implementation of anti-combines or anti-trust legislation depends on the willingness of businesses to conform to the standards of conduct defined in such legislation independently of the frequency or likelihood of state inspection; see P. K. Gorecki and W. T. Stanbury, "Canada's Combines Investigation Act: The Record of Public Law Enforcement, 1889-1976", in J. R. S. Prichard, W. T. Stanbury and T. A. Wilson, eds., *Canadian Competition Policy: Essays in Law and Economics* (1979), at p. 173; E. Rostow, *Planning for Freedom* (1962),

38). En outre, une personne est passible d'un emprisonnement de deux ans en vertu de l'art. 33 qui porte sur les monopoles et les fusions, ainsi qu'en vertu de l'art. 34 qui définit diverses pratiques commerciales illégales. Un emprisonnement de deux ans peut également être imposé en vertu de l'un des articles qui portent sur la publicité trompeuse, les indications quant aux épreuves ou aux attestations ou les ventes pyramidales ou par recommandation, lorsque la personne est poursuivie par voie de procédure sommaire. Ici encore, cette peine peut s'accompagner d'une amende. Enfin, il existe plusieurs dispositions qui imposent une peine d'incarcération d'un an, comme l'art. 37.1 (vente au-dessus du prix annoncé).

Je devrais peut-être m'étendre sur les raisons qui sous-tendent ces sanctions. Quant aux mécanismes d'application, les lois relatives aux coalitions ne peuvent s'appuyer sur le type d'inspection périodique des lieux qui caractérise plusieurs autres types de lois de nature réglementaire, et ce, parce que la Loi réglemente l'activité économique en général, alors que la plupart des autres types de lois de nature réglementaire ne visent que certains commerces ou entreprises. Entreprendre la visite périodique de toutes les entreprises exploitées au Canada ou même de la plupart de celles-ci représenterait, du point de vue financier et administratif, une tâche immense et vraisemblablement impossible. Même si elle pouvait faire l'objet d'un financement et d'une gestion efficace, elle aurait forcément pour effet de perturber régulièrement les activités commerciales, ce qui pourrait diminuer l'efficacité économique globale.

Pour cette raison, comme l'ont affirmé des auteurs canadiens et américains, l'application efficace de lois anticoalitions ou antitrust dépend de la volonté des entreprises de se conformer aux normes de conduite définies dans ces lois indépendamment de la fréquence des inspections tenues par l'État ou de la probabilité qu'il en tienne; voir P. K. Gorecki et W. T. Stanbury, «Canada's Combines Investigation Act: The Record of Public Law Enforcement, 1889-1976», dans J. R. S. Prichard, W. T. Stanbury et T. A. Wilson, éd., *Canadian Competition Policy: Essays in Law and Economics* (1979), à la p. 173; E. Rostow, *Planning for*

at p. 307. Discussion of the means by which this tendency towards "voluntary" compliance can be encouraged has quite naturally focussed on the question of sanctions. As an alternative to regular or periodic and unannounced inspection as a means of achieving behaviour modification, the approach in competition law has been to provide for penalties capable of counterbalancing the incentive to flout the law which a low expectation of detection might otherwise produce. In the vast majority of cases, fines will not be sufficient to the task. Regardless of whether they are imposed on the corporation or its officers, they will usually be paid for by the former. Unless they were to be set at so high a level as to be capable of putting violators out of business (a result that would in most cases be politically and economically indefensible), such fines would simply be treated as part of the cost of doing business. When measured against the relatively low probability of detection, the possibility of suffering a loss by way of a fine may seem inconsequential as compared to the likelihood of making or increasing profits through anti-competitive practices.

For these reasons, fines are unlikely to encourage the kind of compliance that is necessary if the objectives of combines legislation are to be realized. This is the ultimate rationale for the imprisonment of those responsible for the operation of the company or unincorporated business which engages in anti-competitive conduct. Obviously, there is no way in which the cost of such a penalty can be passed on to the employing company or business. It can only be paid by the officers of the company or business. This introduces an element of personal vulnerability into business decision-making, in so far at least as it relates to the type of conduct and practices proscribed by the *Combines Investigation Act*. The result is that the provisions of the Act are much more likely to be a part of the process by which the company or business decides between alternative courses of conduct. It goes without saying that it also increases the probability

Freedom (1962), à la p. 307. L'examen des moyens qui pourraient favoriser cette tendance à se conformer «volontairement» à la Loi a tout naturellement porté sur la question des sanctions.

- a Comme solution de rechange à l'inspection régulière ou périodique effectuée à l'improviste afin de réaliser une modification du comportement, le droit en matière de concurrence a voulu prévoir des sanctions susceptibles de contrebalancer l'incitation à faire fi de la loi que pourrait par ailleurs entraîner la faible probabilité de la tenue d'une inspection. Dans la très grande majorité des cas, les amendes ne suffiront pas à la tâche. Que
- b celles-ci soient imposées à la société ou à ses dirigeants, elles seront généralement payées par la première. À moins d'imposer des amendes tellement élevées qu'elles pourraient entraîner la faillite des auteurs de l'infraction (un résultat qui
- c dans la plupart des cas serait politiquement et économiquement inacceptable), ces amendes seraient simplement considérées comme faisant partie des frais d'exploitation de l'entreprise. En comparaison de la probabilité relativement faible
- d de la tenue d'une inspection, le risque de subir une perte par suite de l'imposition d'une amende semble sans importance comparativement à la probabilité de faire des profits ou d'augmenter ceux-ci par des pratiques contraires à la concurrence.
- e
- f

Pour ces raisons, il est peu probable que les amendes susciteront le genre de respect nécessaire à la réalisation des objectifs des lois relatives aux coalitions. Il s'agit donc de la raison fondamentale justifiant l'emprisonnement des responsables de l'exploitation de la société ou de l'entreprise non constituée en personne morale qui se livre à des pratiques contraires à la concurrence. Il n'existe évidemment aucun moyen de faire assumer le coût de cette peine par la société ou l'entreprise en question. Ce coût ne peut être assumé que par les dirigeants de la société ou de l'entreprise. On introduit alors un élément de vulnérabilité personnelle dans le processus décisionnel des entreprises, à tout le moins en ce qui concerne le type de conduites et de pratiques interdites par la *Loi relative aux enquêtes sur les coalitions*. Par conséquent, il est beaucoup plus probable que les dispositions de la Loi fassent partie du processus par

that conduct that violates the Act will not be engaged in.

From this perspective it can be seen that the terms of imprisonment provided by the Act are closely and rationally related to the Act's regulatory purpose. To a very large extent, the effectiveness of the Act depends upon the degree to which it is complied with by business organizations, and this in turn depends on the existence of a sanction which will force officers and managers to regard the decision-making of their company or unincorporated employer as a matter of personal responsibility. I believe that this goes far towards justifying any moral or social stigma which imprisonment or its possibility lends to the Act's investigatory machinery. Given that all business ultimately benefits from the competitive conditions the Act is designed to protect, and given that the effectiveness of the Act in protecting these conditions depends on the existence of a compliance incentive other than regular or periodic inspection by anti-combines authorities, this stigma can be seen as a price that has to be paid in return for the continued enjoyment of the conditions upon which modern business depends.

As a final comment, I would point out that the *Combines Investigation Act* is not, as regards sanctions, unlike the *Income Tax Act*. Under section 239 of the latter Act, a taxpayer can be liable to imprisonment to a term "not exceeding 5 years", provided he is, at the election of the Attorney General of Canada, proceeded against by way of indictment. The offences in relation to which this punishment can be imposed are defined in s. 239(1). They include making "false or deceptive statements in a return, certificate, statement or answer filed or made as required by or under this Act" (s. 239(1)(a)); destroying, altering or secreting records or books "to evade payment of a tax imposed by this Act" (s. 239(1)(b)); making or acquiescing in the omission of "a material particular" from the "records or books of account of a

lequel la société ou l'entreprise décide des différents types de conduites à adopter. Il va sans dire que les probabilités d'adoption d'une conduite conforme à la Loi seront meilleures.

^a Dans cette perspective, on peut constater que les peines d'emprisonnement prévues par la Loi sont intimement et rationnellement liées à la nature réglementaire de la Loi. L'efficacité de la Loi ^b dépend dans une très large mesure du nombre d'entreprises commerciales qui s'y conforment et ce facteur dépend à son tour de l'existence d'une sanction qui obligera les dirigeants et gestionnaires à considérer comme une question de responsabilité ^c personnelle le processus décisionnel de leur société ou de l'entreprise non constituée en personne morale pour laquelle ils travaillent. J'estime que cet aspect justifie largement les stigmates de ^d nature morale ou sociale que l'incarcération ou le risque d'incarcération confère au mécanisme d'enquête de la Loi. Puisque toutes les entreprises bénéficient en fin de compte des conditions de concurrence que la Loi vise à protéger, et puisque ^e l'efficacité de la Loi dans la protection de ces conditions dépend de l'existence d'une mesure incitant à la respecter autre que l'inspection régulière et périodique tenue par les responsables de son application, ce stigmatisme peut être perçu comme le ^f prix à payer pour continuer de bénéficier des conditions dont dépendent les entreprises modernes.

^g Comme dernière remarque, je soulignerais que la *Loi relative aux enquêtes sur les coalitions* n'est pas différente de la *Loi de l'impôt sur le revenu* en ce qui concerne les sanctions. En vertu de l'art. 239 de cette dernière loi, un contribuable peut être ^h passible «d'un emprisonnement d'au plus 5 ans» si le procureur général du Canada choisit de le poursuivre par voie de mise en accusation. Les infractions qui font l'objet de cette peine sont définies au par. 239(1). Elles comprennent notamment le fait ⁱ de faire «des déclarations fausses ou trompeuses [...] dans une déclaration, certificat, état ou réponse produits ou faits en vertu de la présente loi» (al. 239(1)a)), de détruire, altérer, mutiler, ^j cacher les registres ou livres de compte «pour éluder le paiement d'un impôt établi par la présente loi» (al. 239(1)b)), de consentir ou d'acquies-

taxpayer" (s. 239(1)(c)); evading "wilfully, in any manner . . . compliance with this Act or payment of taxes imposed by this Act" (s. 239(1)(d)); and conspiring "with any person to commit an offence described by paragraphs (a) to (d)" (s. 239(1)(e)). All of these offences relate to conduct that might well be discovered by the exercise of the power to order the production of documents which s. 231(3) confers on the Minister of National Revenue. This has not prevented this Court from characterizing s. 231(3) as a regulatory or administrative power of investigation; see *R. v. McKinlay Transport Ltd.*, *supra*. I do not see why we should regard the possibility of imprisonment as having a different effect in the case of s. 17 of the *Combines Investigation Act*.

To recapitulate, the relevance of the regulatory character of the offences defined in the Act is that conviction for their violation does not really entail, and is not intended to entail, the kind of moral reprimand and stigma that undoubtedly accompanies conviction for the traditional "real" or "true" crimes. It follows that investigation for purposes of the Act does not cast the kind of suspicion that can affect one's standing in the community and that, as was explained above, entitles the citizen to a relatively high degree of respect for his or her privacy on the part of investigating authorities. This does not, of course, mean that those subject to investigation under the Act have no, or no significant, expectation of privacy in respect of such investigations. The decision of this Court in *Hunter v. Southam Inc.*, *supra*, makes clear that they do. But it does suggest that the degree of privacy that can reasonably be expected within the investigative scope of the Act is akin to that which can be expected by those subject to other administrative and regulatory legislation, rather than to that which can legitimately be expected by those

cer à l'omission d'inscrire «un détail important dans les registres ou livres de compte d'un contribuable» (al. 239(1)c)), d'éluder «volontairement, de quelque manière, [...] l'observation de la présente loi ou le paiement d'un impôt établi en vertu de cette loi» (al. 239(1)d)), et de conspirer «avec une personne pour commettre une infraction visée aux alinéas a) à d)» (al. 239(1)e)). Toutes ces infractions se rapportent à une conduite qui pourrait fort bien être découverte par l'exercice du pouvoir d'ordonner la production de documents que le par. 231(3) confère au ministre du Revenu national. Cela n'a pas empêché notre Cour de dire que le pouvoir d'enquête du par. 231(3) est de nature réglementaire ou administrative; voir l'arrêt *R. c. McKinlay Transport Ltd.*, précité. Je ne vois pas pourquoi nous devrions considérer le risque d'emprisonnement comme ayant un effet différent dans le cas de l'art. 17 de la *Loi relative aux enquêtes sur les coalitions*.

En résumé, l'importance de la nature réglementaire des infractions définies dans la Loi réside dans le fait que la déclaration de culpabilité par suite de leur violation n'entraîne pas véritablement, et n'a pas pour but d'entraîner, le type de réprimande et de stigmatisation de nature morale qui accompagne indubitablement la déclaration de culpabilité par suite de la perpétration d'un crime «proprement dit» au sens où on l'entend traditionnellement. Il s'ensuit que l'enquête aux fins de la Loi ne fait pas peser le genre de soupçon qui peut porter atteinte au statut d'une personne dans la collectivité et, comme je l'ai déjà expliqué, qui permet au citoyen de s'attendre à ce que les responsables de l'enquête accordent un respect relativement élevé à son droit en matière de vie privée. Cela ne signifie pas évidemment que les personnes visées par une enquête tenue en vertu de la Loi n'ont aucune attente, même significative, quant au respect de leur droit à la vie privée. L'arrêt de notre Cour *Hunter c. Southam Inc.*, précité, affirme clairement le contraire. Mais l'arrêt laisse entendre que le respect du droit à la vie privée auquel on peut raisonnablement s'attendre dans le cadre d'une enquête en vertu de la Loi est semblable à celui auquel peuvent s'attendre ceux qui sont assujettis à d'autres lois de nature administrative et réglementaire, plutôt qu'à celui auquel peuvent

subject to police investigation for what I have called "real" or "true" crimes.

Rights of Privacy in Business Records

In so far as s. 17 of the Act is concerned, this conclusion is strengthened by the fact that it will be typically, if not exclusively, used to order the production of business records. I take it as axiomatic, on standard administrative law principles, that s. 17 can only be activated by either the Director of Investigations or the members of the Restrictive Trade Practices Commission in the course of an inquiry or investigation which they are by the Act empowered to undertake. The matters about which the Act allows or requires inquiry or investigation concern, without exception, business decisions or practice, and it would, I think, be a very rare situation in which documents of a personal nature could be relevant to their investigation. This means that business records and documents will normally be the only records and documents that can lawfully be demanded under s. 17.

While such records are not devoid of any privacy interest, it is fair to say that they raise much weaker privacy concerns than personal papers. The ultimate justification for a constitutional guarantee of the right to privacy is our belief, consistent with so many of our legal and political traditions, that it is for the individual to determine the manner in which he or she will order his or her private life. It is for the individual to decide what persons or groups he or she will associate with, what books he or she will read, and so on. One does not have to look far in history to find examples of how the mere possibility of the intervention of the eyes and ears of the state can undermine the security and confidence that are essential to the meaningful exercise of the right to make such choices. But where the possibility of such intervention is confined to business records and documents, the situation is entirely different. These records and documents do not normally contain information about one's lifestyle, intimate relations or political or religious opinions. They do not, in short, deal with those aspects of individual identity

légitimement s'attendre ceux qui font l'objet d'une enquête policière relativement à ce que j'ai appelé des crimes «proprement dits».

a Les droits au respect de la vie privée et les documents de l'entreprise

En ce qui concerne l'art. 17 de la Loi, cette conclusion est renforcée par le fait qu'il sera généralement, sinon exclusivement, utilisé pour ordonner la production de dossiers de l'entreprise. Il est incontestable, compte tenu des principes ordinaires du droit administratif, que le directeur des enquêtes ou les membres de la Commission sur les pratiques restrictives du commerce sont les seuls à pouvoir invoquer l'art. 17 au cours de l'enquête qu'ils peuvent tenir en vertu de la Loi. Les questions qui peuvent ou doivent faire l'objet d'une enquête en vertu de la Loi portent, sans exception, sur les décisions ou pratiques de l'entreprise et j'estime qu'il serait très rare que des documents de nature personnelle soit pertinents relativement à leur enquête. Cela signifie qu'en principe seuls les dossiers et documents des entreprises pourront être légalement exigés en vertu de l'art 17.

Bien que ces dossiers ne soient pas dépourvus d'intérêt de nature privée, il est raisonnable de dire qu'ils soulèvent des préoccupations beaucoup moins importantes que les documents personnels. L'argument suprême à l'appui d'une garantie constitutionnelle du droit au respect de la vie privée repose sur notre conviction, conforme à tant de nos traditions juridiques et politiques, qu'il appartient à l'individu de déterminer la façon dont il mènera sa vie privée. Il appartient à l'individu de décider quels sont les personnes ou groupes qu'il fréquentera, les livres qu'il lira, etc. Il n'est pas nécessaire de remonter très loin dans l'histoire pour trouver des exemples qui démontrent à quel point la seule possibilité d'intervention de l'État peut saper la sécurité et la confiance essentielles à un exercice significatif du droit de faire ces choix. Mais lorsque la possibilité d'une telle intervention est restreinte aux dossiers et documents de l'entreprise, la situation est tout à fait différente. Ces dossiers et documents ne contiennent habituellement pas de renseignements relatifs au mode de vie d'une personne, à ses relations intimes ou à ses convictions

which the right of privacy is intended to protect from the overbearing influence of the state. On the contrary, as already mentioned, it is imperative that the state have power to regulate business and the market both for economic reasons and for the protection of the individual against private power. Given this, state demands concerning the activities and internal operations of business have become a regular and predictable part of doing business. Under these circumstances, I cannot see how there could be a very high expectation of privacy in respect of the records and documents in which this information is contained.

My views regarding the limited privacy interest in business records are amply supported, as my colleague L'Heureux-Dubé J. has demonstrated, by the American courts in assessing the constitutionality of *subpoenae duces tecum*; see *Hale v. Henkel*, 201 U.S. 43 (1906); *Wilson v. United States*, 221 U.S. 361 (1911); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). These cases, it is true, are largely framed in terms of the interrelationship of the state to corporations, and there is no question that the considerations I have described above are even more apparent in the case of corporations. There is nothing either in s. 17 itself or any other section of the Act to suggest that it is limited to the seizure of the records and documents of corporations. However, this would certainly usually be the case. No authority need be cited for the propositions that our economy is dominated by large corporations and that most of the economic activity with which the Act is concerned happens within or is organized by corporations. As in the present case, it is the conduct of corporations that will typically be investigated, and the records and documents of corporations that will be subpoenaed under s. 17. Competition law, therefore, functions largely within the corporate environment.

politiques ou religieuses. Bref, ils ne traitent pas de ces aspects de l'identité personnelle que le droit à la vie privée vise à protéger de l'influence envahissante de l'État. Au contraire, comme je l'ai déjà souligné, il est impératif que l'État ait le pouvoir de réglementer le commerce et le marché tant pour des raisons économiques que pour protéger l'individu d'un pouvoir de nature privée. Cela étant dit, les demandes de l'État relatives aux activités et aux opérations internes des entreprises sont maintenant choses courantes et prévisibles en matière commerciale. Compte tenu de ces circonstances, je ne crois pas qu'il puisse y avoir de très grandes attentes en matière de vie privée à l'égard des dossiers et des documents qui contiennent des renseignements de cette nature.

Mon opinion à cet égard est amplement confirmée, comme ma collègue le juge L'Heureux-Dubé l'a démontré, par les tribunaux américains qui ont évalué la constitutionnalité des *subpoenae duces tecum*; voir *Hale v. Henkel*, 201 U.S. 43 (1906); *Wilson v. United States*, 221 U.S. 361 (1911); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). Il est vrai que ces arrêts se fondent en grande partie sur les relations réciproques entre l'État et les sociétés, et il ne fait pas de doute que les considérations que j'ai décrites auparavant sont encore plus apparentes dans le cas des sociétés. Rien dans l'art. 17 lui-même ni dans un autre article de la Loi ne laisse entendre que cet article est restreint à la saisie de dossiers et de documents des sociétés. Cependant, il est certain que ce serait généralement le cas. Il n'est pas nécessaire de citer des sources à l'appui des propositions que notre économie est dominée par de grandes sociétés et que la plupart des activités économiques visées par la Loi se déroulent à l'intérieur de ces sociétés ou sont organisées par celles-ci. Comme en l'espèce, ce sont les pratiques des sociétés qui feront habituellement l'objet d'une enquête, et ce sont les dossiers et documents des sociétés qui feront l'objet d'un subpoena en vertu de l'art. 17. Par conséquent, le droit en matière de concurrence s'exerce en grande partie à l'intérieur du monde des sociétés.

In fact, however, I do not view the expectations of privacy relating to business documents of corporations as significantly different for present purposes from those of business enterprises functioning under other legal regimes. Officers of the company and other individuals may also be implicated by what is found in corporate documents. Besides, it would be strange if the ambit of the Act were required to be limited by a consideration of the legal mechanism employed to conduct business rather than the nature of the behaviour sought to be regulated. The notion that a distinction is called for because the corporation is a creature of the state, which appears in United States jurisprudence, will not, in my view, withstand scrutiny. It is the policy considerations underlying the legislation that are relevant, and while these considerations apply with greater force to corporate bodies (hence the concentration on them in practice), they are also relevant to other business entities as well.

I, therefore, conclude that those who are ordered under s. 17 of the *Combines Investigation Act* to "make production of books, papers, records or other documents" can claim only a limited expectation of privacy in respect of those books, papers, records or documents. The relevant question in this appeal then becomes whether s. 17 unreasonably infringes on this limited expectation of privacy.

Sections 10 and 17—*Hunter v. Southam Inc.*

The foregoing conclusion is in no way inconsistent with this Court's decision in *Hunter v. Southam Inc.*, *supra*, notwithstanding that it also concerned the constitutionality of investigative powers under the *Combines Investigation Act*, specifically those provided by s. 10. While there are in that case some passing remarks that might arguably suggest that the Act was regarded as being of a criminal character (see pp. 154 and 167), the distinction between regulatory and true criminal offences was not even mentioned, let alone considered. I see no reason, therefore, why these elliptic references should be construed as holding that the Act and all the other legislation prescrib-

De fait cependant, je considère que les attentes en matière de respect de la vie privée relativement aux documents des sociétés ne sont pas très différentes, aux fins du présent pourvoi, de celles des entreprises commerciales exploitées sous un autre régime juridique. Les dirigeants de la société et les autres individus peuvent également être visés par ce qu'on trouve dans les documents de la société. Du reste, il serait étrange que la portée de la Loi soit restreinte par le mécanisme juridique utilisé pour exploiter l'entreprise plutôt que par la nature des comportements visés par la réglementation. L'idée qu'une distinction doive être établie parce que la société est une création de l'État, ce qui apparaît dans la jurisprudence américaine, ne peut à mon avis résister à un examen minutieux. Ce sont les considérations de politique qui sous-tendent la Loi qui sont pertinentes et, bien que ces considérations s'appliquent plus rigoureusement aux personnes morales (d'où l'importance qu'on leur accorde en pratique), elles s'appliquent également aux autres entités commerciales.

Je conclus donc que ceux à qui l'art. 17 de la *Loi relative aux enquêtes sur les coalitions* ordonne de produire «des livres, documents, archives ou autres pièces» ne peuvent faire valoir qu'une attente restreinte au respect de leur droit à la vie privée relativement à ces livres, documents, archives ou pièces. La question pertinente en l'espèce revient donc à savoir si l'art. 17 porte déraisonnablement atteinte à cette attente restreinte au respect du droit à la vie privée.

Les articles 10 et 17—*Hunter c. Southam Inc.*

La conclusion précédente est tout à fait compatible avec l'arrêt de notre Cour *Hunter c. Southam Inc.*, précité, même si celui-ci porte également sur la constitutionnalité des pouvoirs d'enquête prévus par la *Loi relative aux enquêtes sur les coalitions*, plus précisément ceux de l'art. 10. Bien que l'on puisse prétendre que certaines remarques de cet arrêt permettent de conclure que l'on considérerait la Loi comme étant de nature criminelle (voir les pp. 154 et 167), la distinction entre les infractions de nature réglementaire et les infractions véritablement criminelles n'a même pas été mentionnée, encore moins examinée. Je ne vois donc aucune raison d'interpréter ces allusions comme si elles

ing anti-competitive offences must, for all purposes and in all situations, satisfy the stringent standards of reasonableness usually applicable in criminal investigations. To do so would, in my view, severely hamper and perhaps render impossible the effective investigation of anti-competitive offences. These offences typically take the form of subtle alterations in otherwise perfectly legal business practices, and the effect they produce will often appear to be fully explicable by reference to the forces that normally determine success or failure in our economic system. Investigation to a much greater degree than is the case with regard to more traditional criminal offences will often be a necessary preliminary to the determination of whether the commission of an offence should even be suspected. **To hold that anti-combines investigators must always obtain a warrant by showing reasonable and probable grounds as to the commission of an offence and the existence of relevant evidence before they exercise any power of investigation that falls within the ambit of s. 8 of the Charter would, in these circumstances, immunize perpetrators of anti-competitive offences from discovery and prosecution.**

I see no reason to interpret *Hunter v. Southam Inc.* in this rigid fashion. It must be remembered that that case was concerned with the constitutionality of s. 10 of the Act, and that that provision, unlike s. 17, conferred on the Director of Investigations a power of search as well as seizure. It must surely be obvious that a power to search premises and take away documents is far more intrusive than a mere power to order the production of documents. Accordingly, the fact that the power there was held to be an unreasonable violation of reasonable expectations of privacy in no way determines that a power to order the production of documents must also be held to be an unreasonable intrusion on privacy. I can do no better in this regard than to refer to the reasons of Wilson J. in the companion case of *R. v. McKinlay Transport Ltd.*, *supra*. At page 649 of her reasons,

permettaient de conclure que la Loi et toutes les autres lois prévoyant des sanctions pour les pratiques contraires à la concurrence devaient, à toutes fins utiles, répondre aux normes sévères du caractère raisonnable habituellement applicables dans les enquêtes criminelles. À mon avis, prétendre le contraire pourrait sérieusement compromettre et peut-être même rendre impossible la tenue d'enquêtes efficaces relativement à des infractions contre la concurrence. Ces infractions prennent généralement l'allure d'altérations subtiles apportées à ce qui constitue par ailleurs des pratiques commerciales tout à fait légales et l'effet qu'elles produisent pourra souvent s'expliquer par les forces qui font normalement le succès ou l'échec d'une entreprise dans notre système économique. Une enquête beaucoup plus poussée qu'en matière d'infractions criminelles plus traditionnelles sera souvent nécessaire avant de décider si la perpétration d'une infraction devrait même être soupçonnée. **Affirmer que les enquêteurs en matière de coalitions doivent toujours obtenir un mandat, en démontrant qu'il existe des motifs raisonnables et probables de croire qu'une infraction a été commise et qu'il existe des éléments de preuve pertinents, avant de pouvoir exercer n'importe quel pouvoir d'enquête relevant de la portée de l'art. 8 de la Charte empêcherait, dans ces circonstances, la découverte et la poursuite des auteurs d'infractions contre la concurrence.**

Je ne vois aucune raison d'interpréter l'arrêt *Hunter c. Southam Inc.* aussi rigoureusement. Il faut se rappeler que cet arrêt portait sur la constitutionnalité de l'art. 10 de la Loi et que cette disposition, contrairement à l'art. 17, conférait au directeur des enquêtes le pouvoir de perquisitionner et de fouiller ainsi que celui de saisir. Manifestement, il est clair que le pouvoir de perquisitionner dans des lieux et de prendre des documents est beaucoup plus envahissant que le simple pouvoir d'ordonner la production de documents. Par conséquent, le fait qu'on ait conclu dans cet arrêt que le pouvoir constituait une violation abusive des attentes raisonnables en matière de respect de la vie privée ne permet aucunement de conclure que le pouvoir d'ordonner la production de documents constitue également une violation abusive du droit à la vie privée. À cet égard, je ne puis que men-

she says, in respect of the Minister of Revenue's power to order the production of documents from taxpayers:

The greater the intrusion into the privacy interests of an individual, the more likely it will be that safeguards akin to those in *Hunter* will be required. Thus, when the tax officials seek entry onto the private property of an individual to conduct a search or seizure, the intrusion is much greater than a mere demand for production of documents. The reason for this is that, while a taxpayer may have little expectation of privacy in relation to his business records relevant to the determination of his tax liability, he has a significant privacy interest in the inviolability of his home.

With appropriate modifications, this statement perfectly summarizes the difference between this appeal and *Hunter v. Southam Inc.* To paraphrase Wilson J., I would say that while a business, be it incorporated or unincorporated, may have little expectation of privacy in relation to its business records relevant to an investigation under the Act, it has a significant privacy interest in the inviolability of its business premises. It must be added that its owners and managers also have a significant privacy interest in the inviolability of their private homes, since there was nothing in s. 10 to restrict the Director's powers of search to business premises.

The proposition that those associated with a business have a greater privacy interest in the physical integrity of their homes than in the records and documents of that business should require no demonstration. But this hardly means that a significant privacy interest does not also subsist in relation to one's business premises. While it can fairly be said that business records do not usually contain information relating to one's personal affairs, opinions and associations, the same cannot be said with confidence of everything that may be found or observed in business files or premises. People who work in offices (the type of

tionner les motifs du juge Wilson dans l'arrêt connexe *R. c. McKinlay Transport Ltd.*, précité. À la page 649 de ses motifs, elle dit ce qui suit au sujet du pouvoir du ministre du Revenu d'ordonner aux contribuables de produire des documents:

Plus grande est l'atteinte aux droits à la vie privée des particuliers, plus il est probable que des garanties semblables à celles que l'on trouve dans l'arrêt *Hunter* seront nécessaires. Ainsi, le fait pour des agents du fisc de pénétrer dans la propriété d'un particulier pour y faire une perquisition et une saisie constitue une immixtion beaucoup plus grande que la simple demande de production de documents. La raison en est que même s'il est possible que le contribuable s'attende peu à ce que son droit à la protection de sa vie privée soit respecté relativement à ses documents commerciaux utiles pour établir son assujettissement à l'impôt, il n'en attache pas moins d'importance au respect de l'inviolabilité de son domicile.

En y apportant les modifications qui s'imposent, cet extrait résume parfaitement bien la différence entre ce pourvoi et l'arrêt *Hunter c. Southam Inc.* Pour paraphraser les propos du juge Wilson, je dirais que même si une entreprise, qu'elle soit ou non constituée en personne morale, ne peut avoir de telles attentes à l'égard de ses documents commerciaux pertinents relativement à une enquête tenue en vertu de la Loi, elle attache beaucoup d'importance au respect de l'inviolabilité de ses locaux. Il faut ajouter que ses propriétaires et gestionnaires attachent également beaucoup d'importance à l'inviolabilité de leur domicile puisque rien dans l'art. 10 ne restreint les pouvoirs du directeur de perquisitionner dans les locaux de l'entreprise.

Il va de soi que les personnes qui font partie d'une entreprise attachent plus d'importance à l'intégrité physique de leur domicile qu'aux dossiers et documents de l'entreprise. Mais cela ne signifie pas qu'ils n'attachent pas non plus d'intérêt à la protection des locaux de leur entreprise. Bien que l'on puisse raisonnablement dire que les dossiers d'entreprise ne contiennent habituellement pas de renseignements relatifs aux affaires, aux opinions et aux fréquentations personnelles d'un particulier, on ne peut affirmer la même chose avec autant de conviction de tout ce qui peut être trouvé ou observé dans les dossiers ou les locaux de l'entre-

workplace that would typically be searched under combines legislation) think of their own offices as personal space in a manner somewhat akin to the way in which they view their homes, and act accordingly. In part this reflects an understandable need to humanize an environment in which people spend a good deal of their waking hours. It may in part reflect the simple reality that human life is not divisible into mutually exclusive compartments of professional and personal which correspond with the office and the home. Indeed, an office may actually be more private than the home in so far as one's relations with family are concerned. Whatever the reason, it is a fact that in an office one is likely to find personal letters, private telephone and address directories, and many other indicators of the personal life of its occupant. The requirement to submit to a search of business premises by agents of the state can therefore amount to a requirement to reveal aspects of one's personal life to the chilling glare of official inspection. It seriously invades the right to be secure against unreasonable search and seizure. This is not the case with a power to order the production of records and documents relevant to the investigation of anti-competitive offences; there the eyes of the state can see no further than the business records it is entitled to demand.

The Nature and Purpose of Section 17

The greater intrusiveness of the investigative powers challenged in *Hunter v. Southam Inc.* fully supported the application in that case of the stringent criteria of reasonableness reproduced in Wilson J.'s reasons. By the same token, the limited scope of the power to order the production of documents, together with the limited privacy interests that can be said to reside in the records and documents that can be lawfully demanded, makes these criteria inappropriate for determination of the constitutionality of s. 17. As I have already suggested, their application might make our anti-combines legislation practically unenforceable. In particular, it would be regrettable if the power to order production of documents was dependent, as

prise. Les gens qui travaillent dans des bureaux (le genre de milieu de travail où l'on perquisitionnerait habituellement en vertu de la loi relative aux coalitions) perçoivent ceux-ci comme un endroit personnel, un peu comme ils perçoivent leur domicile, et agissent en conséquence. Cela traduit en partie le besoin compréhensible d'humaniser un environnement fréquenté une bonne partie de la journée. Cela peut refléter en partie le simple fait que la vie humaine ne peut être compartimentée en section professionnelles et personnelles étanches correspondant au bureau et au domicile. D'ailleurs, un bureau peut s'avérer plus privé que le domicile en ce qui concerne les relations familiales. Peu importe la raison, il est effectivement probable que l'on trouvera dans un bureau des lettres personnelles, des répertoires d'adresses et de numéros de téléphone privés et bien d'autres indices de la vie personnelle de son occupant. L'obligation de subir la perquisition des lieux de l'entreprise par des fonctionnaires de l'État peut donc revenir à obliger le particulier à révéler des aspects de sa vie privée au regard froid de fonctionnaires. Cela porte sérieusement atteinte au droit d'être protégé contre les fouilles, les perquisitions et les saisies abusives. On ne peut dire la même chose du pouvoir d'ordonner la production de dossiers et de documents qui ont rapport à l'enquête relative à une infraction contre la concurrence: alors, le regard de l'État s'arrête aux dossiers de l'entreprise qu'il peut exiger.

La nature et l'objet de l'art. 17

La nature plus intrusive des pouvoirs d'enquête contestés dans l'arrêt *Hunter c. Southam Inc.* justifiait tout à fait, dans cet arrêt, l'application de critères plus sévères du caractère raisonnable, que reprend le juge Wilson dans ses motifs. En même temps, la portée restreinte du pouvoir d'ordonner la production de documents, ainsi que le peu de renseignements de nature privée susceptibles de se trouver dans les dossiers et documents qui peuvent être légalement exigés, rend ces critères inadéquats pour se prononcer sur la constitutionnalité de l'art. 17. Comme je l'ai déjà signalé, leur application pourrait rendre les lois relatives aux coalitions pratiquement inexécutoires. En particulier, il serait regrettable que le pouvoir d'ordonner la production

it would be under the *Hunter v. Southam Inc.* criteria, on the ability to establish reasonable and probable grounds to believe that an offence under the Act had been committed.

That is so because of the difficulty of discovering violations of combines legislation. While investigatory difficulties are obviously a concern in all law enforcement activity, it is important to note the distinctive nature of those encountered by authorities charged with the enforcement of anti-combines legislation. In the traditional police investigation, there will typically be no question that an offence has been committed. A body will have been found, a person will report the theft of their belongings or an attack on their person, or a person will have been observed engaging in a prohibited course of conduct. In other words, the commission of most of the offences typically investigated by the police requires the creation of physical evidence or at least a course of conduct that is physically observable. This means that the usual problem in a police investigation will not be to determine whether the law has been broken, but will instead be the difficulty of linking a particular person or persons to the offence that is known to have been committed.

In the case of anti-combines legislation, the situation is quite different. Under the *Combines Investigation Act*, an inquiry by the Director of Investigation and Research or a member of the Restrictive Trade Practices Commission, or the Commission itself, can relate either to the granting or violation of an order under Part V of the Act or the commission of an offence under Part VI. Both the conduct constituting a violation of such order and the conduct constituting an offence are, with exceptions, not generally observable by third parties; nor do they produce a result that announces (or perhaps even strongly indicates) that they have in fact been engaged in. For the most part, they take place within the hidden boardrooms and offices of corporations. They can, in some cases at least, be engaged in by the most subtle of alterations in otherwise totally legitimate activities, such as the pricing of goods or the decision as to

de documents dépende, comme ce serait le cas en vertu du critère de l'arrêt *Hunter c. Southam Inc.*, de la capacité d'établir l'existence de motifs raisonnables et probables de croire qu'une infraction à la Loi a été commise.

Il en est ainsi en raison de la difficulté de découvrir les violations des lois relatives aux coalitions. Bien que les difficultés d'enquête soient évidemment toujours un sujet de préoccupation en matière d'application des lois, il est important de souligner la nature distincte des problèmes rencontrés par les responsables de l'application des lois anticoalitions. Dans une enquête policière traditionnelle, on sait généralement qu'une infraction a été commise. Un corps aura été trouvé, une personne portera plainte parce que ses biens auront été volés ou parce qu'elle aura été attaquée, ou on aura vu une personne se livrer à une conduite interdite. En d'autres termes, la perpétration de la plupart des infractions qui font généralement l'objet d'une enquête des policiers exige l'établissement d'une preuve matérielle ou, à tout le moins, une conduite que l'on peut physiquement observer. C'est dire que le problème habituel d'une enquête policière n'est pas de déterminer si la loi a été violée, mais d'établir un lien entre une personne ou des personnes en particulier et l'infraction que l'on sait avoir été commise.

En matière de lois anticoalitions, la situation est très différente. En vertu de la *Loi relative aux enquêtes sur les coalitions*, l'enquête tenue par le directeur des enquêtes et recherches, un membre de la Commission sur les pratiques restrictives du commerce ou la Commission elle-même peut porter soit sur la délivrance ou la violation d'une ordonnance rendue en vertu de la partie V de la Loi soit sur la perpétration d'une infraction visée à la partie VI. La conduite qui constitue une violation d'une telle ordonnance et la conduite qui constitue une infraction ne sont, sauf exceptions, généralement pas observables par des tiers; elles ne produisent pas non plus un résultat qui laisse voir (ou indique peut-être même sérieusement) qu'on s'est livré à celles-ci. La plupart du temps, elles se déroulent à l'abri des salles de conférence et des bureaux des sociétés. Dans certains cas à tout le moins, elles peuvent prendre l'allure d'altérations

whether or not to submit a bid in response to particular tenders. The corollary of this last point is that many of the regulated or proscribed forms of conduct produce results, such as the decision to supply one buyer and not another, or the decision to price a good at one possible level rather than another, or the decision to bid on one tender but not another, which are fully explicable as normal or routine business decisions. In short, much of the conduct the Director must be able to inquire into produces no "smoking gun"; see the remarks of Estey J. in *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, at p. 238, cited *infra*. The following quotation from S. V. Wilson and A. H. Matz, "Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods" (1977), 14 *Am. Crim. L. Rev.* 651, at p. 651, encapsulates the problems involved in investigating economic crimes generally:

But economic crimes are far more complex than most other federal offences. The events in issue usually have occurred at a far more remote time and over a far more extensive period. The "proof" consists not merely of relatively few items of real evidence but of a large roomful of often obscure documents. In order to try the case effectively, the Assistant United States Attorney must sometimes master the intricacies of a sophisticated business venture. Furthermore, in the course of doing so, he, or the agents with whom he works, often must resolve a threshold question that has already been determined in most other cases: Was there a crime in the first place? To use the colloquial, it is not so much a matter of "whodunit" as "what-was-done". [Emphasis added.]

For example, s. 32.2, which makes it an offence to be party to a bid-rigging arrangement, defines bid-rigging as "an agreement or arrangement between or among two or more persons whereby one or more of such persons agrees or undertakes not

les plus subtiles apportées à des activités par ailleurs tout à fait légitimes, comme la fixation des prix des marchandises ou la décision de présenter une soumission en réponse à des appels d'offres particuliers. Dans ce dernier cas, il s'ensuit que plusieurs formes de conduites réglementées ou interdites produisent des résultats, comme la décision d'approvisionner un acheteur plutôt qu'un autre, la décision de fixer le prix d'une marchandise à un niveau donné plutôt qu'à un autre ou la décision de présenter une soumission à un appel d'offres plutôt qu'à un autre, qui s'inscrivent très bien dans les prises de décisions normales ou habituelles. Bref, la plupart des conduites qui font l'objet d'une enquête par le directeur ne laissent pas de traces visibles; voir les remarques du juge Estey dans l'arrêt *Irvine c. Canada (Commission sur les pratiques restrictives du commerce)*, [1987] 1 R.C.S. 181, à la p. 238, reproduites plus loin. L'extrait suivant de S. V. Wilson et A. H. Matz, «Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods» (1977), 14 *Am. Crim. L. Rev.* 651, à la p. 651, résume les difficultés liées aux enquêtes sur les crimes économiques en général:

[TRADUCTION] Mais les crimes économiques sont beaucoup plus complexes que la plupart des autres infractions relevant de la compétence fédérale. Les événements en cause se sont généralement produits à une époque beaucoup plus lointaine et sur une période beaucoup plus longue. La «preuve» ne se résume pas simplement à quelques rares éléments de preuve matérielle mais à une grande pièce remplie de documents souvent obscurs. Pour plaider efficacement, le substitut du procureur général des États-Unis doit parfois maîtriser les complexités d'une entreprise commerciale sophistiquée. En outre, ce faisant, celui-ci, ou les fonctionnaires qui travaillent avec lui, doivent souvent répondre à une question fondamentale à laquelle on a déjà répondu dans la plupart des autres cas: Premièrement, un crime a-t-il été commis? En langage courant, la question n'est pas tellement de savoir «qui a commis l'infraction» mais «qu'est-ce qui a été commis». [Je souligne.]

Par exemple, l'art. 32.2, qui prévoit que quiconque participe à un truquage d'offres commet une infraction, définit le truquage des offres comme «l'accord ou arrangement entre plusieurs personnes par lequel au moins l'une d'elles consent ou s'en-

to submit a bid in response to a call or request for bids or tenders”, or “the submission . . . of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers”. The implementation of such an arrangement would in many cases be indistinguishable from the usual process by which tenders are submitted and in which tenderers decide between jobs based on their genuine assessment of what they are capable of doing and what they are likely to be recognized as capable of doing. Similarly, s. 38(6) makes it an offence “by threat, promise or any like means, attempt to induce a supplier . . . as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons”. Again, once implemented, such a “refusal to supply” would probably “look” like a perfectly normal pattern of commercial relations. Similar analyses could be made, in the cases of other offences, in respect of s. 32 (conspiracy) and s. 38 (price maintenance). In the case of the matters with respect to which the Commission can make orders under Part IV.1 of the Act, a similar analysis can be made in respect of s. 31.4 which empowers the Commission to prohibit persons from continuing to engage in exclusive dealing, market restriction or tied-selling.

In brief, because of the nature of the conduct regulated by the Act, there will in many cases be no way of determining whether proscribed conduct has been engaged in, short of studying the process by which a suspected corporation or business has made and implemented its decisions. In this respect, the situation is not unlike that under the *Income Tax Act*. I agree with Wilson J. that under the latter Act, it will often be “impossible to determine from the face of the return whether any impropriety has occurred in its preparation” (see *R. v. McKinlay Transport Ltd.*, *supra*, at p. 648). I would simply add that under the *Combines Investigation Act* it will likewise often be impossible for those responsible for its enforcement to

gager à ne pas présenter d'offre en réponse à un appel ou à une demande d'offres ou de soumissions», ou «la présentation [...] d'offres ou de soumissions qui sont le fruit d'un accord ou arrangement entre plusieurs enchérisseurs ou soumissionnaires». Dans plusieurs cas, la mise à exécution d'un tel arrangement pourrait ne pas se distinguer du processus habituel par lequel des soumissions sont présentées et où les soumissionnaires décident des travaux à exécuter selon une évaluation véritable de leur capacité d'exécution et ce qu'on les croit capables d'exécuter. De même, le par. 38(6) prévoit que «[n]ul ne doit, par menace, promesse ou quelque autre moyen semblable, tenter de persuader un fournisseur [...] en en faisant la condition de leurs relations commerciales, de refuser de fournir un produit à une personne donnée ou à une catégorie donnée de personnes en raison du régime de bas prix de cette personne ou catégorie». Encore une fois, lorsqu'il sera mis à exécution, un tel «refus de fournir» aura probablement d'air d'une condition tout à fait normale des relations commerciales. Des analyses semblables pourraient être faites dans le cas des autres infractions concernant l'art. 32 (complot) et l'art. 38 (maintien des prix). En ce qui concerne les questions au sujet desquelles la Commission peut rendre des ordonnances en vertu de la partie IV.1 de la Loi, une analyse semblable peut être faite en ce qui concerne l'art. 31.4 qui permet à la Commission d'interdire aux personnes de continuer de pratiquer l'exclusivité, les ventes liées ou de se livrer à la limitation du marché.

En résumé, étant donné la nature des conduites réglementées par la Loi, il sera souvent impossible de déterminer si une personne s'est livrée à la conduite interdite sans examiner le processus par lequel une société ou une entreprise soupçonnée a pris et exécuté ses décisions. À cet égard, la situation est semblable à ce qui se produit sous le régime de la *Loi de l'impôt sur le revenu*. Je suis d'accord avec le juge Wilson qu'en vertu de cette dernière loi, il est souvent «impossible de dire, à première vue, si une déclaration a été préparée de façon irrégulière» (voir l'arrêt *R. c. McKinlay Transport Ltd.*, précité, à la p. 648). J'ajouterais simplement que les responsables de l'application de la *Loi relative aux enquêtes sur les coalitions*

determine whether it has in fact been violated. I see no reason why this factor should be relevant to the constitutionality of the power to order production found in the former Act but irrelevant to the constitutionality of a substantially similar power found in the latter Act. Investigatory mechanisms which force corporations and other businesses to divulge what they and only they can know about their internal affairs are part of the state's interest in the enforcement of combines legislation. The power to subpoena books, records and documents is obviously one such investigatory mechanism. To limit its use to situations in which the Director or a Commission member can show reasonable and probable grounds to believe that a specific offence has been committed would frustrate the process of investigation at its very inception.

These considerations have played an important role in shaping the American approach to combines legislation. Thus in *United States v. Morton Salt Co.*, *supra*, the Federal Trade Commission, in the course of an anti-trust investigation, by subpoena ordered production of certain documents to satisfy itself that previously-issued cease and desist orders were being complied with. In upholding the subpoena, Jackson J., writing for the court, stated at pp. 642-43:

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps

seront de même souvent incapables de déterminer si la Loi a effectivement été violée. Je ne vois aucune raison pour laquelle ce facteur devrait être pertinent quant à la constitutionnalité du pouvoir d'ordonner la production de documents dans le cas de la première loi, mais non pertinent quant à la constitutionnalité d'un pouvoir en grande partie identique dans le cas de la seconde. Les mécanismes d'enquête qui obligent les sociétés et les autres entreprises à divulguer ce qu'elles sont les seules à connaître de leurs affaires internes font partie de l'intérêt qu'a l'État à ce que les lois relatives aux coalitions soient appliquées. Le pouvoir d'ordonner la production de livres, d'archives et de documents fait évidemment partie de ce mécanisme d'enquête. En limiter l'emploi à des situations où le directeur ou un membre de la Commission peut établir l'existence de motifs raisonnables et probables de croire qu'une infraction précise a été commise entraverait le processus d'enquête à son origine même.

Ces questions ont joué un rôle important dans la formulation de la position américaine au sujet des lois relatives aux coalitions. Ainsi, dans l'arrêt *United States v. Morton Salt Co.*, précité, la Federal Trade Commission a, au cours d'une enquête relative à une loi antitrust, ordonné par subpoena la production de certains documents pour vérifier si on s'était conformé à des ordonnances de ne pas faire. En confirmant la validité du subpoena, le juge Jackson affirme, au nom de la cour, aux pp. 642 et 643:

[TRADUCTION] Le seul pouvoir dont il est question ici, c'est le pouvoir d'obtenir des renseignements de ceux qui sont les mieux placés pour les donner et les moins intéressés à le faire. Parce que les tribunaux, quand ils en ont la compétence, hésitent à exercer leurs pouvoirs d'ordonner la production d'une preuve avant que sa pertinence dans le litige ne soit établie, il ne s'ensuit pas qu'un organisme administratif responsable de l'application des lois ne peut avoir ni exercer de pouvoirs d'enquête qui lui sont propres. Il a, si l'on veut, un pouvoir d'enquête qui ne découle pas du pouvoir judiciaire. Son pouvoir ressemble davantage à celui du grand jury qui n'a pas besoin d'une instance ou d'une controverse pour obtenir des éléments de preuve mais peut enquêter dès qu'il soupçonne que la loi est violée, ou même simplement pour s'assurer qu'il n'y a pas eu violation de la loi.

to inform itself as to whether there is probable violation of the law. [Emphasis added.]

This passage was quoted with approval in *Federal Trade Commission v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir. 1977). In that case, one of the grounds on which the subpoena was challenged was that the relevant legislation did not provide for sufficient judicial supervision of the process by which the subpoena was issued. In rejecting this argument, the Court of Appeal for the District of Columbia said, at pp. 872-73, that:

... the scope of issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity. As the Ninth Circuit has noted, the "very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate..." *FMC v. Port of Seattle*, 521 F.2d 431, 433.

I acknowledge that I have found little literature dealing specifically with the importance of s. 17 to the Director and Commission's efforts to enforce the Act. This is not really surprising given that the Director, the officer who has historically shouldered the brunt of the investigative responsibility under the Act, was until quite recently able to rely on the power to enter and search premises. It is instructive to note, however, that in the course of an explanation of proposed amendments to the Act, the Government of Canada defended the scope of the Director's powers of investigation by emphasizing the difficulties of detection which characterize anti-competitive offences. At page 29 of the Minister of Consumer and Corporate Affairs' pamphlet, *Combines Investigation Act Amendments 1984: Background Information and Explanatory Notes* (1984), the following appears:

The powers of the Director are essential to determining both whether and to what extent offences have been committed under the Act and whether certain restrictive or predatory practices are being engaged in which should be prohibited or whether an anti-competitive merger should be remedied. [Emphasis added.]

Lorsque la loi délègue des pouvoirs d'enquête et d'accusation à un organisme administratif, celui-ci peut également prendre des mesures pour vérifier s'il y a violation de la loi. [Je souligne.]

^a Ce passage a été cité et approuvé dans l'arrêt *Federal Trade Commission v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir. 1977). Dans cet arrêt, l'un des motifs de contestation du subpoena était que la loi applicable ne prévoyait pas un pouvoir de contrôle judiciaire suffisant du processus par lequel le subpoena avait été décerné. En rejetant cet argument, la Cour d'appel du district de Columbia a affirmé, aux pp. 872 et 873, que:

^c [TRADUCTION] ... l'étendue des questions qui peuvent être contestées dans une procédure d'exécution doit être restreinte en raison de l'intérêt important qu'a le gouvernement dans la tenue d'enquêtes expéditives sur l'existence d'activités illégales. Comme l'a souligné la Cour du neuvième Circuit le «pivot même de l'efficacité d'un organisme administratif dans l'exercice des pouvoirs délégués par le Congrès en matière de réglementation des entreprises est l'exercice rapide du pouvoir d'enquête...» *FMC v. Port of Seattle*, 521 F.2d 431, à la p. 433.

^f Je reconnais avoir trouvé peu d'ouvrages portant précisément sur l'importance de l'art. 17 pour le directeur et la Commission dans la mise en application de la Loi. Cela n'est pas vraiment surprenant puisque le directeur, le fonctionnaire qui a toujours été responsable de la tenue des enquêtes en vertu de la Loi, pouvait jusqu'à tout récemment invoquer le pouvoir d'entrer et de perquisitionner dans les lieux. Il est cependant intéressant de souligner que le gouvernement du Canada, dans ses explications sur le projet de modification de la Loi, a défendu l'étendue des pouvoirs d'enquête du directeur en soulignant que les infractions en matière de concurrence sont difficiles à découvrir. À la page 34 de la brochure du ministre de la Consommation et des Corporations intitulée, *Modifications de 1984 à la Loi relative aux enquêtes sur les coalitions: Documentation de base et notes explicatives* (1984), on lit:

^j Les pouvoirs du Directeur sont essentiels pour déterminer si des infractions ont été commises et dans quelle mesure, et si certaines pratiques restrictives ou abusives qui devraient être interdites sont utilisées. [Je souligne.]

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The pamphlet goes on to characterize suggestions that all of the Director's powers of investigation should be circumscribed by a requirement equivalent to the warrant requirement in criminal law as a failure "to appreciate the nature of offences being investigated under the Act" (p. 29).

Those suggestions, I think, also fail to appreciate the real function of s. 17. Essentially, it serves the same purpose as a programme of regular inspection in other areas of the law which, as I have already noted, is neither possible nor desirable in this context. The fact that an investigation may occur encourages compliance as in the case of inspections under other regulatory legislation. As in the case of the *Income Tax Act*, discussed in *R. v. McKinlay Transport Ltd.*, *supra*, the Act is to a considerable extent self-enforcing, but, as already noted, this ultimately depends on effective sanctions which in turn depend on the possibility of adequate investigation. Estey J. aptly describes the need for such investigation in *Irvine v. Canada (Restrictive Trade Practices Commission)*, *supra*, at p. 238:

The area under investigation concerns trading crimes which by nature are difficult of investigation. Persons conspiring to profit improperly from trade combinations do not create much physical evidence and have every opportunity to disguise their conduct. The impact of the crime on the individuals affected is in each case very small in economic terms but in gross produces sizeable criminal profit. Again this type of crime requires more than the usual combination of informants and complainants from the public at large. The demonstration of the crime generally requires the early and active investigative action by the state itself. An awareness of these concerns by the legislators is apparent when the investigative program established in the Act is read as a whole. [Emphasis added.]

I do not think the factors there noted are any less cogent now than they were before the enactment of the *Charter*.

Le Ministre poursuit en disant que la proposition selon laquelle les pouvoirs d'enquête du directeur devraient tous être limités par une condition équivalente à celle du mandat en droit criminel «ne tient pas compte de la nature des infractions qui font l'objet d'une enquête en vertu de la Loi» (p. 34).

Je pense de plus que cette proposition ne tient pas compte du véritable rôle de l'art. 17. Il vise essentiellement le même but qu'un programme d'inspections régulières dans d'autres domaines du droit et, comme je l'ai déjà souligné, cela n'est ni possible ni souhaitable dans ce contexte. Parce qu'une enquête peut avoir lieu, l'entreprise a tendance à se conformer à la Loi comme dans le cas des inspections en vertu d'autres lois de nature réglementaire. Comme dans le cas de la *Loi de l'impôt sur le revenu*, examinée dans l'arrêt *R. c. McKinlay Transport Ltd.*, précité, l'existence même de la Loi suffit dans une large mesure à la faire observer mais, comme je l'ai déjà souligné, cela dépend en fin de compte de l'efficacité des sanctions qui à leur tour dépendent de la possibilité de tenir une enquête appropriée. Le juge Estey décrit bien la nécessité de ces enquêtes dans l'arrêt *Irvine c. Canada (Commission sur les pratiques restrictives du commerce)*, précité, à la p. 238:

Le domaine d'enquête en cause concerne les crimes commerciaux qui par nature font difficilement l'objet d'une enquête. Les personnes qui complotent de profiter à tort de quelque tractation commerciale ne laissent guère de preuves matérielles derrière elles et elles ont toute l'occasion voulue pour camoufler leur conduite. L'effet du crime sur les individus touchés est, dans chaque cas, négligeable sur le plan économique, mais il génère globalement un profit criminel important. Faut-il le redire, ce genre de crime exige plus, pour le combattre, que la combinaison habituelle de dénonciateurs et de plaignants en provenance du grand public. La preuve du crime requiert généralement des mesures d'enquête promptes et actives de la part de l'État lui-même. La conscience de ces préoccupations par le législateur est apparente lorsque la procédure d'enquête établie par la Loi est envisagée dans son ensemble. [Je souligne.]

Je ne crois pas que les facteurs soulignés dans cette affaire soient moins pertinents maintenant qu'ils ne l'étaient avant l'adoption de la *Charte*.

If it is unnecessary under s. 17 to establish the existence, on reasonable and probable grounds, of a belief that a particular offence has been committed, then compliance with the remaining *Hunter v. Southam Inc.* criteria also becomes unnecessary. All of these are derivative from the reasonable and probable grounds requirement. This is obviously the case in respect of the requirement to show "reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered". It is also true of the requirement that the use of the power of search or seizure must depend on "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". As Wilson J. today points out in *R. v. McKinlay Transport Ltd.*, there is no role for such an arbiter where there is no requirement of reasonable and probable grounds, since "his central role under *Hunter* is to ensure that the person seeking the authorization has reasonable and probable grounds to believe that a particular offence has been committed, that there are reasonable and probable grounds to believe that the authorization will turn up something relating to that particular offence, and that the authorization only goes so far as to allow the seizure of documents relevant to that particular offence" (emphasis in original) (p. 649). The fact that s. 17 provides for an *ex parte* application by members of the Commission, who in *Hunter v. Southam Inc.* were found to be insufficiently detached from the process of investigation for the purposes of an application for permission to search premises, is not therefore fatal to its constitutionality.

Nor would it make sense to hold that s. 17 must comply with the final *Hunter v. Southam Inc.* criterion, the requirement "that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation". If it is not necessary that the investigators establish reasonable and probable grounds to believe that an offence has been committed, it cannot be necessary that a particular offence be under investigation at all. It follows that it cannot

S'il n'est pas nécessaire d'établir en vertu de l'art. 17 l'existence de motifs raisonnables et probables de croire qu'une infraction particulière a été commise, il n'est pas nécessaire non plus de se conformer aux autres critères de l'arrêt *Hunter c. Southam Inc.* Ceux-ci découlent de l'exigence de motifs raisonnables et probables. C'est évidemment le cas en ce qui concerne l'obligation d'établir l'existence de «motifs raisonnables de croire que l'on découvrira quelque chose qui fournira une preuve que l'infraction précise faisant l'objet de l'enquête a été commise». Cela est également vrai de l'exigence que l'exercice du pouvoir de fouille, de perquisition ou de saisie dépende d'une «procédure d'autorisation préalable par un arbitre tout à fait neutre et impartial qui est en mesure d'agir de façon judiciaire en conciliant les intérêts de l'État et ceux de l'individu». Comme le juge Wilson le souligne aujourd'hui dans l'arrêt *R. c. McKinlay Transport Ltd.*, l'arbitre n'a aucun rôle à jouer lorsqu'il n'existe aucune exigence de motifs raisonnables et probables puisque «son rôle principal, selon l'arrêt *Hunter*, consiste à s'assurer que la personne qui demande l'autorisation a des motifs raisonnables et probables de croire qu'une infraction précise a été commise, qu'il existe des motifs raisonnables et probables de croire que l'autorisation permettra de découvrir quelque chose ayant trait à cette infraction précise, et que l'autorisation ne vise qu'à permettre la saisie de documents se rapportant à l'infraction précise» (souligné dans l'original) (p. 649). Le fait que les membres de la Commission, dont on a dit, dans l'arrêt *Hunter c. Southam Inc.*, qu'ils n'étaient pas suffisamment détachés du processus d'enquête puissent présenter une requête *ex parte* en vertu de l'art. 17 n'a donc pas pour effet de rendre cet article inconstitutionnel.

Il ne serait pas logique non plus de conclure que l'art. 17 doit être conforme au dernier critère de l'arrêt *Hunter c. Southam Inc.*, «que les seuls documents dont la saisie est autorisée soient ceux se rapportant strictement à l'infraction faisant l'objet de l'enquête». S'il n'est pas nécessaire que les enquêteurs établissent l'existence de motifs raisonnables et probables de croire qu'une infraction a été commise, il n'est pas nécessaire non plus qu'une infraction précise fasse l'objet de l'enquête.

be necessary that only documents relevant to the investigation of a particular offence be seized.

The Scope of Section 17

I hasten to add that this does not mean that there is no limitation to the potential scope of an order to produce documents which can be validly issued under s. 17. **The material sought must be relevant to the inquiry in progress. The question of relevancy, however, must be related to the nature and purpose of the power accorded under s. 17.** As to whether the obligation, when challenged, to satisfy this standard of relevancy can be said to make a seizure under s. 17 "reasonable" within the meaning of s. 8 of the *Charter*, I note that it is in American law the principal precondition to the satisfaction of the Fourth Amendment's protection against unreasonable search and seizure, in so far as that protection enures to those ordered to produce documents.

In *Oklahoma Press Publishing Co. v. Walling*, *supra*, which concerned an order to produce documents issued by the Administrator of *The Fair Labor Standards Act*, Rutledge J., speaking on behalf of the majority of the Supreme Court, said of the Fourth Amendment that the "gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable" (p. 208). He went on to say that, in regard to *subpoena duces tecum*, this did not require "that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one" (p. 209). Instead, it was sufficient that:

... the investigation be for a lawfully authorized purpose, within the power of Congress to command ... The requirement of "probable cause, supported by oath or affirmation," literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can

Il s'ensuit qu'il ne peut être nécessaire que seuls les documents qui ont rapport à l'enquête relative à une infraction précise soient saisis.

a La portée de l'art. 17

Je m'empresse d'ajouter que cela ne signifie pas que la portée éventuelle d'une ordonnance de produire des documents, qui peut être rendue valablement en vertu de l'art. 17, n'a pas de limites. **Les documents recherchés doivent se rapporter à l'enquête en cours. La question de la pertinence doit cependant se rapporter à la nature et à l'objet du pouvoir conféré en vertu de l'art. 17.** Quant à savoir si on peut dire que l'obligation, lorsqu'elle est contestée, de respecter cette norme de pertinence rend la saisie en vertu de l'art. 17 «raisonnable» au sens de l'art. 8 de la *Charte*, je souligne qu'en droit américain c'est la principale condition préalable pour bénéficier de la protection du Quatrième amendement contre les fouilles, les perquisitions et les saisies abusives dans la mesure où cette protection s'applique à ceux qui se voient ordonner de produire des documents.

Dans l'arrêt *Oklahoma Press Publishing Co. v. Walling*, précité, qui portait sur une ordonnance de produire des documents rendue par l'administrateur de *The Fair Labor Standards Act*, le juge Rutledge, s'exprimant au nom des juges formant la majorité de la Cour suprême, a affirmé au sujet du Quatrième amendement que la [TRADUCTION] «protection accordée se réduit à l'exigence, expressément formulée, que la divulgation demandée ne soit pas déraisonnable» (p. 208). Il a poursuivi en disant qu'en ce qui concerne le *subpoena duces tecum*, il n'était pas nécessaire [TRADUCTION] «qu'une accusation ou une plainte précise relativement à la violation d'une loi ait été portée ou que l'ordonnance ait été rendue par suite d'une telle accusation ou plainte» (p. 209). Il suffisait plutôt que:

[TRADUCTION] ... l'enquête soit tenue pour une fin autorisée par la loi, c'est-à-dire pour une fin qui relève du pouvoir du Congrès. [...] L'exigence d'un «motif plausible, soutenu par serment ou affirmation», qui s'applique littéralement aux mandats, est remplie dans le cas d'une ordonnance de production dès que le tribunal décide que l'enquête a été autorisée par le Congrès,

order, and the documents sought are relevant to the inquiry. [Emphasis added.]

It is true that *Oklahoma Press Publishing Co. v. Walling* was not concerned with a subpoena issued in the course of an inquiry into the violation of anti-trust legislation, but it was applied without qualification to just such a subpoena in *United States v. Morton Salt Co.*, *supra*, where Jackson J., speaking on behalf of the court, said that "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant" (p. 652). There are many other cases in which the "relevancy to a lawful inquiry" test has been applied to subpoenas issued by agencies or officials investigating anti-trust violations; see *People v. Allen*, 103 N.E.2d 92 (Ill. 1952); *Federal Trade Commission v. Tuttle*, 244 F.2d 605 (2d Cir. 1957); *Adams v. Federal Trade Commission*, 296 F.2d 861 (8th Cir. 1961); *People v. Dorr*, 265 N.E.2d 601 (Ill. 1971); *Federal Trade Commission v. Texaco, Inc.*, *supra*. What is more, a modern treatise on American anti-trust law makes it clear that American courts continue to rely on the "relevancy to a lawful inquiry test" in determining the constitutionality of subpoena issued by anti-trust authorities; see E. W. Kintner and W. P. Kratzke, *Federal Antitrust Law* (1986), vol. VI, § 45.25, at pp. 248-56.

The requirement that the order to produce documents be relevant to a lawful inquiry does not exhaust the American law in this area. In *Oklahoma Press Publishing Co. v. Walling*, the Supreme Court said that beyond relevancy there was the Fourth Amendment requirement of sufficient particularity in "describing the place to be searched, and the persons or things to be seized", which in the case of a *subpoena duces tecum* "comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry" (p. 209). It is

qu'elle vise un but relevant du pouvoir du Congrès et que les documents demandés sont pertinents pour les fins de l'enquête. [Je souligne.]

a Il est vrai que l'arrêt *Oklahoma Press Publishing Co. v. Walling* ne concernait pas un subpoena délivré au cours d'une enquête sur la violation d'une loi antitrust, mais l'arrêt a été appliqué sans restriction à un tel subpoena dans l'arrêt *United States v. Morton Salt Co.*, précité, où le juge Jackson a affirmé, au nom de la cour, que [TRADUCTION] «il est suffisant si l'enquête relève du pouvoir de l'organisme, si la demande n'est pas trop vague et si les renseignements recherchés sont raisonnablement pertinents» (p. 652). Il existe plusieurs autres décisions dans lesquelles le critère de la [TRADUCTION] «pertinence relativement à l'enquête autorisée légalement» a été appliqué à des subpoenas délivrés par des organismes ou des responsables enquêtant relativement à des violations de lois antitrust; voir les arrêts *People v. Allen*, 103 N.E.2d 92 (Ill. 1952); *Federal Trade Commission v. Tuttle*, 244 F.2d 605 (2d Cir. 1957); *Adams v. Federal Trade Commission*, 296 F.2d 861 (8th Cir. 1961); *People v. Dorr*, 265 N.E.2d 601 (Ill. 1971); *Federal Trade Commission v. Texaco, Inc.*, précité. Qui plus est, un traité moderne sur la législation antitrust américaine révèle clairement que les tribunaux américains continuent de recourir au [TRADUCTION] «critère de la pertinence relativement à l'enquête autorisée légalement» pour déterminer la constitutionnalité des subpoenas délivrés par des autorités agissant en vertu de lois antitrust: voir E. W. Kintner et W. P. Kratzke, *Federal Antitrust Law* (1986), vol. VI, § 45.25, aux pp. 248 à 256.

h L'exigence que l'ordonnance de produire des documents soit pertinente pour les fins de l'enquête autorisée légalement n'est pas la seule condition du droit américain en la matière. Dans l'arrêt *Oklahoma Press Publishing Co. v. Walling*, la Cour suprême a dit qu'au-delà de la pertinence, il y a le Quatrième amendement qui exige une précision suffisante dans [TRADUCTION] «la description [du] lieu à fouiller et [d]es personnes ou choses à saisir», ce qui, dans le cas d'un *subpoena duces tecum* [TRADUCTION] «se ramène à une désignation des documents à produire qui soit suffisante

usually said that there are two aspects to this "adequate specification" requirement. The first is quite simply that the subpoena must be sufficiently clear and specific to inform the subpoenaed party of precisely what documents are being demanded. The second is that the subpoena must only be as broad as is necessary for the purposes of the inquiry in progress. An unduly broad subpoena will be struck down on grounds of burdensomeness; see *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924), at pp. 305-6.

While both of these requirements are self-evidently sensible, they do not in my opinion appear to have a basis distinct from the overriding requirement that the order to produce documents be relevant to a lawful inquiry. Rather, they seem to be common sense standards by which to measure such relevancy. The objection of overbreadth is surely only an objection that documents not relevant to the inquiry in progress are being demanded. To the extent that it could be interpreted as an absolute bar to all subpoenas demanding the production of more than a certain number of documents, it would be inconsistent with the maxim, set down in *Oklahoma Press Publishing Co. v. Walling*, that "relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry" (p. 209). Similarly, the requirement that the subpoena be sufficiently precise and clear in terms of its identification of the documents demanded would simply be a necessary prerequisite to any determination of the relevancy of those documents to the inquiry relied on by the demanding authority.

Returning to the requirement of relevancy itself, I note that under the American test, as under s. 17 of the Act, there is no requirement that relevancy to a lawful inquiry be determined before the subpoena is issued; it is sufficient if its relevancy can be challenged by way of judicial review; see W. R. LaFave, *Search and Seizure: A Treatise on the*

aux fins de l'enquête en question, sans être d'une précision excessive» (p. 209). On affirme généralement que cette exigence d'une [TRADUCTION] «mention suffisante» comporte deux aspects. Le premier est tout simplement que le subpoena doit être suffisamment clair et précis pour informer exactement la partie visée des documents précis qui sont demandés. Le second est que la portée du subpoena ne doit pas être plus large que nécessaire pour les fins de l'enquête en cours. Un subpoena dont la portée est trop large sera annulé parce qu'il comporte un fardeau trop lourd; voir l'arrêt *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924), aux pp. 305 et 306.

Bien que ces deux exigences soient manifestement sensées, j'estime que leur fondement ne paraît pas distinct de l'exigence primordiale que l'ordonnance de produire des documents soit pertinente pour les fins d'une enquête autorisée légalement. Elles semblent plutôt constituer des normes relevant du sens commun qui permettent d'évaluer cette pertinence. Il est certain que l'objection de la portée trop large n'est qu'une objection portant que les documents demandés ne sont pas pertinents pour l'enquête en cours. Dans la mesure où elle pourrait être interprétée comme un obstacle absolu à la délivrance de subpoenas exigeant la production de plus qu'un certain nombre de documents, elle serait incompatible avec la règle formulée dans l'arrêt *Oklahoma Press Publishing Co. v. Walling*, selon laquelle [TRADUCTION] «la pertinence et le caractère suffisant ou la généralité excessive du subpoena varient selon la nature, les objets et l'ampleur de l'enquête» (p. 209). De même, l'exigence que le subpoena soit suffisamment clair et précis pour identifier les documents demandés constituerait simplement une condition préalable nécessaire pour déterminer la pertinence des documents demandés par les autorités en question pour les fins de l'enquête.

Pour revenir à l'exigence de la pertinence elle-même, je souligne qu'en vertu du critère américain comme en vertu de l'art. 17 de la Loi, il n'est pas nécessaire que la pertinence pour les fins d'une enquête autorisée légalement soit déterminée avant la délivrance du subpoena; il suffit que sa pertinence puisse être contestée par voie de contrôle

Fourth Amendment (2nd ed. 1987), vol. 2, § 4.13(e), at p. 382, n. 111. I note also that the expressed rationale for requiring no greater satisfaction of the Fourth Amendment refers to the same factors, namely the difficulty of determining whether violations of anti-trust (and other regulatory) legislation has in fact occurred, to which I have referred earlier in these reasons. In *United States v. Morton Salt Co.*, *supra*, Jackson J., we saw, said at p. 642 that the "only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so". In *People v. Dorr*, *supra*, which also concerned investigations under anti-trust laws, the Supreme Court of Illinois said, at p. 603:

Because of the numerous and varied activities which may constitute substantive violations of the quoted portions of the Act, grand jury investigations seeking to ascertain the probable existence of such violations must be given the broadest scope possible, consistent, of course, with constitutional limitations. Thus in the circumstances here present, what we observed in *People v. Allen*, 410 Ill. 508, 517, 103 N.E.2d 92, 96, is particularly pertinent: "In litigated cases, materiality can be fixed with a relatively high degree of precision by reference to the issues formulated in the pleadings. No standard of comparable certainty exists with respect to an inquiry by a grand jury. The very purpose of such an inquiry is to uncover matters previously unknown to the investigating agency." [Emphasis added.]

Both of these statements can be regarded as applications to the anti-trust context of an assumption that underlies the position of the American courts to the constitutionality of *subpoenae duces tecum* in a wide range of administrative and regulatory contexts. LaFave, *op. cit.*, sums up this position by noting that "most courts recognize that administrative regulation of business is a necessary by-product of industrialization and that effective regulation requires effective investigative procedures" (pp. 380-81). More expansively, K. C.

judiciaire; voir W. R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (2^e éd. 1987), vol. 2, § 4.13e), à la p. 382, n. 111. Je souligne également que la raison expresse pour laquelle on n'exige pas un respect plus rigoureux du Quatrième amendement se rapporte aux mêmes facteurs que j'ai mentionnés précédemment dans ces motifs, c'est-à-dire à la difficulté de déterminer s'il y a effectivement eu violation des lois antitrust (et d'autres lois de nature réglementaire). Dans l'arrêt *United States v. Morton Salt Co.*, précité, nous avons vu que le juge Jackson affirme, à p. 642 que le «seul pouvoir dont il est question ici, c'est le pouvoir d'obtenir des renseignements de ceux qui sont les mieux placés pour les donner et les moins intéressés à le faire». Dans l'arrêt *People v. Dorr*, précité, qui portait également sur des enquêtes tenues en vertu de lois antitrust, la Cour suprême de l'Illinois a affirmé, à la p. 603:

[TRADUCTION] En raison des nombreuses et diverses activités qui peuvent constituer des violations substantielles des extraits reproduits de la Loi, il faut accorder aux enquêtes menées par le grand jury en vue de déterminer l'existence probable de ces violations la plus grande portée possible, laquelle doit cependant être conforme aux limites constitutionnelles. Ainsi, dans les circonstances de l'espèce, ce que nous avons constaté dans l'arrêt *People v. Allen*, 410 Ill. 508, 517, 103 N.E.2d 92, 96, est particulièrement pertinent: «Dans les litiges, le caractère substantiel peut être déterminé avec un degré de précision relativement élevé par rapport aux questions formulées dans les procédures. Aucun degré de certitude comparable n'existe à l'égard d'une enquête menée par un grand jury. L'objet même de cette enquête est de mettre à jour des questions jusque-là inconnues de l'organisme enquêteur». [Je souligne.]

Ces deux affirmations peuvent être considérées comme des applications, dans le contexte des lois antitrust, d'une présomption qui sous-tend la position des tribunaux américains à l'égard de la constitutionnalité des *subpoenae duces tecum* dans un large éventail de contextes administratifs et réglementaires. LaFave, *op. cit.*, résume cette position en soulignant que [TRADUCTION] «la plupart des tribunaux reconnaissent que la réglementation administrative des entreprises est un sous-produit nécessaire de l'industrialisation et qu'une réglementation efficace exige des procédures d'enquête efficaces» (pp. 380 et 381). De façon plus élaborée,

Davis, in his book *Administrative Law Text* (3rd ed. 1972), says at pp. 66-67:

But a better understanding of the significance of what has happened emphasizes the inevitability. Each step follows inexorably: Industrialization brings regulation. Regulation necessitates administrative processes. Agencies cannot operate without access to facts. Ideas about privacy, standing in the way of agencies which seek information indispensable to intelligent regulation, have to give way. In the same way that the gasoline engine made inevitable the development of the airplane, mass production methods and all they symbolize produce complex business arrangements which bring forth equally intricate governmental mechanisms requiring effective exercise of the administrative power of investigation. And the courts as a result feel called upon to write out of the Constitution the protections that the courts at an earlier time felt called upon to write into the Constitution.

These statements suggest the same kind of connection between broad investigatory powers and effective economic regulation which I have argued is fundamental to a proper understanding of the state's interest in the enforcement of anti-combines legislation. The following statement from the leading case of *Oklahoma Press Publishing Co. v. Walling, supra*, at p. 213, is indicative of the rationale that lies behind the relaxation of Fourth Amendment rights in respect of *subpoenae duces tecum*:

... petitioners' view [that subpoena could only be validly issued if issued in accordance with the traditional Fourth Amendment requirements], if accepted, would stop much if not all of investigation in the public interest at the threshold of inquiry and, in the case of the Administrator, is designed avowedly to do so. This would render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him. And if his functions could be thus blocked, so might many others of equal importance.

I find this body of American jurisprudence, emphasizing as it does the vital importance of the power to order the production of documents in the effective regulation of modern economic enterprise, highly persuasive. The courts in Canada, no less than those in the United States, cannot remain

K. C. Davis, dans son ouvrage *Administrative Law Text* (3^e éd. 1972), affirme, aux pp. 66 et 67:

[TRADUCTION] Mais une meilleure compréhension de l'importance de ce qui s'est produit en souligne le caractère inévitable. Chaque étape est inexorable: l'industrialisation entraîne la réglementation. La réglementation exige un processus administratif. Les organismes ne peuvent fonctionner sans avoir accès aux faits. Les notions de respect de la vie privée qui entravent les organismes en quête de renseignements indispensables à une réglementation intelligente doivent céder le pas. Tout comme les moteurs à essence ont rendu inévitable le développement de l'avion, les modes de production en série et tout ce qu'ils représentent sont à l'origine d'arrangements commerciaux complexes qui font intervenir également des mécanismes gouvernementaux tout aussi complexes qui exigent que le pouvoir d'enquête administratif soit exercé efficacement. Il s'ensuit que les tribunaux estiment devoir écarter de la Constitution les protections qu'ils avaient auparavant estimé devoir inscrire dans la Constitution.

Ces affirmations font ressortir le même genre de rapport entre des pouvoirs d'enquête étendus et une réglementation économique efficace qui, je l'ai affirmé, est essentiel pour bien comprendre l'intérêt qu'a l'État dans l'application des lois relatives aux coalitions. L'extrait suivant de l'arrêt de principe *Oklahoma Press Publishing Co. v. Walling*, précité, à la p. 213, indique la raison d'être qui justifie l'assouplissement des droits reconnus par le Quatrième amendement à l'égard des *subpoenae duces tecum*:

[TRADUCTION] ... si la thèse des requérants [que pour être valide le subpoena devait être décerné conformément aux exigences traditionnelles du Quatrième amendement] était accueillie, elle mettrait fin à la plupart sinon à toutes les enquêtes tenues dans l'intérêt public dès le commencement de celles-ci et, dans le cas de l'administrateur, c'est le but avoué de la thèse. Cela rendrait presque impossible l'exécution efficace de ses fonctions d'enquête et d'application déléguées par le Congrès. Et si ses fonctions peuvent ainsi être entravées, il pourrait en être de même de plusieurs autres de même importance.

J'estime que cette jurisprudence américaine, soulignant comme elle le fait l'importance primordiale du pouvoir d'ordonner la production de documents pour réglementer efficacement l'entreprise économique moderne, est très convaincante. Tout comme les tribunaux américains, les tribunaux

oblivious to the concrete social, political and economic realities within which our system of constitutional rights and guarantees must operate. In particular, we must recognize that the *Charter* alone cannot secure that full portion of individual freedom to which we aspire. Effective regulation of the many private and democratically unaccountable institutions which are capable of exercising virtually coercive powers within their sphere of operations is also crucially important. We cannot allow our commitment to the former preclude our further reliance on the latter. I add that as the Canadian economy becomes increasingly integrated with the American and, indeed, the global economy, we should be wary of giving an interpretation to the Constitution that shackles the government's capacity to cope with problems that other countries, with which we share similar human, legal and constitutional values, are quite able to deal with in, to use Eugene Rostow's apt phrase, planning for freedom.

Conclusion

Accordingly, I would on this aspect of the appeal find in favour of the respondents. In my opinion, s. 17 of the *Combines Investigation Act* does not, having regard to the low expectation of privacy which those subject to its operation can be said to have in regard to the documents that fall within its scope and the important and difficult task of law enforcement in which it assists, countenance the making of unreasonable seizures within the meaning of s. 8 of the *Charter*. The opportunity to challenge, by way of judicial review, the relevancy of any particular use of s. 17 to matters in respect of which the Director or Commission can conduct inquiries, provides adequate guarantee against potential abuse of the power s. 17 confers. No evidence of any such abuse is apparent in the case before this Court.

canadiens ne peuvent davantage ignorer les réalités sociales, politiques et économiques concrètes à l'intérieur desquelles doit s'inscrire notre système de droits et de garanties constitutionnels. Plus particulièrement, nous devons reconnaître que la *Charte* ne peut à elle seule protéger toute la dimension de liberté individuelle à laquelle nous aspirons. La réglementation efficace des divers organismes privés qui, démocratiquement, n'ont pas de compte à rendre et qui peuvent exercer des pouvoirs quasi coercitifs à l'intérieur de leur domaine d'activités a également une importance cruciale. Notre engagement à l'égard de la *Charte* ne peut nous empêcher de reconnaître la nécessité de cette réglementation. J'ajoute qu'avec l'intégration plus grande de l'économie canadienne dans l'économie américaine et même dans l'économie mondiale, nous devrions hésiter à donner à la Constitution une interprétation qui entrave la capacité du gouvernement d'affronter des problèmes que d'autres pays, avec lesquels nous partageons des valeurs humaines, juridiques et constitutionnelles semblables, sont tout à fait capables de traiter dans leur vision de la liberté comme l'a si bien dit Eugene Rostow.

f Conclusion

Par conséquent, sur cet aspect du pourvoi je suis d'avis de conclure en faveur des intimés. À mon avis, l'art. 17 de la *Loi relative aux enquêtes sur les coalitions* ne permet pas d'effectuer des saisies abusives au sens de l'art. 8 de la *Charte*, étant donné les faibles attentes en matière de respect du droit à la vie privée que peuvent avoir ceux qui y sont assujettis, pour ce qui est des documents qui relèvent de sa portée, étant donné également son rôle dans la tâche importante et difficile d'application de la Loi. La possibilité de contester par voie de contrôle judiciaire la pertinence de tout recours particulier à l'art. 17 quant à l'objet des enquêtes que peuvent tenir le directeur ou la Commission offre une garantie suffisante contre tout abus possible du pouvoir conféré par l'art. 17. Il n'y a preuve d'aucun abus semblable dans le présent pourvoi.

TAB 90

Ontario Supreme Court
Ravenshoe Services Ltd. v. Canada (Commissioner of Competition)¹,
Date: 2001-11-29

Ravenshoe Services Ltd. et al.

and

Commissioner of Competition

Court File No. 10829

Ontario Superior Court of Justice Chadwick J.

Heard: August 28, 2001

Judgement rendered: November 29, 2001

Chris N. Buhr, Ian Donaldson, Q.C., and Jennifer Gleitman, for applicants.

J.D. Sutton and Donna Blois, for respondent, the Crown.

[1] CHADWICK J.:—The applicants seek an order setting aside the order of the Honourable Mr. Justice Soubliere, made the 2nd day of January, 2001, in relation to s. 11 of the *Competition Act*, R.S.C. 1985, c. C-34. The applicants also seek an order declaring s. 11 of the *Competition Act* to be of no force or effect to the extent that it authorizes an order to obtain information to substantiate a prosecution of alleged offences under the *Competition Act*, much less from the target of such a prosecution, in the absence of compliance with the constitutionally mandated prerequisites to a lawful search as determined in *Hunter v. Southam Inc.*, *infra*.

[2] The facts are not in dispute.

[3] On June 3, 1999, the Commissioner of Competition commenced an inquiry under s. 10(1)(b)(iii) of the *Competition Act* into allegations that Ravenshoe, 483775, Hailstone, HMS, Kirk, FSA, and Int Access had breached the provisions of s. 52 of the Act, prohibiting false or misleading representations to the public. On June 17, 1999, the Honourable Mr. Justice Panet of the Ontario Superior Court in Ottawa issued search warrants authorizing the search and seizure of certain records relating to the investigation. A further warrant was

¹ Notice of appeal was filed on January 7, 2002 (Court File No. C37515).

that people take prescribed standards of care to avoid risks of injury. The object is to induce compliance with rules for the overall benefit of society.”

[16] Section 1.1 of the *Competition Act* sets out its purpose as follows:

...to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

[17] The nature of the *Competition Act* is regulatory and, as such, s. 8 of the Charter is treated with more flexibility than in cases where it is of a criminal context.

[18] Section 17 of the *Combines Investigation Act* was similar to s. 11 of the *Competition Act*. It empowered the Director or a member of the Commission to compel persons to produce relevant records. The procedure was by way of an *ex parte* motion.

[19] The nature of the Commissioner's Order under s. 11 of the *Competition Act* is with reference to corporate information and data and, as such, there would be a limited expectation of privacy.

[20] Although prior searches and seizures had been carried out pursuant to ss. 15 and 16 of the *Competition Act*, in my view, this does not preclude the Commissioner from proceeding in making demands under s. 11 of the *Competition Act*. Search warrants were issued on the basis of reasonable and probable grounds that offence has been committed, but s. 11 of the *Competition Act* does not require such a high standard. The documents and information sought in the s. 11 application came about after the searches were carried out.

[21] In my view, s. 11 of the *Competition Act* does not contravene s. 8 of the Charter. The Application is dismissed. The respondent shall be entitled to their costs. I will receive written submissions from counsel within 15 days regarding the fixing of costs.

Application dismissed.

TAB 91

Gurmakh Kang-Brown *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Criminal Lawyers' Association (Ontario) and Canadian Civil Liberties Association *Interveners*

INDEXED AS: R. v. KANG-BROWN

Neutral citation: 2008 SCC 18.

File No.: 31598.

2007: May 22; 2008: April 25.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of Rights — Search and seizure — Sniffer dogs — Bus stations — Police officer involved in special operation designed to detect drug couriers at bus stations observing suspicious passenger disembarking from bus — Officer approaching passenger and asking to inspect contents of his bag — Passenger starting to open bag when officer reached hand out — Passenger pulling bag back and acting nervously — Officer signaling to another officer with sniff dog to approach — Dog indicating presence of drugs in passenger's bag — Passenger arrested and drugs found on him and in his bag upon search — Whether dog sniff constituted search — If so, whether search reasonable — If search unreasonable, whether evidence should be excluded — Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Police — Police powers — Investigative tools — Sniffer dogs — Whether common law powers of police to investigate crime include use of sniffer dogs.

Gurmakh Kang-Brown *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario, procureur général du Québec, procureur général de la Colombie-Britannique, Criminal Lawyers' Association (Ontario) et Association canadienne des libertés civiles *Intervenants*

RÉPERTORIÉ : R. c. KANG-BROWN

Référence neutre : 2008 CSC 18.

N° du greffe : 31598.

2007 : 22 mai; 2008 : 25 avril.

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

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

Droit constitutionnel — Charte des droits — Fouilles, perquisitions et saisies — Chiens renifleurs — Gares d'autobus — Policier participant à une opération spéciale destinée à détecter les passeurs de drogue dans les gares d'autobus observant un passager suspect qui descend d'un autobus — Policier abordant le passager et lui demandant à voir le contenu de son sac — Policier tendant la main vers le sac au moment où le passager commence à l'ouvrir — Passager tirant le sac vers lui et manifestant de la nervosité — Policier faisant signe à un autre policier de s'amener avec son chien renifleur — Chien indiquant la présence de drogue dans le sac du passager — Passager mis en état d'arrestation et drogue découverte sur lui et dans son sac lors d'une fouille — L'intervention du chien renifleur constituait-elle une fouille? — Dans l'affirmative, la fouille était-elle non abusive? — Si la fouille était abusive, la preuve doit-elle être écartée? — Charte canadienne des droits et libertés, art. 8, 24(2).

Police — Pouvoirs policiers — Outils d'enquête — Chiens renifleurs — Le pouvoir d'effectuer des enquêtes criminelles que la common law confère aux policiers comprend-il celui d'utiliser des chiens renifleurs?

a measure of flexibility when the demands of reasonableness require. The presumptive requirement of prior judicial authorization remains, of course, and in the present case the onus is on the Crown to demonstrate on a balance of probabilities that the police use of the sniffer dogs in this case and in *A.M.* satisfied the *Collins* requirement for warrantless searches.

[60] For the reasons explained in *A.M.*, I believe the *Charter* test is met in the case of sniffer-dog searches by proof of reasonable suspicion. I believe, therefore, that in cases where reasonable suspicion exists, the first two conditions of the *Collins* test are satisfied (*Collins*, at pp. 278-79; *R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 15-16). Where reasonable suspicion exists, a sniffer-dog search is authorized by the common law, and the common law itself is reasonable on the basis of reasonable suspicion, given the minimally intrusive, narrowly targeted and high accuracy of “sniff searches” by dogs with a proven track record like Chevy. However, on the facts of this case, because of the absence of reasonable suspicion, the search fails the first and third branches of the *Collins* test. As there was not reasonable suspicion, the search was not authorized by law and fails the first requirement. Further, it fails on the third requirement, namely that the search be conducted reasonably. The police failed because they exercised their common law power based on speculation rather than objectively verifiable evidence supporting reasonable suspicion.

[61] Of course, it would be *desirable* for Parliament to enact a comprehensive scheme governing police powers. It has not done so. The Court has no mandate to dictate Parliament’s agenda. In

effectuées par les autorités scolaires dans l’affaire *R. c. M. (M.R.)*, [1998] 3 R.C.S. 393. La jurisprudence permet donc une certaine souplesse lorsque cela est nécessaire pour satisfaire aux exigences du caractère raisonnable. Bien sûr, l’exigence présumée d’une autorisation judiciaire préalable demeure et, en l’espèce, il incombe au ministère public de démontrer, selon la prépondérance des probabilités, que l’utilisation des chiens renifleurs par les policiers en l’espèce et dans l’affaire *A.M.* satisfaisait à l’exigence de l’arrêt *Collins* concernant les fouilles sans mandat.

[60] Pour les raisons exposées dans l’arrêt *A.M.*, j’estime que, dans le cas d’une fouille effectuée à l’aide d’un chien renifleur, la preuve de l’existence de soupçons raisonnables satisfait au critère de la *Charte*. Je crois donc que les deux premières conditions du critère de l’arrêt *Collins* sont remplies dans les cas où il existe des soupçons raisonnables (*Collins*, p. 278-279; *R. c. Kokesch*, [1990] 3 R.C.S. 3, p. 15-16). En présence de tels soupçons, la common law autorise les fouilles ou perquisitions à l’aide de chiens renifleurs, et cette règle de common law n’a elle-même rien d’abusif vu le caractère peu envahissant, étroitement ciblé et hautement fiable des fouilles ou perquisitions effectuées à l’aide de chiens qui, comme Chevy, ont fait leurs preuves. Toutefois, les faits de la présente affaire démontrent qu’en raison de l’absence de soupçons raisonnables la fouille effectuée ne satisfait pas aux premier et troisième volets du critère de l’arrêt *Collins*. À cause de l’absence de soupçons raisonnables, la fouille n’était pas autorisée par la loi, de sorte qu’elle ne satisfait pas à la première exigence. Elle ne satisfait pas non plus à la troisième exigence, selon laquelle la fouille ou perquisition doit être effectuée de manière non abusive. Le manquement des policiers découle du fait qu’ils se sont fondés sur des hypothèses pour exercer leur pouvoir de common law au lieu de se fonder sur des éléments de preuve objectivement vérifiables qui justifient des soupçons raisonnables.

[61] Il serait évidemment *souhaitable* que le législateur établisse un régime global applicable à l’exercice des pouvoirs de la police. Celui-ci ne l’a pas fait. La Cour n’est pas habilitée à dicter les

TAB 92

**Angela Araujo, Spencer Leslie,
Neil Grandmaison, Christina Khoury, Victor
Camara, Robert Jenkins, Tiffany Muriel
Leslie, Kevin Lathangue and Jolene
Irons** *Appellants*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: R. v. ARAUJO

Neutral citation: 2000 SCC 65.

File Nos.: 26898, 26899, 26904, 26943, 26968.

2000: April 11, 12; 2000: December 14.

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
BRITISH COLUMBIA

*Criminal law — Appeals — Question of law —
Crown's appeal against acquittals — Issues on appeal
concerning application and interpretation of legal stan-
dard of investigative necessity for obtaining wiretap
authorization — Whether Court of Appeal had jurisdic-
tion to hear Crown's appeal — Criminal Code, R.S.C.,
1985, c. C-46, s. 676(1)(a).*

*Criminal law — Interception of communications —
Investigative necessity requirement — Nature and inter-
pretation of requirement — Whether affidavit materials
submitted to obtain wiretap authorization established
investigative necessity — Criminal Code, R.S.C., 1985,
c. C-46, s. 186(1)(b).*

*Criminal law — Interception of communications —
Standard of review for wiretap authorization — Whether
trial judge applied proper standard — Approach to
amplification.*

*Criminal law — Interception of communications —
Affidavits — Kind of affidavit to be submitted on appli-
cation for wiretap authorization.*

The accused faced multiple charges related to their
cocaine-trafficking ring. Much of the Crown's evidence
against them was gleaned from information captured

**Angela Araujo, Spencer Leslie,
Neil Grandmaison, Christina Khoury, Victor
Camara, Robert Jenkins, Tiffany Muriel
Leslie, Kevin Lathangue et Jolene
Irons** *Appelants*

c.

Sa Majesté la Reine *Intimée*

RÉPERTORIÉ: R. c. ARAUJO

Référence neutre: 2000 CSC 65.

Nos du greffe: 26898, 26899, 26904, 26943, 26968.

2000: 11, 12 avril; 2000: 14 décembre.

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 LA COLOMBIE-
BRITANNIQUE

*Droit criminel — Appels — Question de droit —
Appel du ministère public contre des acquittements —
Questions relatives à l'application et à l'interpré-
tation de la norme juridique de la nécessité pour
l'enquête relativement à l'obtention d'une autorisation
d'écoute électronique — La Cour d'appel avait-elle
compétence pour connaître de l'appel du ministère
public? — Code criminel, L.R.C. (1985), ch. C-46,
art. 676(1)a).*

*Droit criminel — Interception de communications —
Exigence de nécessité pour l'enquête — Nature et inter-
prétation de l'exigence — L'affidavit soumis pour l'ob-
tention d'une autorisation d'écoute électronique établit-
il la nécessité pour l'enquête? — Code criminel, L.R.C.
(1985), ch. C-46, art. 186(1)b).*

*Droit criminel — Interception de communications —
Norme de révision applicable à l'autorisation d'écoute
électronique — Le juge du procès a-t-il appliqué la
norme appropriée? — Démarche en matière d'amplifi-
cation.*

*Droit criminel — Interception de communications —
Affidavits — Genre d'affidavit à présenter à l'appui
d'une demande d'autorisation d'écoute électronique.*

Les accusés ont fait l'objet de multiples accusations
dans le cadre de leur réseau de trafic de cocaïne. La
preuve à charge repose essentiellement sur des rensei-

cisely, the question is whether the factual circumstances revealed in the affidavit could have provided a sufficient basis for the issuance of the authorization.

The facts as set out in the affidavit met this standard. Catching the ringleaders in drug rings and conspiracies is never an easy task. This is particularly so when, as here, they use counter-surveillance measures and behave in a clandestine fashion. The affidavit attested to the failure of the police efforts in spite of the use of physical surveillance and search warrants. It also provided evidence as to why the use of informants or undercover agents trying to infiltrate the drug ring would be ineffective and potentially dangerous. There was, in my view, evidence in the affidavit to negate arguments for other investigative techniques and to make the case that wiretapping was, practically speaking, the only reasonable alternative, taking into account the nature and purpose of this particular investigation.

The appellants made much of arguments that the cross-examination on the affidavit seemed to reveal the availability of another surveillance team, the Special Operations Group, that the police could have used. The availability of another surveillance team was, in reality, of little consequence in the circumstances of the case at bar. The fact is that the police had done extensive surveillance. By doing so, they obtained some information. But their surveillance efforts were occasionally met by counter-surveillance, whose presence can obviously affect the effectiveness of investigative methods, and by the clear reality that surveillance efforts alone would not bring them into contact with higher-ups in the drug organization. Indeed, I am quite uncertain how surveillance alone would ever have given good proof of laundering and conspiracy. By showing that the police were already conducting surveillance and that this was not accomplishing everything required, the affidavit materials established investigative necessity.

The objective of the police investigation here was to bring the higher-ups in a drug ring to jus-

décider si les faits énoncés dans l'affidavit suffisaient pour justifier l'octroi de l'autorisation.

Les faits énoncés dans l'affidavit satisfont à cette norme. Il n'est jamais facile d'arrêter les dirigeants d'un réseau de trafic de stupéfiants ou les auteurs d'un complot. Cela se révèle particulièrement difficile lorsque, comme en l'espèce, ils ont recours à des mesures de contre-surveillance et opèrent dans la clandestinité. L'affidavit fait état des efforts infructueux de la police, malgré le recours à la surveillance visuelle et aux mandats de perquisition. Il fournit aussi la preuve que le recours à des indicateurs ou à des agents d'infiltration serait inefficace et pouvait même être dangereux. Il renferme, à mon sens, des éléments de nature à écarter toute prétention quant à la disponibilité d'autres techniques d'enquête et à établir que, en pratique, l'écoute électronique restait le seul autre moyen raisonnable, vu la nature et l'objet de l'enquête.

Les appelants ont beaucoup insisté sur le fait que le contre-interrogatoire sur l'affidavit semble révéler l'existence d'une autre équipe de surveillance, la section des affaires spéciales, à laquelle la police aurait pu faire appel. En réalité, l'existence d'une autre équipe de surveillance importe peu en l'espèce. La police a pris d'importantes mesures de surveillance, ce qui lui a permis de recueillir des renseignements. Ses activités de surveillance se sont parfois heurtées à de la contre-surveillance, mesure qui est manifestement de nature à compromettre l'efficacité de la méthode d'enquête. En outre, il est clair que la surveillance, à elle seule, ne permettrait pas à la police de démasquer les dirigeants du réseau de trafic de stupéfiants. Je me demande, en effet, comment la seule surveillance aurait pu permettre d'obtenir une preuve valable du blanchiment et du complot. En révélant que la police recourait déjà à la surveillance et qu'elle n'obtenait pas tous les résultats escomptés, l'affidavit établit la nécessité de l'écoute électronique pour l'enquête.

En l'occurrence, l'objectif de l'enquête policière était de traduire en justice les têtes dirigeantes du

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tice, not simply to remove a few replaceable street dealers. Among their various arguments, the appellants challenged the right of the police to define the objectives of their investigation, alleging that the police could manipulate the objectives in order to get the chance to use a wiretap. However, it is clear that the police here had probable grounds to investigate the serious crimes that they were investigating. This part of the test for wiretapping — probable grounds for believing that serious crimes would likely occur — removes the need for concern about the kinds of suspicions that the appellants raise. If the police have probable grounds to investigate a serious crime, then they may use wiretapping to do so, provided they meet the investigative necessity requirement. There is nothing pernicious about the fact that the objective of their investigation rightly informs the investigative necessity analysis. Here, the police had more need for wiretapping given that they were trying to move up the chain and catch the higher-ups in the operation. This rightly reinforces the investigative necessity made plain by the affidavit materials.

réseau, et non seulement d'arrêter quelques revendeurs susceptibles d'être remplacés. Les appelants contestent notamment le droit de la police de définir les objectifs de ses enquêtes pour le motif qu'elle peut le faire de manière à faciliter l'obtention d'une autorisation d'écoute électronique. Cependant, il est clair que la police avait en l'espèce des motifs probables d'enquêter sur les crimes graves en cause. Ce volet du critère applicable à l'écoute électronique — l'existence de motifs probables de croire qu'un crime grave risque d'être commis — fait en sorte qu'il n'est pas nécessaire d'examiner les doutes que tentent de faire naître les appelants. Dans la mesure où la police a des motifs probables de faire enquête au sujet d'un crime grave, elle peut recourir à l'écoute électronique, si elle satisfait à l'exigence de nécessité pour l'enquête. Il n'est aucunement pernicious que l'objectif de l'enquête intervienne dans l'analyse relative à la nécessité pour l'enquête. Dans la présente affaire, la police avait davantage besoin de l'écoute électronique, car elle tentait d'atteindre le sommet de la hiérarchie et d'arrêter les dirigeants du réseau. Cet élément milite à juste titre en faveur d'un constat de nécessité pour l'enquête décrite dans l'affidavit.

44 The facts set out in the affidavit in the case at bar establish investigative necessity on the required standard. Any argument that an authorization could not have issued based on the facts set out in the affidavits must fail. On its face, the affidavit was sufficient to support an authorization.

Vu les faits énoncés dans l'affidavit en l'espèce, la norme appropriée de la nécessité pour l'enquête a été respectée. Toute prétention selon laquelle une autorisation n'aurait pu être octroyée sur le fondement des faits énoncés dans l'affidavit doit être rejetée. De prime abord, l'affidavit suffisait pour justifier l'autorisation.

45 This being said, it is clear that the affidavit was not perfect, even on its face. Prior to moving on to the subfacial review required by the last issue in the case at bar, it may be useful to discuss some practical suggestions about the form of affidavits on an application for a wiretap authorization in order to reduce needless litigation on similar matters and in better serving the interests of all parties.

Cela dit, l'affidavit n'est manifestement pas parfait, même à première vue. Avant de passer à l'analyse au fond pour trancher la dernière question en litige dans le cadre du pourvoi, il peut être utile de formuler quelques recommandations d'ordre pratique concernant la rédaction des affidavits présentés à l'appui des demandes d'autorisation d'écoute électronique, de façon à réduire le nombre de litiges inutiles en semblable matière et mieux protéger les droits de toutes les parties.

46 Looking at matters practically in order to learn from this case for the future, what kind of affidavit should the police submit in order to seek permis-

D'un point de vue pratique et afin de tirer des enseignements pour l'avenir, il faut se demander quel genre d'affidavit la police devrait présenter à

TAB 93

McKinlay Transport Limited and C.T. Transport Inc. Appellants

v.

Her Majesty The Queen Respondent

and

The Attorney General for Ontario, the Attorney General of Quebec and the Attorney General for Alberta Interveners

INDEXED AS: R. V. MCKINLAY TRANSPORT LTD.

File No.: 20761.

1988: November 2; 1990: March 29.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Unreasonable search and seizure — Income tax audit — Demand for information or documents under s. 231(3) of the Income Tax Act — Whether a demand for information or documents under s. 231(3) constitutes a seizure — If so, whether seizure under s. 231(3) unreasonable — Canadian Charter of Rights and Freedoms, s. 8.

Taxation — Income tax — Investigation — Demand for information or documents under s. 231(3) of the Income Tax Act — Whether s. 231(3) violates the guarantee against unreasonable search and seizure in s. 8 of the Canadian Charter of Rights and Freedoms.

During an income tax audit of the appellants, Revenue Canada, pursuant to s. 231(3) of the *Income Tax Act*, served them with letters demanding information and the production of documents. Because the appellants failed to comply with these demands, an information was issued alleging that they had breached s. 238(2) of the Act. A Provincial Court judge quashed the information holding that s. 231(3) violated the guarantee to protection against unreasonable search and seizure in s. 8 of the *Canadian Charter of Rights and Freedoms*. The Ontario Supreme Court allowed respondent's appeal. The court found that s. 231(3) did not authorize a seizure within the meaning of s. 8. The judgment was upheld by the Court of Appeal.

Held: The appeal should be dismissed.

McKinlay Transport Limited et C.T. Transport Inc. Appelantes

c.

a Sa Majesté la Reine Intimée

et

b Le procureur général de l'Ontario, le procureur général du Québec et le procureur général de l'Alberta Intervenants

RÉPERTORIÉ: R. C. MCKINLAY TRANSPORT LTD.

N° du greffe: 20761.

c 1988: 2 novembre; 1990: 29 mars.

Présents: Les juges Lamer, Wilson, La Forest, L'Heureux-Dubé et Sopinka.

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

d

Droit constitutionnel — Charte des droits — Fouilles, perquisitions et saisies abusives — Vérification fiscale — Demande de renseignements ou de documents en vertu de l'art. 231(3) de la Loi de l'impôt sur le revenu — Une demande de renseignements ou de documents en vertu de l'art. 231(3) constitue-t-elle une saisie? — Dans l'affirmative, la saisie en vertu de l'art. 231(3) est-elle abusive? — Charte canadienne des droits et libertés, art. 8.

Droit fiscal — Impôt sur le revenu — Enquête — Demande de renseignements ou de documents en vertu de l'art. 231(3) de la Loi de l'impôt sur le revenu — L'article 231(3) viole-t-il la garantie contre les fouilles, les perquisitions et les saisies abusives reconnue à l'art. 8 de la Charte canadienne des droits et libertés?

Au cours d'une vérification fiscale des appelantes, Revenu Canada leur a signifié, conformément au par. 231(3) de la *Loi de l'impôt sur le revenu*, des lettres exigeant des renseignements et la production de documents. Parce que les appelantes n'ont pas obtempéré à ces demandes, elles ont fait l'objet d'une dénonciation dans laquelle on les accusait d'avoir violé le par. 238(2) de la Loi. Un juge de la Cour provinciale a annulé la dénonciation, concluant que le par. 231(3) violait le droit à la protection contre les fouilles, les perquisitions et les saisies abusives garanti à l'art. 8 de la *Charte canadienne des droits et libertés*. La Cour suprême de l'Ontario a accueilli l'appel de l'intimée. Elle a conclu que le par. 231(3) n'autorisait pas une saisie au sens de l'art. 8. La Cour d'appel a confirmé ce jugement.

Arrêt: Le pourvoi est rejeté.

Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful. I think the point is aptly made by A. D. Reid and A. H. Young in "Administrative Search and Seizure Under the Charter" (1985), 10 *Queen's L.J.* 392, at pp. 398-400:

A person's expectations of privacy with respect to administrative search and seizure have been less well defined [than criminal search and seizure]. There are facets of state authority, generically associated with search or seizure, that are so intertwined with the regulated activity as to raise virtually no expectation of privacy whatsoever. Inspections may be blended into product grading functions, and in fact, they may be so integrated into the production process that a *refusal* to inspect can by law be invoked as a sanction to enforce the maintenance of prescribed sanitary conditions within the plant. Other activities are regulated so routinely that there is virtually no expectation of privacy from state intrusion. Annual filing requirements for banks, corporations, trust companies, loan companies, and the like are inextricably associated with carrying on business under state licence.

There are other situations in which government intrusion cannot be as confidently predicted, yet the range of discretion extended to state officials is so wide as to create in the regulatee an expectation that he may be inspected or requested to provide information at some point in the future. This may arise in the form of an inspection carried out either on a "spot check" basis, or on the strength of suspected non-compliance. The search may be in the form of a request for information that is not prescribed as an annual filing requirement, but is required to be produced on a demand basis. For the most part, there is no requirement that these powers be exercised on belief or suspicion of non-compliance. Rather, they are based on the common sense assumption that the threat of unannounced inspection may be the most effective way to induce compliance. They are based on a view that inspection may be the only means of

Puisque les attentes des gens en matière de protection de leur vie privée varient selon les circonstances et les différents genres de renseignements et de documents exigés, il s'ensuit que la norme d'examen de ce qui est «raisonnable» dans un contexte donné doit être souple si on veut qu'elle soit réaliste et ait du sens. Je crois que ce point de vue a été bien exposé par A. D. Reid et A. H. Young dans leur article intitulé «Administrative Search and Seizure Under the Charter» (1985), 10 *Queen's L.J.* 392, aux pp. 398 à 400:

[TRADUCTION] Les attentes d'une personne en matière de vie privée relativement aux fouilles, aux perquisitions et aux saisies administratives sont moins bien définies [que relativement aux fouilles, aux perquisitions et aux saisies dans un contexte criminel]. Il y a des aspects de l'autorité de l'État, communément associée aux fouilles, aux perquisitions et aux saisies, qui sont si étroitement liés à l'activité réglementée que ceux qui en font l'objet ne s'attendent pratiquement pas au respect de leur vie privée. Les inspections peuvent s'intégrer aux fonctions de classement des produits et même faire si intimement partie du processus de production que le *refus* de procéder à une inspection peut légalement être invoqué comme sanction pour assurer l'application des normes d'hygiène prescrites dans l'usine. D'autres activités sont réglementées de façon si courante qu'on ne s'attend pratiquement pas à ce qu'elles soient protégées contre l'immixtion de l'État. L'obligation faite aux banques, aux sociétés, aux compagnies de fiducie et aux compagnies de prêt et autres organismes semblables de produire des déclarations annuelles fait inextricablement partie de l'exploitation de l'entreprise en vertu d'un permis de l'État.

Il existe d'autres situations où il n'est pas possible de prédire avec autant d'assurance l'immixtion de l'État et pourtant le pouvoir discrétionnaire accordé aux fonctionnaires est si étendu que ceux qui sont visés par un règlement s'attendent à faire l'objet d'une inspection ou à ce qu'on leur demande de fournir des renseignements à un moment donné. Il peut s'agir d'une inspection qui prend la forme d'un contrôle ponctuel ou qui a lieu parce qu'on soupçonne l'existence d'une violation. La fouille ou perquisition peut revêtir la forme d'une demande de renseignements qui n'ont pas à être fournis annuellement mais qui doivent être produits sur demande. Dans la plupart des cas, rien n'exige que ces pouvoirs soient exercés sur la foi d'une croyance ou d'un soupçon qu'il y a eu violation. Ils se fondent plutôt sur l'hypothèse logique que la menace d'une inspection imprévue peut constituer l'incitation la plus efficace au

detecting non-compliance, and that its detection serves an important public purpose. Inspections to determine work place safety, building safety, aviation safety, fire safety, environmental quality, food quality, health standards and the like have been routinely authorized by statute without specifying grounds for intruding upon someone's privacy.

There is, therefore, a large circle of social and business activity in which there is a very low expectation of privacy. The issue is not whether, but rather when, how much, and under what conditions information must be disclosed to satisfy the state's legitimate requirements. Every person who files an annual tax return may be said to enjoy a low expectation of privacy with respect to information about his income. But that is surely tempered by an expectation that demands for information have limits, and will be administered under terms that are fair and reasonable. That is what section 8 of the Charter is all about. [Emphasis added.]

The lower courts, generally speaking, have shown no hesitation in applying s. 8 flexibly in relation to a wide variety of regulatory schemes. A few examples make the point. In *Re Alberta Human Rights Commission and Alberta Blue Cross Plan* (1983), 1 D.L.R. (4th) 301 (Alta. C.A.), the court held that the provisions of the *Individual's Rights Protection Act* which allowed for the compulsory production of an individual's documents by the Human Rights Commission were not unreasonable. In that case the court did not apply the standard of reasonableness applicable to criminal cases. Rather, the court applied the rough model of reasonableness employed in production of documents in civil cases. The rationale for this was that what is reasonable "depends upon consideration of what is sought, from whom, for what purpose, by whom, and in what circumstances": see p. 307. This approach was followed in *Re Reich and College of Physicians and Surgeons of Alberta* (No. 2) (1984), 8 D.L.R. (4th) 696 (Alta. Q.B.), wherein McDonald J. held that the provisions of the *Medical Profession Act* which compelled the production of a doctor's documents and records were reasonable.

respect de la loi. Ces pouvoirs se fondent sur l'opinion que l'inspection peut être le seul moyen de découvrir les violations et que cette découverte répond à un objectif public important. Les inspections visant à assurer la sécurité des lieux de travail et celle des édifices, la sécurité aérienne et la protection contre les incendies, la qualité de l'environnement et celle des aliments, le respect des normes d'hygiène et ainsi de suite, ont été couramment autorisées par des lois sans que soient précisés les motifs de cette immixtion dans la vie privée.

Il existe donc un grand nombre d'activités sociales et commerciales à l'égard desquelles les attentes en matière de vie privée sont très faibles. La question n'est pas de savoir si des renseignements doivent être communiqués pour répondre aux exigences légitimes de l'État, mais plutôt de savoir quand cela doit se faire, dans quelle mesure et à quelles conditions. On peut considérer que quiconque produit une déclaration d'impôt annuelle s'attend peu à garder pour lui seul les renseignements ayant trait à son revenu. Mais cela est sûrement tempéré par l'attente que les demandes de renseignements aient des limites et qu'elles respectent des modalités justes et raisonnables. Voilà de quoi retourne l'article 8 de la Charte. [Je souligne.]

De façon générale, les tribunaux d'instance inférieure n'ont pas hésité à appliquer l'art. 8 avec souplesse relativement à une grande variété de régimes de réglementation. Quelques exemples le prouvent. Dans l'affaire *Re Alberta Human Rights Commission and Alberta Blue Cross Plan* (1983), 1 D.L.R. (4th) 301 (C.A. Alb.), la cour a statué que les dispositions de l'*Individual's Rights Protection Act* qui permettaient à la Commission des droits de la personne d'exiger la production des documents d'un particulier n'étaient pas abusives. Dans cette affaire, la cour n'a pas utilisé la norme du caractère raisonnable applicable en matière criminelle. Elle a plutôt appliqué la norme rudimentaire du caractère raisonnable utilisée pour la production de documents en matière civile. La raison en était que ce qui est raisonnable [TRANSLATION] «dépend de l'examen de ce qui est demandé, à qui, dans quel but, par qui, et dans quelles circonstances»: voir p. 307. Ce point de vue a été adopté dans l'affaire *Re Reich and College of Physicians and Surgeons of Alberta* (No. 2) (1984), 8 D.L.R. (4th) 696 (B.R. Alb.), où le juge McDonald a conclu que les dispositions de la *Medical Profession Act* qui exigeaient la production des documents et des archives d'un médecin étaient raisonnables.

In *Re Belgoma Transportation Ltd. and Director of Employment Standards* (1985), 51 O.R. (2d) 509 (C.A.), the court upheld the validity of the provisions of the *Employment Standards Act* which allowed an employment standards officer to enter upon business premises and require the production of certain documents and remove them for copying. MacKinnon A.C.J.O. stated at p. 512:

The standards to be applied to the reasonableness of a search or seizure and the necessity for a warrant with respect to criminal investigations cannot be the same as those to be applied to search or seizure within an administrative and regulatory context The "search or seizure" in the instant case, if such it is, is not aimed at detecting criminal activity, but rather, as indicated, in ensuring and securing compliance with the regulatory provisions of the Act enacted for the purpose of protecting the public interest.

In *R. v. Bichel*, [1986] 5 W.W.R. 261 (B.C.C.A.), the court considered the validity of a by-law which authorized the entry of a building inspector on property or premises to ascertain whether there had been compliance with the by-law. The court applied the reasoning in *Belgoma* and ruled that an individual's privacy interests in connection with this type of inspection were much less than those in *Hunter*.

I refer to these cases not to approve or disapprove the results achieved but rather as evidence of the need to take a flexible and purposive approach to s. 8 of the *Charter*. It is consistent with this approach, I believe, to draw a distinction between seizures in the criminal or quasi-criminal context to which the full rigours of the *Hunter* criteria will apply, and seizures in the administrative or regulatory context to which a lesser standard may apply depending upon the legislative scheme under review. I do not believe that when the Chief Justice said in *Simmons* at p. 527 that departures from the *Hunter* criteria would be rare he was applying his mind to searches or seizures in the context of regulatory legislation. I think he was addressing as in the cases of *Hunter* and *Simmons*

Dans l'affaire *Re Belgoma Transportation Ltd. and Director of Employment Standards* (1985), 51 O.R. (2d) 509 (C.A.), la cour a confirmé la validité des dispositions de la *Loi sur les normes d'emploi* qui permettaient à un agent des normes d'emploi de pénétrer dans des locaux commerciaux, d'exiger la production de certains documents et de les emporter pour en tirer des copies. Le juge en chef adjoint MacKinnon de l'Ontario affirme, à la p. 512:

[TRADUCTION] Les critères applicables au caractère raisonnable d'une fouille, d'une perquisition ou d'une saisie et à la nécessité d'obtenir un mandat dans le cadre des enquêtes criminelles ne peuvent être les mêmes que ceux auxquels doivent répondre les mêmes mesures dans un contexte administratif et réglementaire [...] La «fouille, perquisition ou saisie» en l'espèce, le cas échéant, ne vise pas à mettre à jour des activités criminelles mais plutôt, tel qu'indiqué, à assurer le respect des dispositions de réglementation de la Loi, édictées dans l'intérêt public.

Dans l'arrêt *R. v. Bichel*, [1986] 5 W.W.R. 261 (C.A.C.-B.), la cour avait à se prononcer sur la validité d'un règlement municipal qui permettait à un inspecteur des bâtiments de pénétrer dans des propriétés ou des lieux pour vérifier si ce règlement avait été respecté. La cour a adopté le raisonnement suivi dans l'arrêt *Belgoma* et elle a statué que les intérêts d'un individu en matière de vie privée relativement à ce genre d'inspection étaient beaucoup moindres que ceux dont il était question dans l'affaire *Hunter*.

Je cite ces arrêts non pour en approuver ou désapprouver l'issue mais plutôt pour prouver la nécessité d'une interprétation de l'art. 8 de la *Charte* qui soit souple et fondée sur l'objet visé. J'estime qu'il est conforme à cette interprétation de faire une distinction entre, d'une part, les saisies en matière criminelle ou quasi criminelle auxquelles s'appliquent dans toute leur rigueur les critères énoncés dans l'arrêt *Hunter* et, d'autre part, les saisies en matière administrative et de réglementation, auxquelles peuvent s'appliquer des normes moins strictes selon le texte législatif examiné. Je ne crois pas que lorsque le Juge en chef a affirmé, à la p. 527 de l'arrêt *Simmons*, que les dérogations aux critères énoncés dans l'arrêt *Hunter* seraient rares, il songeait aux fouilles, aux perquisitions ou

themselves searches or seizures in a criminal or quasi-criminal context. It is with these considerations in mind that I examine the reasonableness of s. 231(3) of the *Income Tax Act*.

At the beginning of my analysis I noted that the *Income Tax Act* was based on the principle of self-reporting and self-assessment. The Act could have provided that each taxpayer submit all his or her records to the Minister and his officials so that they might make the calculations necessary for determining each person's taxable income. The legislation does not so provide, no doubt because it would be extremely expensive and cumbersome to operate such a system. However, a self-reporting system has its drawbacks. Chief among these is that it depends for its success upon the taxpayers' honesty and integrity in preparing their returns. While most taxpayers undoubtedly respect and comply with the system, the facts of life are that certain persons will attempt to take advantage of the system and avoid their full tax liability.

Accordingly, the Minister of National Revenue must be given broad powers in supervising this regulatory scheme to audit taxpayers' returns and inspect all records which may be relevant to the preparation of these returns. The Minister must be capable of exercising these powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act. Often it will be impossible to determine from the face of the return whether any impropriety has occurred in its preparation. A spot check or a system of random monitoring may be the only way in which the integrity of the tax system can be maintained. If this is the case, and I believe that it is, then it is evident that the *Hunter* criteria are ill-suited to determine whether a seizure under s. 231(3) of the *Income Tax Act* is reasonable. The regulatory nature of the legislation and the scheme enacted require otherwise. The need for random monitoring is incompatible with the requirement in *Hunter* that the person seeking authorization for a search

aux saisies effectuées en application d'un texte de réglementation. Je crois plutôt qu'il visait, comme c'était le cas dans les affaires *Hunter* et *Simmons*, les fouilles, les perquisitions ou les saisies en matière criminelle ou quasi criminelle. C'est donc dans cette optique que je vais examiner le caractère raisonnable du par. 231(3) de la *Loi de l'impôt sur le revenu*.

Au début de mon analyse, j'ai souligné que la *Loi de l'impôt sur le revenu* se fondait sur le principe de l'auto-déclaration et de l'auto-cotisation. La Loi aurait pu prévoir que chaque contribuable doit remettre tous ses documents au Ministre et à ses fonctionnaires pour qu'ils puissent faire les calculs nécessaires pour déterminer le revenu imposable de chacun. La Loi n'exige pas cela, sûrement parce qu'un tel système serait extrêmement coûteux et peu commode. Cependant, un régime d'auto-déclaration a ses désavantages, dont le principal est que son succès dépend de l'honnêteté et de l'intégrité du contribuable dans la préparation de sa déclaration. Bien qu'il ne fasse pas de doute que la plupart des contribuables respectent le régime et s'y conforment, c'est un fait que certaines personnes tentent d'en tirer profit et d'échapper en partie au fisc.

Conséquemment, le ministre du Revenu national doit disposer, dans la surveillance de ce régime de réglementation, de larges pouvoirs de vérification des déclarations des contribuables et d'examen de tous les documents qui peuvent être utiles pour préparer ces déclarations. Le Ministre doit être capable d'exercer ces pouvoirs, qu'il ait ou non des motifs raisonnables de croire qu'un certain contribuable a violé la Loi. Il est souvent impossible de dire, à première vue, si une déclaration a été préparée de façon irrégulière. Les contrôles ponctuels ou un système de vérification au hasard peuvent constituer le seul moyen de préserver l'intégrité du régime fiscal. Si tel est le cas, et je crois qu'il en est ainsi, il est évident que les critères de l'arrêt *Hunter* ne conviennent pas pour déterminer le caractère raisonnable d'une saisie effectuée en vertu du par. 231(3) de la *Loi de l'impôt sur le revenu*. La nature réglementaire du texte législatif et son intention générale ne s'y prêtent pas. La nécessité d'un contrôle au hasard est incompatible

TAB 94

Bruce Douglas Branch and Pal Arthur Levitt *Appellants*

v.

British Columbia Securities Commission *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Saskatchewan and the Attorney General for Alberta *Intervenors*

INDEXED AS: BRITISH COLUMBIA SECURITIES COMMISSION
v. BRANCH

File No.: 22978.

1994: February 28 and March 1; 1995: April 13.

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

Constitutional law — Charter of Rights — Fundamental justice — Self-incrimination — Right to silence — Securities commission investigation — Company's officers ordered to testify under oath and to produce documents pursuant to s. 128(1) of Securities Act — Whether s. 128(1) infringes s. 7 of Canadian Charter of Rights and Freedoms — Securities Act, S.B.C. 1985, c. 83, s. 128(1).

Constitutional law — Charter of Rights — Unreasonable search and seizure — Securities commission investigation — Company's officers ordered to produce documents pursuant to s. 128(1) of Securities Act — Whether s. 128(1) infringes s. 8 of Canadian Charter of Rights and Freedoms — Securities Act, S.B.C. 1985, c. 83, s. 128(1).

Bruce Douglas Branch et Pal Arthur Levitt *Appelants*

c.

British Columbia Securities Commission *Intimée*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Nouvelle-Écosse, le procureur général du Manitoba, le procureur général de la Colombie-Britannique, le procureur général de la Saskatchewan et le procureur général de l'Alberta *Intervenants*

RÉPERTORIÉ: BRITISH COLUMBIA SECURITIES COMMISSION
c. BRANCH

N° du greffe: 22978.

1994: 28 février et 1^{er} mars; 1995: 13 avril.

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

Droit constitutionnel — Charte des droits — Justice fondamentale — Auto-incrimination — Droit de garder le silence — Enquête par une commission des valeurs mobilières — Dirigeants d'une société enjoins de témoigner sous serment et de produire des documents conformément à l'art. 128(1) de la Securities Act — L'article 128(1) porte-t-il atteinte à l'art. 7 de la Charte canadienne des droits et libertés? — Securities Act, S.B.C. 1985, ch. 83, art. 128(1).

Droit constitutionnel — Charte des droits — Fouilles, perquisitions et saisies abusives — Enquête par une commission des valeurs mobilières — Dirigeants d'une société enjoins de produire des documents conformément à l'art. 128(1) de la Securities Act — L'article 128(1) porte-t-il atteinte à l'art. 8 de la Charte canadienne des droits et libertés? — Securities Act, S.B.C. 1985, ch. 83, art. 128(1).

the scope of s. 7 protection against self-incrimination in a case where the documents do not pre-exist the statutory compulsion to produce, but rather have been created by statutory compulsion.

2. Section 8 of the Charter

To reiterate, the issue raised by this portion of the appeal is whether s. 128(1) of the *Securities Act* infringes s. 8 of the *Charter*. The foundation for a s. 8 analysis was laid by Dickson J. (as he then was) in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145. As Dickson J. stated, at pp. 159-60, one of the clear purposes of the *Charter* is the protection of the individual's reasonable expectation of privacy:

The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 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.]

Dickson J. set forth several criteria which had to be met in order that a search be reasonable. These criteria were summarized by Wilson J. at p. 499 of *Thomson Newspapers*:

- (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

soulevé. Nous remettons également à plus tard l'examen de la pertinence du contexte réglementaire pour déterminer la portée de la garantie de l'art. 7 contre l'auto-incrimination dans un cas où les documents n'existent pas avant la contrainte légale à les produire, mais sont plutôt le fruit de cette contrainte.

2. L'article 8 de la Charte

De nouveau, nous précisons que la question soulevée dans cette partie du pourvoi est de savoir si le par. 128(1) de la *Securities Act* porte atteinte à l'art. 8 de la *Charte*. Dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, le juge Dickson (plus tard Juge en chef) a jeté les bases d'une analyse fondée sur l'art. 8. Comme il l'affirme aux pp. 159 et 160, l'un des objectifs clairs de la *Charte* est la protection des attentes raisonnables que le particulier a en matière de vie privée:

La garantie de protection contre les fouilles, les perquisitions et les saisies abusives ne vise qu'une attente raisonnable. Cette limitation du droit garanti par l'art. 8, qu'elle soit exprimée sous la forme négative, c'est-à-dire comme une protection contre les fouilles, les perquisitions et les saisies «abusives», ou sous la forme positive comme le droit de s'attendre «raisonnablement» à la protection de la vie privée, indique qu'il faut apprécier si, dans une situation donnée, le droit du public de ne pas être importuné par le gouvernement doit céder le pas au droit du gouvernement de s'immiscer dans la vie privée des particuliers afin de réaliser ses fins et, notamment, d'assurer l'application de la loi. [Souligné dans l'original.]

Le juge Dickson énonce plusieurs critères qu'il faut respecter pour qu'une perquisition soit raisonnable et non abusive. Le juge Wilson les résume, à la p. 499 de l'arrêt *Thomson Newspapers*:

- a) une procédure d'autorisation préalable par un arbitre tout à fait neutre et impartial qui est en mesure d'agir de façon judiciaire en conciliant les intérêts de l'État et ceux de l'individu;
- b) une exigence que l'arbitre impartial s'assure que la personne qui demande l'autorisation a des motifs raisonnables, établis sous serment, de croire qu'une infraction a été commise;
- c) une exigence que l'arbitre impartial s'assure que la personne qui demande l'autorisation a des motifs rai-

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.

It is important to note, however, that these criteria were articulated in the context of an appeal concerning the validity of a section which was, in essence, criminal or *quasi*-criminal. It is clear that the context within which the alleged violation takes place must be considered, for it is the context which determines the expectation of privacy that is legitimately expected. The following comments of Wilson J. in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at p. 645, are instructive:

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

Therefore, it is clear that the standard of reasonableness which prevails in the case of a search and seizure made in the course of enforcement in the criminal context will not usually be the appropriate standard for a determination made in an administrative or regulatory context: *per* La Forest J. in *Thomson Newspapers*. The greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness. The application of a less strenuous approach to regulatory or administrative searches and seizures is consistent with a purposive approach to the elaboration of s. 8: *Thomson Newspapers*.

While the expectation of privacy with respect to criminal matters seems certain, the standard of reasonableness to be applied in the regulatory and administrative realm is less well defined. Wilson J. found in *McKinlay Transport*, at pp. 645-46, that the point was aptly made by A. D. Reid and A. H. Young in "Administrative Search and Seizure

sonnables de croire que l'on découvrira quelque chose qui fournira une preuve que l'infraction précise faisant l'objet de l'enquête a été commise; et

- d) une exigence que les seuls documents dont la saisie est autorisée soient ceux se rapportant strictement à l'infraction faisant l'objet de l'enquête.

Cependant, il importe de signaler que ces critères ont été formulés dans le contexte d'un pourvoi concernant la validité d'une disposition essentiellement de nature criminelle ou quasi criminelle. Il est clair qu'il faut examiner le contexte dans lequel aurait eu lieu la violation reprochée, car c'est lui qui détermine les attentes légitimes en matière de vie privée. Les commentaires suivants que le juge Wilson fait, dans l'arrêt *R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627, à la p. 645, sont intéressants:

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

En conséquence, il est clair que la norme du caractère raisonnable applicable dans le cas des fouilles, perquisitions et saisies effectuées dans le cadre de la mise en application du droit criminel ne sera généralement pas appropriée pour déterminer le caractère raisonnable dans un contexte administratif ou réglementaire: le juge La Forest dans l'arrêt *Thomson Newspapers*. Plus l'on s'éloignera du domaine du droit criminel, plus la façon d'aborder la norme du caractère raisonnable sera souple. Le recours à une façon moins rigide d'aborder les fouilles, perquisitions et saisies dans le contexte administratif ou réglementaire est conforme à une interprétation fondée sur l'objet de l'art. 8: *Thomson Newspapers*.

Bien que les attentes en matière de vie privée dans le cas d'affaires criminelles semblent certaines, la norme du caractère raisonnable à appliquer dans le contexte administratif ou réglementaire est moins bien définie. Dans l'arrêt *McKinlay Transport*, le juge Wilson conclut, aux pp. 645 et 646, que A. D. Reid et A. H. Young ont bien

Under the Charter" (1985), 10 *Queen's L.J.* 392, at pp. 398-99:

There are facets of state authority, generically associated with search or seizure, that are so intertwined with the regulated activity as to raise virtually no expectation of privacy whatsoever. . . . Other activities are regulated so routinely that there is virtually no expectation of privacy from state intrusion. Annual filing requirements for banks, corporations, trust companies, loan companies, and the like are inextricably associated with carrying on business under state licence.

There are other situations in which government intrusion cannot be as confidently predicted, yet the range of discretion extended to state officials is so wide as to create in the regulatee an expectation that he may be inspected or requested to provide information at some point in the future. This may arise in the form of an inspection carried out either on a "spot check" basis, or on the strength of suspected non-compliance. The search may be in the form of a request for information that is not prescribed as an annual filing requirement, but is required to be produced on a demand basis. For the most part, there is no requirement that these powers be exercised on belief or suspicion of non-compliance. Rather, they are based on the common sense assumption that the threat of unannounced inspection may be the most effective way to induce compliance. They are based on a view that inspection may be the only means of detecting non-compliance, and that its detection serves an important public purpose.

exposé ce point de vue dans leur article intitulé «Administrative Search and Seizure Under the Charter» (1985), 10 *Queen's L.J.* 392, aux pp. 398 et 399:

[TRADUCTION] Il y a des aspects de l'autorité de l'État, communément associée aux fouilles, aux perquisitions et aux saisies, qui sont si étroitement liés à l'activité réglementée que ceux qui en font l'objet ne s'attendent pratiquement pas au respect de leur vie privée. [...] D'autres activités sont réglementées de façon si courante qu'on ne s'attend pratiquement pas à ce qu'elles soient protégées contre l'immixtion de l'État. L'obligation faite aux banques, aux sociétés, aux compagnies de fiducie et aux compagnies de prêt et autres organismes semblables de produire des déclarations annuelles fait inextricablement partie de l'exploitation de l'entreprise en vertu d'un permis de l'État.

Il existe d'autres situations où il n'est pas possible de prédire avec autant d'assurance l'immixtion de l'État et pourtant le pouvoir discrétionnaire accordé aux fonctionnaires est si étendu que ceux qui sont visés par un règlement s'attendent à faire l'objet d'une inspection ou à ce qu'on leur demande de fournir des renseignements à un moment donné. Il peut s'agir d'une inspection qui prend la forme d'un contrôle ponctuel ou qui a lieu parce qu'on soupçonne l'existence d'une violation. La fouille ou perquisition peut revêtir la forme d'une demande de renseignements qui n'ont pas à être fournis annuellement mais qui doivent être produits sur demande. Dans la plupart des cas, rien n'exige que ces pouvoirs soient exercés sur la foi d'une croyance ou d'un soupçon qu'il y a eu violation. Ils se fondent plutôt sur l'hypothèse logique que la menace d'une inspection imprévue peut constituer l'incitation la plus efficace au respect de la loi. Ces pouvoirs se fondent sur l'opinion que l'inspection peut être le seul moyen de découvrir les violations et que cette découverte répond à un objectif public important.

Thus, it is incumbent that an examination of the nature of the securities context be undertaken. As mentioned above, the primary goal of securities legislation is the protection of the investor, but other goals include capital market efficiency and ensuring public confidence in the system. In *Pezim, supra*, the Court noted that the British Columbia Securities Act is regulatory in nature and stated at p. 589 that it forms part of a much larger

Ainsi, il faut procéder à un examen de la nature du contexte des valeurs mobilières. Comme nous l'avons déjà mentionné, la législation sur les valeurs mobilières vise avant tout à protéger l'investisseur, mais aussi, notamment, à assurer le rendement du marché des capitaux et la confiance du public dans le système. Dans l'arrêt *Pezim*, précité, notre Cour souligne, à la p. 589, que la *Securities Act* de la Colombie-Britannique est une loi de

framework which regulates the securities industry throughout Canada:

Within this large framework of securities regulation, there are various government administrative agencies which are responsible for the securities legislation within their respective jurisdictions. The [British Columbia Securities] Commission is one such agency. Also within this large framework are self-regulatory organizations which possess the power to admit and discipline members and issuers. The [Vancouver Stock Exchange] falls under this head. Having regard to this rather elaborate framework, it is not surprising that securities regulation is a highly specialized activity which requires specific knowledge and expertise in what have become complex and essential capital and financial markets.

With this in mind, the obvious question becomes what degree of privacy can those subject to investigation under the British Columbia *Securities Act* reasonably expect in respect of activities and matters with which such investigations may be concerned. The relevant provisions of the Act are reproduced below for ease of analysis.

128. (1) An investigator appointed under section 126 or 131 has the same power

- (a) to summon and enforce the attendance of witnesses,
- (b) to compel witnesses to give evidence on oath or in any other manner, and
- (c) to compel witnesses to produce records and things

as the Supreme Court has for the trial of civil actions, and the failure or refusal of a witness

- (d) to attend,
- (e) to take an oath,
- (f) to answer questions, or
- (g) to produce the records and things in his custody or possession

makes the witness, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

nature réglementaire et qu'elle s'inscrit dans un régime beaucoup plus général de réglementation du secteur des valeurs mobilières au Canada:

À l'intérieur de ce grand régime de réglementation des valeurs mobilières, il existe divers organismes gouvernementaux responsables de l'application des lois sur les valeurs mobilières dans leur ressort respectif. C'est la fonction de la [British Columbia Securities] Commission. Il y a également des organismes autonomes qui possèdent le pouvoir d'inscrire des membres et des émetteurs et d'assurer la discipline. C'est le rôle de la [Bourse de Vancouver]. Compte tenu de cette toile de fond plutôt compliquée, il n'est pas étonnant que la réglementation des valeurs mobilières soit une activité fort spécialisée qui exige des connaissances et une expertise particulières du domaine complexe et essentiel des marchés financiers.

Ceci dit, la question évidente est de savoir quel est le degré de vie privée auquel les personnes qui font l'objet d'une enquête en vertu de la *Securities Act* de la Colombie-Britannique peuvent raisonnablement s'attendre relativement aux activités et aux questions sur lesquelles peuvent porter ces enquêtes. Pour faciliter l'analyse, nous reproduisons ci-après les dispositions pertinentes de la Loi:

[TRADUCTION] **128.** (1) Un enquêteur nommé en vertu des articles 126 ou 131 est investi du même pouvoir

- a) d'assigner des témoins et de les obliger à comparaître,
- b) d'obliger des personnes à témoigner sous serment ou autrement, et
- c) d'obliger des témoins à produire des dossiers et des objets

que celui qui est conféré à la Cour suprême en matière d'actions civiles, et toute personne qui omet ou refuse

- d) de comparaître,
- e) de prêter serment,
- f) de répondre à des questions, ou
- g) de produire les dossiers et objets dont elle a la garde ou la possession

peut, sur requête à la Cour suprême, être condamnée pour outrage au même titre que si elle avait omis de se conformer à une ordonnance ou à un jugement de cette cour.

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It is clear that in numerous instances a regulatory regime will be needed in order to act as a check on an individual's self-interest. There are surely times when one's own motivations and objective are not of benefit to society on a wider scale. As we have already mentioned, the primary goal of securities regulation is the protection of the investing public. The importance of this goal, as against the reasonable expectation of privacy of securities traders, is what we are considering here. At this intersection, the words of our colleague, La Forest J., in *Thomson Newspapers*, *supra*, at pp. 506-7, ring particularly true:

Il est évident que dans de nombreux cas, un régime de réglementation sera nécessaire pour réprimer les intérêts des particuliers. Il arrive sûrement que la motivation et l'objectif de quelqu'un ne bénéficient pas à l'ensemble de la société. Comme nous l'avons déjà mentionné, la réglementation des valeurs mobilières vise avant tout la protection du public investisseur. Ce qui nous intéresse en l'espèce c'est l'importance de cet objectif par rapport aux attentes raisonnables que les négociateurs de valeurs mobilières ont en matière de vie privée. À ce stade, les propos que notre collègue le juge La Forest tient, aux pp. 506 et 507 de l'arrêt *Thomson Newspapers*, précité, sonnent particulièrement juste:

But the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records.

Mais ce degré de vie privée auquel le citoyen peut raisonnablement s'attendre peut varier considérablement selon les activités qui le mettent en contact avec l'État. Dans une société industrielle moderne, on reconnaît généralement que de nombreuses activités auxquelles peuvent se livrer des particuliers doivent malgré tout être plus ou moins réglementées par l'État pour veiller à ce que la poursuite des intérêts des particuliers soit compatible avec les intérêts de la collectivité dans la réalisation des buts et des aspirations collectifs. Dans de nombreux cas, cette réglementation doit nécessairement comporter l'inspection de lieux ou de documents de nature privée par des fonctionnaires de l'État. Pour vérifier si le restaurateur se conforme à la réglementation sur la santé publique, si l'employeur se conforme à la législation sur les normes et la sécurité du travail et si le promoteur ou le propriétaire se conforme au code du bâtiment ou aux règlements de zonage, il n'existe que l'inspection des lieux, et encore celle qui est faite à l'improviste. De même, il arrive fréquemment que le respect des lois sur le salaire minimum, sur l'équité en matière d'emploi et sur les droits de la personne ne puisse être vérifié que par inspection des dossiers et archives de l'employeur.

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There are areas of business, for example, that are subject to regulation as a matter of course. Persons who carry on the business of trading in securities realize that the industry is heavily regulated and for good reason. It is a crucial part of our economy that is at stake. In *Pezim*, *supra*, at pp. 592-93, this Court relied on the following position articulated by Fauteux J. in *Gregory & Co. v. Que-*

Par exemple, il y a des secteurs d'activités qui sont bien entendu réglementés. Les personnes qui effectuent des opérations sur valeurs mobilières comprennent que ce secteur est fortement réglementé, et ce, pour de bonnes raisons. C'est un secteur crucial de notre économie qui est en jeu. Aux pages 592 et 593 de l'arrêt *Pezim*, précité, notre Cour se fonde sur le point de vue formulé par le

bec Securities Commission, [1961] S.C.R. 584, at p. 588:

The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.

In our opinion, persons involved in the business of trading securities do not have a high expectation of privacy with respect to regulatory needs that have been generally expressed in securities legislation. It is widely known and accepted that the industry is well regulated. Similarly, it is well known why the industry is so regulated. The appellants in this case were well aware of the dictates of the *Securities Act*. Once again, we rely on the words of La Forest J. at p. 507 of *Thomson Newspapers*:

It follows that there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature of participation in such activity. As A. D. Reid and A. H. Young point out in their article "Administrative Search and Seizure Under the Charter" (1985), 10 *Queen's L.J.* 392, at p. 399, there is a "large circle of social and business activity in which there is a very low expectation of privacy", and in which the "issue is not *whether*, but rather when, how much, and under what conditions information must be disclosed to satisfy the state's legitimate requirements".

Hence, the *Securities Act* is essentially a scheme of economic regulation which is designed to discourage detrimental forms of commercial behaviour. The provisions provided by the legislature are pragmatic sanctions designed to induce compli-

juge Fauteux dans l'arrêt *Gregory & Co. c. Quebec Securities Commission*, [1961] R.C.S. 584, à la p. 588:

[TRADUCTION] L'objet prépondérant de la loi est d'assurer que les personnes qui, dans la province, exercent le commerce des valeurs mobilières ou qui agissent comme conseillers en placement, sont honnêtes et de bonne réputation et, ainsi, de protéger le public, dans la province ou ailleurs, contre toute fraude consécutive à certaines activités amorcées dans la province par des personnes qui y exercent ce commerce.

À notre avis, les personnes qui effectuent des opérations sur valeurs mobilières n'ont pas des attentes élevées en matière de vie privée relativement au besoin de réglementation généralement exprimé dans les lois sur les valeurs mobilières. Il est généralement reconnu que ce secteur est bien réglementé. De même, on sait bien pourquoi il est ainsi réglementé. Les appelants en l'espèce sont bien au courant des préceptes de la *Securities Act*. De nouveau, nous nous fondons sur les propos tenus par le juge La Forest, à la p. 507 de l'arrêt *Thomson Newspapers*:

Il s'ensuit que les attentes des particuliers ne peuvent être très élevées quant au respect de leur droit à la vie privée dans le cas de lieux ou de documents utilisés ou produits dans l'exercice d'activités qui, bien que légales, sont normalement réglementées par l'État. Dans une société où l'on reconnaît le besoin de réglementer efficacement certains domaines d'activités privées et où l'on y donne suite, l'inspection de lieux et de documents par l'État est un aspect routinier auquel les particuliers s'attendent en exerçant cette activité. Comme A. D. Reid et A. H. Young le soulignent dans leur article «Administrative Search and Seizure Under the Charter» (1985), 10 *Queen's L.J.* 392, à la p. 399, il existe un [TRADUCTION] «large éventail d'activités sociales et commerciales dans lesquelles on s'attend très peu au respect de la vie privée», et où la [TRADUCTION] «question n'est pas de savoir *si* les renseignements doivent être divulgués pour satisfaire aux exigences légitimes de l'État, mais plutôt de déterminer le moment, l'étendue et les conditions de la divulgation».

En conséquence, la *Securities Act* est essentiellement un régime de réglementation économique destiné à décourager les formes préjudiciables de comportement commercial. Les dispositions adoptées par la legislature sont des sanctions pragma-

ance with the Act. After all, the Act is really aimed at regulating certain facets of the economy and business. This has obvious implications for the nation's material prosperity: *Thomson Newspapers*. As such, the effective implementation of securities legislation depends on the willingness of those who choose to engage in the securities trade to comply with the defined standards of conduct. In this respect, we fully agree with Wilson J.'s comments that "[a]t some point the individual's interest in privacy must give way to the broader state interest in having the information or document disclosed": *Thomson Newspapers*, at p. 495.

tiques destinées à inciter au respect de la Loi. Après tout, la Loi vise vraiment à réglementer certaines facettes de l'économie et des affaires. Cela a des répercussions évidentes sur la prospérité matérielle de la nation: *Thomson Newspapers*. Alors, l'efficacité de la mise en œuvre des lois en matière de valeurs mobilières dépend de la volonté qu'ont les gens qui choisissent d'effectuer des opérations sur ce marché de respecter les normes de conduite établies. À cet égard, nous sommes tout à fait d'accord avec le commentaire du juge Wilson, selon lequel «[i]l vient en effet 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»: *Thomson Newspapers*, à la p. 495.

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Of equal importance is the nature of the seizure authorized by the *Securities Act*. The demand for the production of documents contained in the summonses is one of the least intrusive of the possible methods which might be employed to obtain documentary evidence. The importance of this distinction was stressed in *Baron v. Canada*, [1993] 1 S.C.R. 416. At page 443, the Court adopted the following statement from the reasons of Wilson J. *McKinlay Transport, supra*, at pp. 649-50:

Tout aussi importante est la nature de la saisie autorisée par la *Securities Act*. La demande de production de documents contenue dans les assignations est l'une des méthodes les moins envahissantes auxquelles on puisse recourir pour obtenir une preuve documentaire. L'importance de cette distinction a été soulignée dans *Baron c. Canada*, [1993] 1 R.C.S. 416. À la page 443, la Cour adopte l'énoncé suivant tiré des motifs du juge Wilson dans *McKinlay Transport*, précité, aux pp. 649 et 650:

In my opinion, s. 231(3) provides the least intrusive means by which effective monitoring of compliance with the *Income Tax Act* can be effected. It involves no invasion of a taxpayer's home or business premises. It simply calls for the production of records which may be relevant to the filing of an income tax return.

À mon sens, le par. 231(3) prescrit la méthode la moins envahissante pour contrôler efficacement le respect de la *Loi de l'impôt sur le revenu*. Elle n'entraîne pas la visite du domicile ni des locaux commerciaux du contribuable, elle exige simplement la production de documents qui peuvent être utiles au dépôt des déclarations d'impôt sur le revenu.

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In *R. v. Borden*, [1994] 3 S.C.R. 145, it was stated that, "[t]he question of whether the seizure was unreasonable can be disposed of simply. In the absence of prior judicial authorization, a search or seizure will be unreasonable unless it is authorized by law, the law itself is reasonable and the manner in which the search was carried out is reasonable" (p. 165). In this case, the outstanding issue is whether the law is reasonable: *R. v. Kokesch*, [1990] 3 S.C.R. 3, *R. v. Collins, supra*, and *R. v. Wiley*, [1993] 3 S.C.R. 263. As we have indicated above, the *Securities Act* serves an important social

Dans l'arrêt *R. c. Borden*, [1994] 3 R.C.S. 145, on affirme que «[l]a réponse à la question de savoir si la saisie était abusive est simple. En l'absence d'une autorisation judiciaire préalable, une fouille, perquisition ou saisie sera abusive sauf si elle est permise par la loi, si la loi est elle-même raisonnable et si la façon dont la fouille ou la perquisition a été effectuée est raisonnable» (p. 165). En l'espèce, la question à trancher est de savoir si la loi est raisonnable: *R. c. Kokesch*, [1990] 3 R.C.S. 3, *R. c. Collins*, précité, et *R. c. Wiley*, [1993] 3 R.C.S. 263. Comme nous l'avons déjà

purpose and the social utility of such legislation justifies the minimal intrusion that the appellants may face. The law in question, is therefore, reasonable.

As our final point, we note the distinction between business records and personal papers. We are of the view that in order to determine the relative privacy rights that attach, the type of document at issue is important. Documents produced in the course of a business which is regulated have a lesser privacy right attaching to them than do documents that are, strictly speaking, personal. Again, the words of La Forest J. in *Thomson Newspapers*, at pp. 517-18, are helpful:

While such records are not devoid of any privacy interest, it is fair to say that they raise much weaker privacy concerns than personal papers. The ultimate justification for a constitutional guarantee of the right to privacy is our belief, consistent with so many of our legal and political traditions, that it is for the individual to determine the manner in which he or she will order his or her private life. . . . But where the possibility of such intervention is confined to business records and documents, the situation is entirely different. These records and documents do not normally contain information about one's lifestyle, intimate relations or political or religious opinions. They do not, in short, deal with those aspects of individual identity which the right of privacy is intended to protect from the overbearing influence of the state. On the contrary, as already mentioned, it is imperative that the state have power to regulate business and the market both for economic reasons and for the protection of the individual against private power. Given this, state demands concerning the activities and internal operations of business have become a regular and predictable part of doing business. Under these circumstances, I cannot see how there would be a very high expectation of privacy in respect of records and documents in which this information is contained.

Therefore, we conclude that those who are ordered under s. 128(1) of the *Securities Act* "to produce records and things" can claim only a limited expectation of privacy in respect of these

indiqué, la *Securities Act* sert une fin sociale importante et l'utilité sociale d'une telle loi justifie l'atteinte minimale dont peuvent être victimes les appelants. La loi en question est donc raisonnable.

Enfin, nous soulignons la distinction qui existe entre les dossiers d'entreprise et les documents personnels. Nous sommes d'avis que le genre de document en cause est important pour déterminer les droits relatifs en matière de vie privée qui s'y rattachent. Les documents constitués dans le cadre d'une entreprise réglementée sont assortis d'un droit à la vie privée moindre que les documents qui sont strictement personnels. Encore une fois, les propos que le juge La Forest tient, aux pp. 517 et 518 de l'arrêt *Thomson Newspapers*, sont utiles:

Bien que ces dossiers ne soient pas dépourvus d'intérêt de nature privée, il est raisonnable de dire qu'ils soulèvent des préoccupations beaucoup moins importantes que les documents personnels. L'argument suprême à l'appui d'une garantie constitutionnelle du droit au respect de la vie privée repose sur notre conviction, conforme à tant de nos traditions juridiques et politiques, qu'il appartient à l'individu de déterminer la façon dont il mènera sa vie privée. [. . .] Mais lorsque la possibilité d'une telle intervention est restreinte aux dossiers et documents de l'entreprise, la situation est tout à fait différente. Ces dossiers et documents ne contiennent habituellement pas de renseignements relatifs au mode de vie d'une personne, à ses relations intimes ou à ses convictions politiques ou religieuses. Bref, ils ne traitent pas de ces aspects de l'identité personnelle que le droit à la vie privée vise à protéger de l'influence envahissante de l'État. Au contraire, comme je l'ai déjà souligné, il est impératif que l'État ait le pouvoir de réglementer le commerce et le marché tant pour des raisons économiques que pour protéger l'individu d'un pouvoir de nature privée. Cela étant dit, les demandes de l'État relatives aux activités et aux opérations internes des entreprises sont maintenant choses courantes et prévisibles en matière commerciale. Compte tenu de ces circonstances, je ne crois pas qu'il puisse y avoir de très grandes attentes en matière de vie privée à l'égard des dossiers et des documents qui contiennent des renseignements de cette nature.

En conséquence, nous concluons que les personnes qui se voient ordonner, en vertu du par. 128(1) de la *Securities Act*, de [TRADUCTION] «produire des dossiers et des objets» ne peuvent faire

materials. The operative question becomes whether s. 128(1) unreasonably infringes on this limited expectation of privacy.

valoir que des attentes restreintes en matière de vie privée relativement à ceux-ci. La question utile est alors de savoir si le par. 128(1) empiète de façon abusive sur ces attentes limitées en matière de vie privée.

64 In our view it does not. We have already mentioned that in a highly regulated industry, such as the securities market, the individual is aware, and accepts, justifiable state intrusions. All those who enter into this market know or are deemed to know the rules of the game. As such, an individual engaging in such activity has a low expectation of privacy in business records. In fact, "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": *McKinlay Transport, supra*, at pp. 641-42. Under such circumstances, the state authorized inspection of documents under s. 128(1) of the *Securities Act* does not violate s. 8 of the *Charter*.

Nous sommes d'avis que non. Nous avons déjà mentionné que, dans un secteur fortement réglementé comme le marché des valeurs mobilières, le particulier est conscient qu'une certaine ingérence de l'État est justifiable et accepte cet état de choses. Toutes les personnes qui gagnent ce marché connaissent ou sont réputées connaître les règles du jeu. Alors, une personne qui se livre à une telle activité a peu d'attentes en matière de vie privée pour ce qui est de ses dossiers d'entreprise. En fait, «[i]l arrive sans aucun doute qu'un particulier n'a aucun intérêt ni aucune attente à ce que soit protégé un document ou un article particulier dont l'État réclame la production»: *McKinlay Transport*, précité, à la p. 642. Dans ces circonstances, l'inspection de documents, autorisée par l'État en vertu du par. 128(1) de la *Securities Act*, ne porte pas atteinte à l'art. 8 de la *Charte*.

VI. Disposition

VI. Dispositif

65 We thus answer the constitutional questions as follows:

1. [Does] s. 128(1) of the *Securities Act*, S.B.C. 1985, c. 83, infringe[] ss. 7 or 8 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If the answer is yes, is the limitation one which is reasonable, prescribed by law, and demonstrably justified pursuant to s. 1 of the *Charter*?

Answer: It is not necessary to answer this question.

En conséquence, nous répondons ainsi aux questions constitutionnelles:

1. Le paragraphe 128(1) de la *Securities Act*, S.B.C. 1985, ch. 83, porte-t-il atteinte aux art. 7 ou 8 de la *Charte canadienne des droits et libertés*?

Réponse: Non.

2. Dans l'affirmative, cette atteinte constitue-t-elle une limite raisonnable prescrite par une règle de droit, dont la justification peut se démontrer conformément à l'article premier de la *Charte*?

Réponse: Il n'est pas nécessaire de répondre à cette question.

66 We would dismiss the appeal with costs.

Nous sommes d'avis de rejeter le pourvoi avec dépens.

The following are the reasons delivered by

Les motifs suivants ont été rendus par

67 L'HEUREUX-DUBÉ J. — I agree with Sopinka and Iacobucci JJ. that this appeal should be dismissed and I would answer the constitutional ques-

LE JUGE L'HEUREUX-DUBÉ — Je suis d'accord avec les juges Sopinka et Iacobucci pour dire qu'il y a lieu de rejeter le présent pourvoi, et je répon-

TAB 95

Richard James Goodwin *Appellant*

v.

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Respondents*

- and -

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Appellants*

v.

Jamie Allen Chisholm *Respondent*

- and -

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Appellants*

v.

Scott Roberts *Respondent*

- and -

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Appellants*

v.

Carol Marion Beam *Respondent*

- and -

British Columbia (Superintendent of Motor Vehicles) and Attorney General of British Columbia *Appellants*

v.

Richard James Goodwin *Appelant*

c.

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Intimés*

- et -

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Appellants*

c.

Jamie Allen Chisholm *Intimé*

- et -

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Appellants*

c.

Scott Roberts *Intimé*

- et -

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Appellants*

c.

Carol Marion Beam *Intimée*

- et -

Colombie-Britannique (Superintendent of Motor Vehicles) et procureur général de la Colombie-Britannique *Appellants*

c.

(1) Is Section 8 Engaged?

[49] Section 215.41(3) of the *MVA* provided at the relevant time:

(3) If, at any time or place on a highway or industrial road,

- (a) a peace officer makes a demand to a driver under the *Criminal Code* to provide a sample of breath for analysis by means of an approved screening device and the approved screening device registers a warn or a fail, and
- (b) the peace officer has reasonable grounds to believe, as a result of the analysis, that the driver's ability to drive is affected by alcohol,

the peace officer, or another peace officer, must,

- (c) if the driver holds a valid licence or permit . . . take possession of the driver's licence, permit . . . if the driver has it in his or her possession, and
- (d) serve on the driver a notice of driving prohibition.

[50] It is undisputed before this Court that the roadside breath demand constitutes a seizure within the meaning of s. 8 of the *Charter*.⁴

[51] It is also undisputed before this Court that drivers of vehicles have some expectation of privacy in their breath, even if a diminished one. The factors identified by this Court as "helpful markers" in *Tessling*, at paras. 43-62, support this conclusion. The seizure occurs in a vehicle (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at paras. 111 and 113); in the highly regulated context of driving on a public highway (*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at pp. 647-48); and is relatively non-intrusive (*Grant*, at para. 111). While these factors support a diminished expectation of privacy, they do not eliminate any residual privacy interest in one's breath. Thus the demand to breathe into a roadside screening device constitutes a seizure that infringes

(1) L'article 8 entre-t-il en jeu?

[49] Le paragraphe 215.41(3) de la *MVA* prévoyait à l'époque :

[TRADUCTION]

(3) Si, en tout temps ou en tout lieu sur une route ou une route industrielle :

- (a) un agent de la paix ordonne à un conducteur en vertu du *Code criminel* de fournir un échantillon d'haleine pour analyse au moyen d'un appareil de détection approuvé et celui-ci affiche un avertissement ou un échec;
- (b) l'agent de la paix a des motifs raisonnables de croire, par suite de l'analyse, que les facultés du conducteur sont affaiblies par l'alcool,

l'agent de la paix, ou un autre agent de la paix, doit prendre les mesures suivantes :

- (c) si le conducteur détient un permis valide [. . .] prendre possession du permis du conducteur [. . .] si ce dernier l'a en sa possession;
- (d) signifier au conducteur un avis d'interdiction de conduire.

[50] Il n'est pas contesté devant la Cour que la demande d'alcootest constitue une saisie au sens de l'art. 8 de la *Charte*.⁴

[51] Personne ne conteste non plus devant la Cour que les conducteurs de véhicules ont une certaine attente en matière de vie privée concernant leur haleine, même si elle est réduite. Les facteurs qualifiés de « repères utiles » par la Cour aux par. 43-62 de l'arrêt *Tessling* étayaient cette conclusion. La saisie a lieu dans un véhicule (*R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353, par. 111 et 113); dans le contexte très réglementé de la conduite automobile sur la voie publique (*R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627, p. 647-648); et est relativement peu envahissante (*Grant*, par. 111). Bien que ces facteurs militent en faveur d'une attente réduite en matière de vie privée, ils n'éliminent pas le droit résiduel d'une personne à la protection de sa vie privée concernant

⁴ The respondents Chisholm et al. characterize the ARP scheme as a coupled search and seizure power: see R.F., at para. 39.

⁴ Les intimés Chisholm et autres qualifient le RIAC de pouvoir mixte de fouille, de perquisition et de saisie : voir m.i., par. 39.

on an individual's reasonable expectation of privacy. The protection of s. 8 is engaged.

(2) Is the Seizure Authorized by the Provincial Law?

[52] The Province argues that it is not the impugned provisions of the *MVA* that engage a driver's s. 8 rights because the ARP scheme does not itself authorize a seizure. Instead, the regime relies on s. 254(2) of the *Criminal Code* to authorize a roadside breath demand. In the Province's view, a challenge to the *Charter* compliance of the breath demand must therefore attack s. 254(2) of the *Criminal Code*, and not s. 215.41(3)(a) of the provincial *MVA*.

[53] I do not agree. Such a narrow understanding of whether the seizure is "authorized by law" would insulate the province from s. 8 scrutiny over any use of a *Criminal Code* search power. It would also be inconsistent with the flexible and purposive interpretation, focused on protecting people and not places, that s. 8 demands: *McKinlay Transport Ltd.*, at p. 647, per Wilson J.; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 158-59. The analysis of a search or seizure under s. 8 is a contextual inquiry: *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 26. It requires regard to the purpose for which the seizure occurs, and to the statutory provisions that set out the grounds, means and consequences of the seizure. A search or seizure can be valid for one purpose and not for another.

[54] Although the Province relies on the *Criminal Code* to authorize the breath demand, the purpose and consequences of the seizure are established in the ARP scheme, in the *MVA*. The seizure thus takes its colour from the provincial legislation, and cannot be read in isolation from that scheme. For

son haleine. Ainsi, la demande de souffler dans un alcootest constitue une saisie qui porte atteinte à l'attente raisonnable d'une personne en matière de vie privée. La protection de l'art. 8 entre en jeu.

(2) La saisie est-elle autorisée par la loi provinciale?

[52] La Province fait valoir que ce ne sont pas les dispositions contestées de la *MVA* qui font intervenir les droits garantis au conducteur par l'art. 8 parce que le RIAC n'autorise pas en soi une saisie. Le régime s'en remet plutôt au par. 254(2) du *Code criminel* pour autoriser une demande d'alcootest. De l'avis de la Province, une contestation de la conformité à la *Charte* d'une demande d'échantillon d'haleine doit par conséquent viser le par. 254(2) du *Code criminel*, et non l'al. 215.41(3) a) de la *MVA* provinciale.

[53] Je ne suis pas d'accord avec elle. Une interprétation aussi étroite de la question de savoir si la saisie est « autorisée par la loi » mettrait la province à l'abri de l'examen, fondé sur l'art. 8, de tout exercice d'un pouvoir de fouille prévu par le *Code criminel*. Elle serait en outre incompatible avec l'interprétation souple et fondée sur l'objet visé, axée sur la protection des personnes et non des lieux, qu'exige l'art. 8 : *McKinlay Transport Ltd.*, p. 647, la juge Wilson; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 158-159. L'analyse d'une fouille, d'une perquisition ou d'une saisie en application de l'art. 8 est de nature contextuelle : *R. c. Rodgers*, 2006 CSC 15, [2006] 1 R.C.S. 554, par. 26. Elle exige qu'il soit tenu compte de l'objet pour lequel la saisie est faite et des dispositions législatives qui établissent les motifs, les moyens et les conséquences de la saisie. Une fouille, une perquisition ou une saisie peut être valide pour un objet mais pas pour un autre.

[54] Bien que la Province se fonde sur le *Code criminel* pour autoriser la demande d'échantillon d'haleine, l'objet et les conséquences de la saisie sont établis dans le RIAC, dans la *MVA*. La saisie tire donc son caractère de la loi provinciale et ne peut être considérée indépendamment de ce régime.

the purposes of s. 8, it is the ARP scheme that authorizes the seizure of the breath sample, and it is thus subject to *Charter* scrutiny on this basis.

(3) Is the Seizure in the ARP Scheme Reasonable?

[55] As Dickson J. wrote for a unanimous court in *Hunter*, at pp. 159-60, assessing whether the law authorizing a search or seizure is reasonable requires determining

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.

The protection s. 8 provides for an individual's privacy — personal, territorial and informational — is essential not only to human dignity, but also to the functioning of our democratic society. At the same time, s. 8 permits *reasonable* searches and seizures in recognition that the state's legitimate interest in advancing its goals or enforcing its laws will sometimes require a degree of intrusion into the private sphere. The tension articulated in *Hunter* between the competing individual and state interests, and the adequacy of the safeguards provided, remain foundational to this analysis.

[56] Searches or seizures conducted without a warrant — such as the seizure underpinning the ARP scheme — are presumptively unreasonable: *Hunter*, at p. 161. The burden of establishing reasonableness thus rests with the state.

[57] This Court has generally declined to set out a “hard and fast” test of reasonableness: see *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 495. In my view, this flexible approach remains compelling. This Court has nonetheless identified certain considerations that may be helpful in the reasonableness analysis, including “the nature and the purpose

Pour l'application de l'art. 8, c'est le RIAC qui autorise la saisie de l'échantillon d'haleine, et il est donc assujéti à l'examen fondé sur la *Charte* pour ce motif.

(3) La saisie prévue par le RIAC est-elle raisonnable?

[55] Comme l'a écrit le juge Dickson aux p. 159-160 de l'arrêt unanime *Hunter*, pour déterminer si la loi qui autorise une fouille, une perquisition ou une saisie est raisonnable, il faut apprécier

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

La protection que l'art. 8 accorde à la vie privée — personnelle, territoriale et informationnelle — d'un particulier est essentielle non seulement à la dignité humaine, mais aussi au fonctionnement de notre société démocratique. Parallèlement, l'art. 8 permet les fouilles, les perquisitions et les saisies *raisonnables*, reconnaissant que le droit légitime de l'État de réaliser ses fins ou d'appliquer ses lois nécessitera parfois une certaine intrusion dans la sphère privée. Le tiraillement mis en évidence dans *Hunter* entre les intérêts opposés de l'individu et de l'État, et le caractère suffisant des mesures de protection prévues, demeurent fondamentaux pour cette analyse.

[56] Les fouilles, les perquisitions ou les saisies sans mandat — comme la saisie sur laquelle repose le RIAC — sont présumées abusives : *Hunter*, p. 161. Le fardeau d'établir le caractère raisonnable incombe donc à l'État.

[57] La Cour a généralement refusé d'énoncer un critère « absolu » du caractère raisonnable : voir *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, p. 495. À mon sens, cette approche souple demeure avérée. La Cour a néanmoins relevé certaines considérations qui peuvent être utiles dans l'analyse du caractère raisonnable, dont « la nature et

of the legislative scheme . . . , the mechanism . . . employed and the degree of its potential intrusiveness[, and the availability of judicial supervision”: *Del Zotto v. Canada*, [1997] 3 F.C. 40 (C.A.), per Strayer J.A., in dissenting reasons adopted by this Court in [1999] 1 S.C.R. 3.

(a) *Purpose of the ARP Scheme*

[58] The objective of removing impaired drivers from the roads is compelling. As the intervenor Mothers Against Drunk Driving argues, impaired driving is responsible for a devastating number of injuries and deaths annually in Canada, a burden of risk that falls disproportionately to young people.⁵ The ARP scheme was introduced as part of the Province’s objective of reducing driving fatalities caused by alcohol by 35 percent by the end of 2013.⁶

[59] The seizure of a driver’s breath through a roadside ASD analysis is the first step in the Province’s regulatory response to impaired driving, one that permits the Province to both identify and suspend the licences of drivers whose blood alcohol concentration exceeds 0.05. The breath demand is a critical component of the Province’s efforts to protect British Columbians from impaired drivers by suspending the privilege of driving for those who drive while impaired. This compelling purpose of preventing death and serious injuries on public highways weighs heavily in favour of the reasonableness of the breath seizure.

(b) *Nature of the ARP Scheme*

[60] This Court has recognized from its earliest s. 8 jurisprudence that the characterization of a search or seizure as either criminal or regulatory is

⁵ I.F., at para. 1, citing to S. Pitel and R. Solomon, “Estimating the Number and Cost of Impairment-Related Traffic Crashes in Canada: 1999 to 2010” (April 2013).

⁶ Chambers judge’s reasons, at para. 266.

l’objet du régime législatif [. . .]; le mécanisme employé [. . .] et le degré d’empiètement possible de ce mécanisme; et l’existence d’une supervision judiciaire » : *Del Zotto c. Canada*, [1997] 3 C.F. 40 (C.A.), le juge Strayer, dans ses motifs dissidents adoptés par la Cour dans [1999] 1 R.C.S. 3.

a) *L’objet du RIAC*

[58] L’objectif de chasser des routes les conducteurs aux facultés affaiblies est impérieux. Comme le fait valoir l’intervenante Les mères contre l’alcool au volant, la conduite avec facultés affaiblies est responsable d’un nombre alarmant de blessures et de décès chaque année au Canada, un risque auquel les jeunes sont exposés de façon disproportionnée⁵. Le RIAC a été mis en place dans le cadre de l’objectif de la Province de réduire les décès causés par l’alcool au volant de 35 pour 100 au plus tard à la fin de 2013⁶.

[59] La saisie de l’échantillon d’haleine d’un conducteur au moyen d’une analyse effectuée à l’aide d’un ADA lors d’un contrôle routier est la première étape de la réponse réglementaire de la Province à la conduite avec facultés affaiblies, réponse qui permet à la Province de repérer les conducteurs dont l’alcoolémie est supérieure à 0,05 et de suspendre leur permis. La demande d’échantillon d’haleine est un élément crucial des efforts déployés par la Province pour protéger les Britanno-Colombiens des conducteurs aux facultés affaiblies, en révoquant le privilège de conduire à ceux et à celles qui conduisent avec les facultés affaiblies. Cet objet impérieux d’empêcher les décès et les blessures graves sur les voies publiques milite fortement en faveur du caractère raisonnable de la saisie d’un échantillon d’haleine.

b) *La nature du RIAC*

[60] La Cour a reconnu dans ses premiers arrêts sur l’art. 8 que le caractère criminel ou réglementaire attribué à une fouille, à une perquisition ou à une

⁵ m.i., par. 1, où elle cite S. Pitel et R. Solomon, « Conduite avec facultés affaiblies – Estimation du nombre de collisions et des coûts afférents, 1999 à 2010 » (avril 2013).

⁶ Motifs du juge en chambre, par. 266.

relevant in assessing its reasonableness. Where an impugned law's purpose is regulatory and not criminal, it may be subject to less stringent standards: see *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at para. 52; *McKinlay Transport Ltd.*, at p. 647, per Wilson J.; *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757. As noted above, the proper characterization of the ARP scheme and the seizure of a driver's breath were hotly contested throughout these proceedings.

[61] The chambers judge identified a number of similarities between the ARP scheme and the criminal law, and concluded that although the scheme "is not criminal law for the purposes of the division of powers analysis, it is fair to say that it is not far removed as a matter of practice": para. 281. He also noted that, unlike many of the regulatory searches or seizures considered in the case law, the ARP scheme involves a seizure of a breath sample rather than a search or seizure of documents, and that the results of the seizure are not simply evidence that may be used at a subsequent proceeding, but are instead determinative of the resulting consequences, some of which are quite severe: paras. 281-84. These are all relevant considerations.

[62] The ASD test is the sole basis for the penalties and suspensions provided for in the ARP scheme. This is markedly different from the criminal context, in which the ASD test is only the first part in the *Criminal Code*'s two-step process for investigating drunk-driving offences. At this first stage, an officer need only have a reasonable suspicion that the driver has alcohol in their body: *R. v. Lindsay* (1999), 134 C.C.C. (3d) 159 (Ont. C.A.); *R. v. Butchko*, 2004 SKCA 159, [2005] 11 W.W.R. 95. However, these reduced protections for drivers at the roadside screening stage are counterbalanced by limitations on the use to which a potentially unreliable ASD result can be put. It has the limited role of constituting the grounds for a further breath demand, conducted using a breathalyser at a police station, and cannot

saisie est pertinent lorsqu'il s'agit d'en apprécier le caractère raisonnable. Lorsque l'objet de la loi contestée est de nature réglementaire et non criminelle, des normes moins sévères peuvent s'appliquer : voir *British Columbia Securities Commission c. Branch*, [1995] 2 R.C.S. 3, par. 52; *McKinlay Transport Ltd.*, p. 647, la juge Wilson; *R. c. Jarvis*, 2002 CSC 73, [2002] 3 R.C.S. 757. Comme je l'ai déjà dit, la qualification correcte du RIAC et de la saisie d'un échantillon d'haleine d'un conducteur a fait l'objet d'un âpre débat tout au long de l'instance.

[61] Le juge en chambre a relevé plusieurs similitudes entre le RIAC et le droit criminel et a conclu que, même si le régime [TRADUCTION] « ne ressortit pas au droit criminel pour les besoins de l'analyse du partage des compétences, il est juste de dire qu'il n'en est pas très éloigné en pratique » : par. 281. Il a également fait remarquer que, contrairement à bon nombre des fouilles, perquisitions ou saisies de nature réglementaire examinées dans la jurisprudence, le RIAC implique la saisie d'un échantillon d'haleine plutôt qu'une fouille, une perquisition ou une saisie de documents, et que les résultats de la saisie ne constituent pas simplement des éléments de preuve qui peuvent être utilisés dans un procès subséquent; ils sont plutôt déterminants quant aux conséquences qui en découlent, dont certaines sont assez graves : par. 281-284. Ces considérations sont toutes pertinentes.

[62] L'analyse effectuée au moyen d'un ADA est le seul fondement des sanctions et des suspensions prévues par le RIAC, ce qui est nettement différent du contexte criminel, où l'analyse effectuée au moyen d'un ADA ne constitue que la première étape de la procédure à deux volets établie dans le *Code criminel* pour enquêter sur des infractions de conduite en état d'ébriété. À ce premier stade, le policier n'a qu'à soupçonner raisonnablement le conducteur d'avoir de l'alcool dans son organisme : *R. c. Lindsay* (1999), 134 C.C.C. (3d) 159 (C.A. Ont.); *R. c. Butchko*, 2004 SKCA 159, [2005] 11 W.W.R. 95. Toutefois, ces protections réduites pour les conducteurs à l'étape de la détection routière sont contrebalancées par des restrictions imposées à l'utilisation que l'on peut faire du résultat (potentiellement non

alone establish an offence under the *Criminal Code*: s. 254(3).

[63] Driving on highways is, of course, a highly regulated activity, and drivers expect that the rules of the road will be enforced. This reality, combined with the scheme's location within a broader regulatory framework targeting driving and highway safety, supports characterizing the regime as regulatory and applying a more flexible standard in assessing its reasonableness. However, other features of the scheme suggest that closer scrutiny is required to ensure the state does not unreasonably interfere with a driver's privacy interest. First, while the breath seizure occurs for a regulatory purpose, it nonetheless has certain criminal-like features, such as its administration by a police officer pursuant to *Criminal Code* authorization. Second, while the consequences that follow a "fail" reading or the failure to provide a sample are not criminal, they are immediate and serious, and arise without a further test using a (more reliable) breathalyser.

(c) *The Mechanism of Seizure: The ASD Test*

[64] The mechanism for determining whether a driver's blood alcohol concentration exceeds the relevant limits is a roadside test using an ASD. The specific features of the ASD test are relevant to the reasonableness analysis in two respects.

[65] The first is the degree of intrusiveness of the ASD test on a driver's bodily integrity and privacy interests. More intrusive than a demand for documents, a breath demand clearly amounts to what La Forest J. described as "the use of a person's body without his consent to obtain information about him" by which the state "invades an area of

fiable) d'un ADA. Ce résultat a pour fonction limitée de justifier une autre analyse d'échantillon d'haleine, effectuée au moyen d'un alcootest dans un poste de police, et ne peut à lui seul établir une infraction au *Code criminel* : par. 254(3).

[63] Bien entendu, la conduite automobile sur une voie publique est une activité très réglementée, et les conducteurs s'attendent à ce que le code de la route soit appliqué. Cette réalité, conjuguée au fait que le régime s'inscrit dans un cadre réglementaire plus large visant la conduite et la sécurité routière, permet de qualifier le régime de réglementaire et d'appliquer une norme plus souple pour en apprécier le caractère raisonnable. Toutefois, d'autres éléments du régime tendent à indiquer qu'un examen plus attentif est nécessaire pour empêcher que l'État porte abusivement atteinte au droit d'un conducteur à la vie privée. Premièrement, bien que la saisie d'un échantillon d'haleine se fasse à des fins réglementaires, elle possède néanmoins des caractéristiques qui s'apparentent au droit criminel, comme le fait qu'elle soit administrée par un policier conformément à une autorisation accordée par le *Code criminel*. Deuxièmement, si les conséquences du résultat « échec » ou du défaut de fournir un échantillon d'haleine ne sont pas criminelles, elles sont néanmoins immédiates et graves et surviennent sans qu'une autre analyse ne soit effectuée au moyen d'un alcootest (plus fiable).

c) *Le mécanisme de saisie : l'analyse effectuée au moyen d'un ADA*

[64] Pour déterminer si l'alcoolémie d'un conducteur dépasse la limite permise, on administre un alcootest au moyen d'un ADA. Les caractéristiques précises de l'analyse effectuée au moyen d'un ADA sont pertinentes pour juger du caractère raisonnable à deux égards.

[65] Le premier est le degré d'atteinte de l'analyse effectuée au moyen d'un ADA à l'intégrité physique et au droit à la vie privée d'un conducteur. Plus envahissante qu'une demande de documents, une demande d'échantillon d'haleine équivaut clairement à ce que le juge La Forest a décrit comme « l'utilisation du corps d'une personne, sans son

personal privacy essential to the maintenance of his human dignity”: *R. v. Dymont*, [1988] 2 S.C.R. 417, at pp. 431-32. However, a roadside ASD test is far less intrusive than many other searches or seizures that may be performed for law enforcement purposes, such as the blood sample at issue in *Dymont*, or a DNA swab, which contains deeply personal information: *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678, at para. 48. The roadside breath demand authorized by the *Criminal Code* has a much less significant impact on an individual’s bodily integrity and privacy interests: *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 90. This minimally intrusive character supports the reasonableness of the ASD seizure.

[66] However, the use of an ASD to obtain a breath sample also raises concerns that undermine the reasonableness of the seizure, specifically regarding the reliability of test results. The chambers judge concluded, based upon the evidence, that owing to an ASD’s inability to account for the presence of mouth alcohol, “in some circumstances there can be serious issues concerning whether an ASD accurately reflects blood-alcohol readings”: paras. 286-92.

[67] The reliability of a search or seizure mechanism is directly relevant to the reasonableness of the search or seizure itself: *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at para. 48. As noted in *Chehil*, “[a] method of searching that captures an inordinate number of innocent individuals cannot be reasonable”: para. 51. By contrast, a high degree of accuracy has been crucial to endorsing sniffer-dog searches on a lower standard of reasonable suspicion: *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569, at para. 11; see also *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456.

consentement, en vue d’obtenir des renseignements à son sujet » par laquelle l’État commet « une atteinte à une sphère de la vie privée essentielle au maintien de sa dignité humaine » : *R. c. Dymont*, [1988] 2 R.C.S. 417, p. 431-432. Toutefois, un alcootest administré au moyen d’un ADA est beaucoup moins envahissant que bien d’autres fouilles, perquisitions ou saisies qui peuvent être effectuées aux fins d’application de la loi, comme le prélèvement de l’échantillon de sang en cause dans l’arrêt *Dymont* ou le prélèvement d’ADN qui dévoile des renseignements très personnels : *R. c. S.A.B.*, 2003 CSC 60, [2003] 2 R.C.S. 678, par. 48. La demande d’alcootest autorisée par le *Code criminel* a des répercussions beaucoup moins importantes sur l’intégrité physique et le droit à la vie privée d’une personne : *R. c. Stillman*, [1997] 1 R.C.S. 607, par. 90. Cette atteinte minimale étaye le caractère raisonnable de la saisie faite au moyen d’un ADA.

[66] Toutefois, l’utilisation d’un ADA pour obtenir un échantillon d’haleine soulève elle aussi des préoccupations qui minent le caractère raisonnable de la saisie, plus particulièrement quant à la fiabilité des résultats d’analyse. Le juge en chambre a conclu, sur la foi de la preuve, que, comme un ADA ne peut tenir compte de la présence d’alcool dans la bouche, [TRADUCTION] « il peut y avoir de sérieux doutes dans certains cas quant à savoir si un ADA indique avec exactitude les mesures d’alcoolémie » : par. 286-292.

[67] La fiabilité du mécanisme de fouille, de perquisition ou de saisie est directement liée au caractère raisonnable de la fouille, de la perquisition ou de la saisie elle-même : *R. c. Chehil*, 2013 CSC 49, [2013] 3 R.C.S. 220, par. 48. Comme la Cour l’a indiqué dans l’arrêt *Chehil*, « [u]ne méthode de fouille qui aurait pour effet de viser un nombre démesuré de personnes innocentes ne saurait être jugée non abusive » : par. 51. À l’opposé, une grande fiabilité s’est révélée cruciale pour confirmer la validité des fouilles effectuées à l’aide de chiens renifleurs selon la norme moins rigoureuse des soupçons raisonnables : *R. c. A.M.*, 2008 CSC 19, [2008] 1 R.C.S. 569, par. 11; voir également *R. c. Kang-Brown*, 2008 CSC 18, [2008] 1 R.C.S. 456.

[68] While the ARP scheme as enacted in 2010 allowed a driver to obtain a second analysis with a different ASD upon request, it placed no obligation on the police officer to advise the driver of this right: *MVA*, s. 215.42(1) and (2). The ARP scheme also required that the second analysis would govern, regardless of whether it was higher or lower than the initial reading: s. 215.42(3). While a second test with a second device may significantly help resolve the reliability concerns raised by roadside ASD testing, the availability of this safeguard could prove illusory where a driver is unaware of its existence, particularly where there is no guarantee that the lower result will prevail. Absent meaningful safeguards to ensure reliability, this factor raises serious concerns about the reasonableness of the law authorizing the seizure.

(d) *Availability of Judicial Oversight*

[69] Much of the disagreement between the parties hinges on the availability of judicial oversight, and on the significance of the availability of review in the s. 8 analysis. The drivers argue, and the chambers judge agreed, that the inability of a driver to meaningfully challenge both the basis for and, more importantly, the accuracy of the ASD test renders the roadside breath demand an unreasonable seizure. The Province counters that including such procedural considerations in the s. 8 analysis distorts the scope of s. 8, and that these considerations should instead be addressed under either s. 7 or administrative law principles.

[70] This is not the first time this Court has considered the significance of procedural safeguards in a s. 8 analysis. Although the adequacy of such safeguards will often be challenged under s. 7, this Court recognized in *R. v. Mills*, [1999] 3 S.C.R. 668, that the right to full answer and defence is a relevant consideration when assessing the reasonableness of a search or seizure: para. 88; see also

[68] Si le RIAC qui a été mis en place en 2010 autorisait le conducteur à obtenir sur demande une deuxième analyse faite au moyen d'un autre ADA, il n'obligeait aucunement le policier à aviser le conducteur de ce droit : *MVA*, par. 215.42(1) et (2). Le RIAC prescrivait en outre que la deuxième analyse ait préséance, que la lecture obtenue soit plus élevée ou plus basse que la lecture initiale : par. 215.42(3). Bien qu'une deuxième analyse effectuée au moyen d'un deuxième appareil puisse grandement aider à dissiper les doutes concernant la fiabilité de l'alcootest administré au moyen d'un ADA, la possibilité de se prévaloir de cette mesure de protection pourrait s'avérer illusoire lorsque le conducteur n'est pas au courant de son existence, particulièrement lorsqu'il n'y a aucune garantie que le résultat le plus bas l'emportera. En l'absence de mesures de protection significatives assurant la fiabilité, ce facteur suscite de sérieux doutes au sujet du caractère raisonnable de la loi autorisant la saisie.

d) *La possibilité d'avoir recours à la surveillance judiciaire*

[69] Une bonne partie du désaccord entre les parties porte sur la possibilité d'avoir recours à la surveillance judiciaire et sur l'importance de pouvoir recourir au contrôle dans le cadre de l'analyse fondée sur l'art. 8. Les conducteurs font valoir, et le juge en chambre convient avec eux, que comme le conducteur ne peut valablement contester ni le fondement ni, plus important encore, l'exactitude de l'analyse effectuée au moyen d'un ADA, la demande d'alcootest constitue une saisie abusive. La Province réplique que le fait d'inclure de telles considérations procédurales dans l'analyse fondée sur l'art. 8 dénature la portée de cet article, et que ces considérations devraient plutôt être abordées sous l'angle de l'art. 7 ou des principes de droit administratif.

[70] Ce n'est pas la première fois que la Cour traite de l'importance des mesures de protection procédurales dans une analyse fondée sur l'art. 8. Bien que le caractère suffisant de ces mesures soit souvent contesté sur le fondement de l'art. 7, la Cour a reconnu dans l'arrêt *R. c. Mills*, [1999] 3 R.C.S. 668, que le droit à une défense pleine et entière est une considération pertinente lorsqu'il

S.A.B., at para. 35. In *Hunter*, Dickson J. concluded that an unreviewable, discretionary power of search and seizure would be contrary to s. 8: p. 166. More recently, in *Chehil*, the “reasonable suspicion” standard for sniffer-dog searches was held to respect the s. 8 balance because of subsequent judicial oversight “that prevents indiscriminate and discriminatory breaches of privacy interests by ensuring that the police have an objective and reasonable basis” for the privacy interference: para. 25.

[71] Although both *Hunter* and *Chehil* concern review of the lawfulness of a search, rather than the use or reliability of its findings, in my view similar considerations apply, especially where the consequences of the seizure follow automatically and immediately. The nature of the review required will of course vary with the circumstances, including the nature of the scheme. On the other hand, the availability of oversight is particularly important where, as here, a search or seizure occurs without prior authorization: *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 84. While less exacting review may be sufficient in a regulatory context, the availability and adequacy of review is nonetheless relevant to reasonableness under s. 8.

[72] In my view, the chambers judge was correct to consider the scope and availability of review as part of his analysis under s. 8. While s. 8 is not primarily concerned with issues of procedural fairness and safeguards, the restrictive review of the basis and consequences of the breath demand was a central feature of the ARP scheme, particularly given the concerns about the reliability of the ASD, the lack of an intermediate step between the ASD analysis and the roadside suspension, and the immediacy

s’agit d’apprécier le caractère raisonnable d’une fouille, d’une perquisition ou d’une saisie : par. 88; voir également *S.A.B.*, par. 35. Dans *Hunter*, le juge Dickson a conclu qu’un pouvoir discrétionnaire de fouille, de perquisition et de saisie non susceptible de révision serait contraire à l’art. 8 : p. 166. Plus récemment, dans l’arrêt *Chehil*, la Cour a jugé que la norme des « soupçons raisonnables » applicable aux fouilles effectuées à l’aide d’un chien renifleur respectait l’équilibre établi par l’art. 8 en raison d’un contrôle judiciaire ultérieur qui « permet [. . .] d’empêcher les atteintes aveugles et discriminatoires au droit à la vie privée, les tribunaux vérifiant que l’atteinte policière à l’attente raisonnable en matière de vie privée repose bel et bien sur un fondement objectif et raisonnable » : par. 25.

[71] Bien que les arrêts *Hunter* et *Chehil* portent tous deux sur le contrôle de la légalité d’une fouille ou d’une perquisition plutôt que sur l’utilisation ou la fiabilité des résultats de cette fouille, je suis d’avis que des considérations similaires s’appliquent, surtout dans les cas où les conséquences de la saisie s’ensuivent automatiquement et sur-le-champ. Évidemment, la nature du contrôle nécessaire varie selon les circonstances, y compris la nature du régime. Par ailleurs, la possibilité de recourir à la surveillance après coup est particulièrement importante lorsque, comme en l’espèce, une fouille, une perquisition ou une saisie a lieu sans autorisation préalable : *R. c. Tse*, 2012 CSC 16, [2012] 1 R.C.S. 531, par. 84. Même si un contrôle moins rigoureux peut se révéler suffisant dans un contexte réglementaire, la possibilité de recourir au contrôle et l’efficacité de celui-ci sont néanmoins pertinentes pour juger du caractère raisonnable sur le fondement de l’art. 8.

[72] À mon sens, le juge en chambre a eu raison d’examiner l’étendue du contrôle et la possibilité d’y recourir dans son analyse fondée sur l’art. 8. Bien que l’art. 8 ne vise pas principalement des questions d’équité procédurale et de mesures de protection, l’examen limité du fondement et des conséquences de la demande d’échantillon d’haleine était un élément central du RIAC, surtout compte tenu des doutes concernant la fiabilité de l’ADA, de l’absence d’une étape intermédiaire

of the penalties that ensue. A driver's ability to challenge the accuracy of the ASD result is thus critical to the reasonableness of the ARP scheme.

[73] It is common ground that the ARP scheme permits a driver to apply to the Superintendent for review of a driving prohibition, and that the Superintendent's decision is subject to judicial review. However, the process for review of suspensions under the ARP regime only permits the Superintendent to consider two issues: whether the applicant was a "driver" and whether the ASD registered a "fail", "warn", or the applicant refused to provide a sample. If both criteria are met, the Superintendent is required to confirm the suspension: s. 215.5(1). The chambers judge concluded that "[t]he result of the limited scope of review is that if a driver did not have a blood-alcohol level over 0.08 or 0.05 at the time of the prohibition, he or she still cannot challenge the suspension based on the roadside screening device": para. 305.

[74] The Chief Justice raises the possibility that the Superintendent could hear challenges to the reasonableness of the manner in which a search or seizure is conducted under s. 8 of the *Charter*. These reasons should not be taken as expressing an opinion on this point. However, this case is not about the reasonableness of a police officer's behaviour in conducting a particular seizure. It concerns a more fundamental issue: whether the law authorizing the seizure is itself reasonable. The fact that a driver may be able to challenge the conduct of a particular seizure does not resolve whether the ARP scheme itself complies with s. 8.

[75] While I agree with the Chief Justice that the administrative nature of the scheme justifies the administrative nature of the review, this does not, in my view, resolve the issue of whether the scope of such review is adequate in the circumstances. I agree with the chambers judge's conclusion that the

entre l'analyse effectuée au moyen d'un ADA et la suspension imposée lors d'un contrôle routier et de l'immédiateté des sanctions qui s'ensuivent. La possibilité pour le conducteur de contester l'exactitude du résultat de l'ADA est donc essentielle au caractère raisonnable du RIAC.

[73] Il est admis que le RIAC permet à un conducteur de demander au Surintendant la révision d'une interdiction de conduire et que la décision du Surintendant est susceptible de contrôle judiciaire. Toutefois, la procédure de contrôle des suspensions imposées en application du RIAC permet seulement au Surintendant de trancher deux questions : le demandeur était-il un « conducteur » et l'ADA a-t-il affiché le résultat « échec » ou « avertissement », ou le demandeur a-t-il refusé de fournir un échantillon? Si les deux conditions sont remplies, le Surintendant est tenu de confirmer la suspension : par. 215.5(1). Le juge en chambre a conclu qu'en [TRADUCTION] « raison de la portée limitée de l'examen, le conducteur dont l'alcoolémie n'est pas supérieure à 0,08 ou à 0,05 au moment de l'interdiction ne peut tout de même pas contester la suspension sur la base de l'appareil de détection » : par. 305.

[74] La Juge en chef évoque la possibilité que le Surintendant connaisse des contestations, fondées sur l'art. 8 de la *Charte*, du caractère raisonnable de la manière dont une fouille, une perquisition ou une saisie a été effectuée. Il ne faut pas voir les présents motifs comme l'expression d'une opinion sur ce point. Toutefois, la présente affaire ne porte pas sur le caractère raisonnable du comportement d'un policier qui fait une saisie en particulier. Elle porte sur une question plus fondamentale : la loi qui autorise la saisie est-elle en soi raisonnable? La possibilité pour un conducteur de contester la manière dont une saisie en particulier a été opérée ne règle pas la question de savoir si le RIAC lui-même est conforme à l'art. 8.

[75] Bien que je partage l'avis de la Juge en chef selon lequel la nature administrative du régime justifie la nature administrative du contrôle, j'estime que la question de savoir si la portée d'un tel contrôle est suffisante dans les circonstances n'est pas réglée pour autant. Je souscris à la conclusion

absence of meaningful review of the accuracy of the result of the seizure, in light of the unreliability of the test, raises concerns about the reasonableness of the ARP scheme. Absent such review, a driver could find herself facing serious administrative sanctions without the precondition for the sanctions being met, and without any mechanism for redress.

(4) Conclusion on Section 8

[76] The chambers judge found that the serious consequences of a driver registering a “fail”, combined with an inability to challenge the basis on which these consequences are imposed, rendered the ARP scheme unreasonable. I agree.

[77] The ARP scheme as enacted in 2010 depends entirely on the results from a test conducted using an ASD, a device known to produce false positives where mouth alcohol is present. Despite this defect regarding ASD reliability, the scheme provides no meaningful opportunity to challenge a licence suspension issued under this scheme on the basis that the result is unreliable. In the particular circumstances of these appeals, in which a “fail” result automatically triggers serious consequences for a driver without the possibility of review, the scheme fails to provide adequate safeguards. Thus, despite the pressing objective and minimal intrusiveness of the seizure, the ARP scheme fails to strike a reasonable balance between the interests of the state against those of individual motorists, and infringes drivers’ s. 8 rights.

[78] I need not determine whether the same result follows where the “warn” scheme is concerned. The chambers judge’s finding of the s. 8 breach related only to the “fail” branch. In some aspects, he drew a distinction between the two branches. There was no cross-appeal in the Court of Appeal or before us regarding his finding that the “warn” branch of the regime did not infringe s. 8 of the *Charter*. As a result, it is not properly before us. In these circumstances, I

du juge en chambre que l’absence d’un contrôle valable de l’exactitude du résultat de la saisie, vu la non-fiabilité du test, suscite des doutes concernant le caractère raisonnable du RIAC. En l’absence d’un tel contrôle, le conducteur pourrait se voir imposer de graves sanctions administratives sans que les conditions préalables à l’imposition des sanctions ne soient réunies et sans qu’il ne puisse bénéficier d’un mécanisme pour obtenir réparation.

(4) Conclusion sur l’art. 8

[76] Le juge en chambre a conclu que les graves conséquences subies par le conducteur qui échoue au test, conjuguées à l’impossibilité pour lui de contester le motif pour lequel ces conséquences sont imposées, rendent le RIAC abusif. Je suis du même avis.

[77] Le RIAC mis en place en 2010 dépend entièrement des résultats d’un test administré à l’aide d’un ADA, un appareil reconnu pour donner de faux résultats positifs lorsqu’il y a de l’alcool dans la bouche de l’intéressé. Malgré ce vice entachant la fiabilité de l’ADA, le régime ne permet pas réellement de contester la suspension d’un permis imposée en application de ses dispositions au motif que le résultat n’est pas fiable. Dans les circonstances particulières des présents pourvois, où un « échec » entraîne automatiquement de graves conséquences pour un conducteur sans possibilité de contrôle, le régime ne prévoit pas de mesures de protection adéquates. Ainsi, malgré l’objectif urgent et l’atteinte minimale portée par la saisie, le RIAC n’établit pas un équilibre raisonnable entre les intérêts de l’État et ceux des automobilistes et porte atteinte aux droits garantis aux conducteurs par l’art. 8.

[78] Je n’ai pas à décider si le volet « avertissement » du régime mène au même résultat. La conclusion du juge en chambre que l’art. 8 a été violé intéressait uniquement le volet « échec ». À certains égards, il a établi une distinction entre les deux volets. Aucun appel incident n’a été formé devant la Cour d’appel ou la Cour contre sa conclusion selon laquelle le volet « avertissement » du régime ne contrevenait pas à l’art. 8 de la *Charte*.

prefer not to address the issue. I note that to the extent that the legislative amendments addressed both the “warn” and “fail” aspects of the programme, this issue is moot.

D. Is the Seizure in the ARP Scheme Saved Under Section 1?

[79] The Province bears the burden of justifying the violation of s. 8 under s. 1 of the *Charter*. To do so, it must demonstrate, on a balance of probabilities, that the ARP scheme has a pressing and substantial objective and that the means chosen to achieve that objective are proportionate. The proportionality test comprises three inquiries: (1) whether the means adopted are rationally connected to the objective, (2) whether the law is minimally impairing of the violated right, and (3) whether the deleterious and salutary effects of the law are proportionate to each other; see *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 111; *R. v. Oakes*, [1986] 1 S.C.R. 103.

[80] I agree with the chambers judge that the objective of the scheme is “to remove impaired drivers from the highway and keep them off the highway”: para. 357. The parties do not dispute that this objective is pressing and substantial.

[81] Further, I agree with the chambers judge that the automatic prohibitions from driving based on roadside screening are rationally connected to the “objective of reducing death and injury caused by impaired driving”: para. 360.

[82] At the second stage of the proportionality test, the Province must establish that the ARP scheme minimally impairs the s. 8 right in pursuit of its objective. This inquiry does not require the government to adopt the least impairing measure, but rather one “that falls within a range of reasonable alternatives”: *Mounted Police Association of*

Par conséquent, nous ne sommes pas régulièrement saisis de cette conclusion. Dans les circonstances, je préfère ne pas me prononcer sur ce point. Je signale que, dans la mesure où les modifications législatives traitaient à la fois de l’aspect « avertissement » et de l’aspect « échec » du programme, cette question est théorique.

D. L’article premier sauvegarde-t-il la saisie prévue par le RIAC?

[79] Il incombe à la Province de justifier la violation de l’art. 8 en vertu de l’article premier de la *Charte*. Pour ce faire, elle doit démontrer, selon la prépondérance des probabilités, que le RIAC a un objectif urgent et réel et que les moyens choisis pour réaliser cet objectif sont proportionnels. Le critère de proportionnalité comporte trois questions : (1) existe-t-il un lien rationnel entre les moyens choisis et l’objectif; (2) la loi porte-t-elle atteinte de façon minimale au droit violé; (3) les effets préjudiciables et les effets bénéfiques de la loi sont-ils proportionnels entre eux; voir *R. c. Nur*, 2015 CSC 15, [2015] 1 R.C.S. 773, par. 111; *R. c. Oakes*, [1986] 1 R.C.S. 103.

[80] Je conviens avec le juge en chambre que l’objectif du régime est [TRADUCTION] « de chasser des routes les conducteurs aux facultés affaiblies et de les empêcher de conduire à nouveau » : par. 357. Les parties s’entendent pour dire que cet objectif est urgent et réel.

[81] En outre, je partage l’avis du juge en chambre qu’il existe un lien rationnel entre les interdictions automatiques de conduire fondées sur une analyse faite lors d’un contrôle routier et [TRADUCTION] « l’objectif de réduire les décès et les blessures causés par la conduite avec facultés affaiblies » : par. 360.

[82] À la deuxième étape du critère de proportionnalité, la Province doit établir que le RIAC porte atteinte de façon minimale au droit garanti par l’art. 8 dans la poursuite de son objectif. À cette étape, le gouvernement n’est pas tenu d’adopter la mesure la moins attentatoire possible, mais celle qu’il choisit doit « se situer à l’intérieur d’une

TAB 96

Jean-Claude Garofoli *Appellant*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: R. V. GAROFOLI

File No.: 21099.

1989: October 3, 4; 1990: November 22.

Present: Dickson C.J.* and Lamer C.J.** and
La Forest, L'Heureux-Dubé, Sopinka, Gonthier and
McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

Criminal law — Interception of private communications — Access to sealed packet — Validity of wiretap authorizations — Grounds for challenging authorizations and appropriate remedies — Protection of identity of informers — Editing of affidavits — Entitlement of accused to cross-examine on affidavits — Criminal Code, R.S.C. 1970, c. C-34, Part IV.1.

Criminal law — Interception of private communications — Admissibility of evidence — Relationship between s. 178.16 of Criminal Code and s. 24(2) of Canadian Charter of Rights and Freedoms.

Constitutional law — Charter of Rights — Unreasonable search and seizure — Interception of private communications — Judge failing to include minimization clause in wiretap authorizations — Whether authorizations violate s. 8 of Canadian Charter of Rights and Freedoms.

Appellant was charged with conspiring to import a narcotic. The evidence against him was derived largely from private communications intercepted pursuant to wiretap authorizations. At the conclusion of a *voir dire* to determine the admissibility of the intercepted communications, the trial judge refused to order the opening of the sealed packets containing the affidavits upon which the authorizations were granted and found the wiretap evidence to be admissible. He convicted appellant. Relying on its decision in *Playford*, released after the trial judge's ruling, the Court of Appeal found that appellant was entitled to have access to the sealed packets. The affidavits were edited to protect confidential informants and then released to him. The court found that the editing did not impair counsel's ability to determine the facial validity of the affidavits, that the

Jean-Claude Garofoli *Appelant*

c.

Sa Majesté la Reine *Intimée*

a

RÉPERTORIÉ: R. C. GAROFOLI

N° du greffe: 21099.

1989: 3, 4 octobre; 1990: 22 novembre.

b

Présents: Le juge en chef Dickson*, le juge en chef Lamer** et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier et McLachlin.

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

c

Droit criminel — Interception de communications privées — Accès au paquet scellé — Validité d'autorisations d'écoute électronique — Motifs de contestation des autorisations et recours appropriés — Protection de l'identité des informateurs — Révision des affidavits — Droit de l'accusé de contre-interroger au sujet des affidavits — Code criminel, S.R.C. 1970, ch. C-34, partie IV.1.

e

Droit criminel — Interception de communications privées — Recevabilité de la preuve — Rapports entre l'art. 178.16 du Code criminel et l'art. 24(2) de la Charte canadienne des droits et libertés.

f

Droit constitutionnel — Charte des droits — Fouilles, perquisitions et saisies abusives — Interception de communications privées — Omission du juge d'inclure une clause de minimisation dans les autorisations d'écoute électronique — Les autorisations violent-elles l'art. 8 de la Charte canadienne des droits et libertés?

g

L'appelant a été accusé de complot en vue d'importer un stupéfiant. La preuve contre lui provenait en grande partie de communications privées interceptées en vertu d'autorisations d'écoute électronique. À la fin d'un *voir dire* sur la recevabilité des communications interceptées, le juge du procès a refusé d'ordonner l'ouverture des paquets scellés contenant les affidavits sur la foi desquels les autorisations avaient été accordées et il a statué que la preuve obtenue par écoute électronique était recevable. Il a déclaré l'appelant coupable. Se fondant sur l'arrêt *Playford*, qu'elle avait rendu après la décision du juge de première instance, la Cour d'appel a jugé que l'appelant avait droit d'accès aux paquets scellés. Les affidavits ont été révisés pour protéger des informateurs et communiqués à l'appelant. La cour a conclu que la révision ne compromettait pas la capacité de l'avocat

* Chief Justice at the time of hearing.

** Chief Justice at the time of judgment.

* Juge en chef à la date de l'audition.

** Juge en chef à la date du jugement.

The result is that the statutory requirements of s. 178.13(1)(a) are identical to the constitutional requirements. An authorizing judge must, therefore, be satisfied on the basis of the affidavit evidence that these conditions have been met.

Challenging the Authorization

The current state of the law with respect to testing the admissibility of wiretap evidence is a procedural quagmire. The various procedures that are available have come to be known by the names of the cases that initiated them.

First there is a "*Parsons voir dire*," named after *R. v. Parsons* (1977), 37 C.C.C. (2d) 497 (Ont. C.A.), aff'd [1980] 1 S.C.R. 785, *sub nom. Charette v. The Queen*. The function of this hearing before the trial judge is to determine such issues as whether the authorization is valid on its face, whether the police executed the interception within the terms of the authorization, and whether statutory requirements such as reasonable notice were complied with. The remedy is exclusion under s. 178.16. The second is the "*Wilson* application". This hearing takes place before the issuing court, to determine the substantive or subfacial validity of the affidavit. The remedy is the setting aside of the authorization. **The third is a "*Garofoli* hearing". This is a hearing before the trial judge to determine the compliance of the authorization with s. 8 of the *Charter*. The remedy is a determination under s. 24(2) of the *Charter*.** The fourth, and last, procedure is a "*Vanweenan* hearing", so-called after one of the appellants in *R. v. Chesson*, [1988] 2 S.C.R. 148. This again is a *voir dire* before the trial judge, but with the object of determining whether the authorization names all "known" persons as required by ss. 178.12(1)(e) and 178.13(2)(c). The remedy again is exclusion under s. 178.16.

Consolidation of the *Parsons*, *Garofoli* and *Vanweenan* hearings presents no difficulty, and is in keeping with the view of this Court that all matters that relate to the conduct of the trial

Il en résulte que les exigences de l'al. 178.13(1)a) sont identiques aux exigences constitutionnelles. Le juge qui accorde l'autorisation doit donc être convaincu, au vu de la preuve par affidavit, que ces conditions ont été remplies.

La contestation de l'autorisation

L'état actuel du droit en matière de contestation de la recevabilité d'une preuve recueillie par écoute électronique est un fouillis procédural. Les diverses procédures existantes ont fini par prendre le nom de l'affaire dans laquelle elles ont été invoquées.

Il y a d'abord le «voir-dire de type *Parsons*», selon l'arrêt *R. v. Parsons* (1977), 37 C.C.C. (2d) 497 (C.A. Ont.); conf. par [1980] 1 R.C.S. 785, *sub nom. Charette c. La Reine*. Le but de cette audience tenue devant le juge du procès est de répondre à des questions tels la validité apparente de l'autorisation, le respect par les policiers qui ont pratiqué l'interception des conditions de l'autorisation et le respect des exigences légales, comme l'avis raisonnable. La réparation est l'exclusion en vertu de l'art. 178.16. Le deuxième moyen de contestation est la «demande de type *Wilson*». Cette audience se tient devant le tribunal qui a accordé l'autorisation pour déterminer si l'affidavit est valide quant au fond. La réparation est l'annulation de l'autorisation. Le troisième moyen est une «audience de type *Garofoli*». Il s'agit d'une audience devant le juge du procès, qui a pour objet de déterminer si l'autorisation est conforme à l'art. 8 de la *Charte*. La réparation est une décision en vertu du par. 24(2) de la *Charte*. Le quatrième et dernier moyen est une «audience de type *Vanweenan*», selon le nom d'un des appelants dans l'arrêt *R. c. Chesson*, [1988] 2 R.C.S. 148. Il s'agit encore d'un voir-dire tenu devant le juge du procès, mais en vue de déterminer si l'autorisation identifie toutes les personnes «connu[es]» comme l'exigent les al. 178.12(1)e) et 178.13(2)c). La réparation est encore une fois l'exclusion en vertu de l'art. 178.16.

La réunion des audiences de type *Parsons*, *Garofoli* et *Vanweenan* ne présente aucune difficulté et est conforme à l'opinion de notre Cour que toutes les questions qui portent sur la conduite du

To succeed on an appeal from an acquittal under s. 613(4) of the *Criminal Code* the Crown must satisfy the appellate court that the trial judge erred and that the result would not necessarily have been the same if he had not so erred: *R. v. McMillan* (1975), 23 C.C.C. (2d) 160, 7 O.R. (2d) 750, 20 C.R.N.S. 191, and *Vezeau v. The Queen* (1976), 28 C.C.C. (2d) 81, 66 D.L.R. (3d) 418, [1977] 2 S.C.R. 277.

The language of s. 178.14 (now s. 187) will continue to require an application to open before a judge referred to therein. In some cases, this will not be the trial judge. I have referred in *Dersch* to the desirability of a legislative amendment to enable the trial judge to order the opening of the packet.

Grounds for Review

In *R. v. Collins*, [1987] 1 S.C.R. 265, Lamer J. (as he then was) set out the basic test for determining the reasonableness of a search under s. 8 of the *Charter*. He stated, at p. 278:

A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable.

In *Hunter v. Southam, supra*, this Court set out the basic requirements with respect to prior authorizations. In *Duarte, supra*, this Court decided that s. 178.13(1)(a) complies with these standards, and that before granting an authorization, a judge must be satisfied by affidavit that there are reasonable and probable grounds to believe that:

- (a) a specified crime has been or is being committed; and,
- (b) the interception of the private communication in question will afford evidence of the crime.

To arrive at the conclusion that the search is authorized by law, the reviewing judge must therefore conclude that these conditions were complied with. If he concludes that they were not, then the

[TRANSLATION] Pour avoir gain de cause dans un appel interjeté contre l'acquiescement en vertu du par. 613(4) du *Code criminel*, le ministère public doit convaincre la cour d'appel que le juge du procès a commis une erreur et que le résultat n'aurait pas nécessairement été le même s'il n'avait pas commis cette erreur: *R. v. McMillan* (1975), 23 C.C.C. (2d) 160, 7 O.R. (2d) 750, 20 C.R.N.S. 191, et *Vezeau v. The Queen* (1976), 28 C.C.C. (2d) 81, 66 D.L.R. (3d) 418, [1977] 2 R.C.S. 277.

Les termes de l'art. 178.14 (maintenant l'art. 187) vont continuer à exiger qu'une demande d'ouverture du paquet soit présentée devant un juge mentionné dans cette disposition. Dans certains cas, il ne s'agira pas du juge du procès. J'ai mentionné dans l'arrêt *Dersch* qu'il est souhaitable qu'une modification législative soit apportée pour permettre au juge du procès d'ordonner l'ouverture du paquet.

Les moyens de révision

Dans l'arrêt *R. c. Collins*, [1987] 1 R.C.S. 265, le juge Lamer (aujourd'hui Juge en chef) a formulé le critère fondamental pour déterminer le caractère raisonnable d'une perquisition ou d'une fouille en vertu de l'art. 8 de la *Charte*. Il a affirmé, à la p. 278:

Une fouille ne sera pas abusive si elle est autorisée par la loi, si la loi elle-même n'a rien d'abusif et si la fouille n'a pas été effectuée d'une manière abusive.

Dans l'arrêt *Hunter c. Southam*, précité, notre Cour a formulé les exigences fondamentales quant aux autorisations préalables. Dans l'arrêt *Duarte*, précité, notre Cour a décidé que l'al. 178.13(1)a) est conforme à ces normes et qu'avant d'accorder une autorisation un juge doit être convaincu par affidavit qu'il existe des motifs raisonnables et probables de croire que:

- a) un crime particulier a été commis ou est commis;
- b) l'interception de la communication privée en question en procurera une preuve.

Pour conclure que la perquisition ou la fouille est permise par la loi, le juge qui siège en révision doit donc conclure que ces conditions ont été respectées. S'il conclut qu'elles ne l'ont pas été, la

search is not authorized by law and is unlawful. Consequently, in order to discharge the duty cast upon the reviewing judge to determine whether there has been a breach of s. 8, he or she must determine whether the *Code* provisions have been satisfied. This is the inevitable result of the statutory conditions being identical to the requirements of s. 8. Whereas *Wilson* precluded a review of the authorizing judge's decision that the statutory conditions had been complied with, unless some ground such as fraud or new evidence was established, the application of s. 8 requires review as a step in determining the reasonableness of the search and seizure.

While a judge exercising this relatively new power need not comply with the *Wilson* criteria, he should not review the authorization *de novo*. The correct approach is set out in the reasons of Martin J.A. in this appeal. He states, at p. 119:

If the *trial judge* concludes that, on the material before the authorizing judge, there was no basis upon which he could be satisfied that the pre-conditions for the granting of the authorization exist, then, it seems to me that the trial judge is required to find that the search or seizure contravened s. 8 of the Charter.

The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

3. *What remedy is appropriate?*

Once the reviewing judge determines that the interception was not lawfully made, he or she has made a determination in the very language of s. 178.16(1)(a), which provides:

perquisition ou la fouille n'est donc pas autorisée par la loi et elle est illégale. Par conséquent, pour que le juge qui siège en révision détermine, comme il est tenu de le faire, s'il y a eu violation de l'art. 8, il doit déterminer si les dispositions du *Code* ont été respectées. Cela résulte inévitablement de ce que les conditions légales sont identiques aux exigences de l'art. 8. L'arrêt *Wilson* ne permettait pas de réviser la décision du juge ayant accordé l'autorisation selon laquelle les conditions légales avaient été respectées, sauf lorsque étaient établis des moyens telles la fraude ou la découverte de nouveaux éléments de preuve; par contre, l'application de l'art. 8 exige la révision comme étape de la décision relative au caractère raisonnable de la fouille, de la perquisition et de la saisie.

Bien que le juge qui exerce ce pouvoir relativement nouveau ne soit pas tenu de se conformer au critère de l'arrêt *Wilson*, il ne devrait pas réviser l'autorisation *de novo*. La façon appropriée est établie dans les motifs du juge Martin en l'espèce. Il affirme, à la p. 119:

[TRADUCTION] Si le *juge du procès* conclut, d'après les documents dont disposait le juge ayant accordé l'autorisation, qu'il n'existait aucun élément susceptible de le convaincre que les conditions préalables pour accorder l'autorisation existaient, il me semble alors que le juge du procès doit conclure que la fouille, la perquisition ou la saisie contrevient à l'art. 8 de la Charte.

Le juge qui siège en révision ne substitue pas son opinion à celle du juge qui a accordé l'autorisation. Si, compte tenu du dossier dont disposait le juge qui a accordé l'autorisation et complété lors de la révision, le juge siégeant en révision, conclut que le juge qui a accordé l'autorisation pouvait le faire, il ne devrait pas intervenir. Dans ce processus, la fraude, la non-divulgaration, la déclaration trompeuse et les nouveaux éléments de preuve sont tous des aspects pertinents, mais au lieu d'être nécessaires à la révision leur seul effet est d'aider à décider s'il existe encore un fondement quelconque à la décision du juge qui a accordé l'autorisation.

3. *Quelle est la réparation appropriée?*

Lorsque le juge siégeant en révision décide que l'interception n'a pas été faite légalement, il rend une décision selon les termes mêmes de l'al. 178.16(1)a), qui prévoit:

TAB 97

Francisco Batista Pires *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Attorney General of Ontario,
Attorney General of British Columbia
and Criminal Lawyers' Association
(Ontario)** *Interveners*

- and -

Ronaldo Lising *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Attorney General of Ontario,
Attorney General of British Columbia
and Criminal Lawyers' Association
(Ontario)** *Interveners*

INDEXED AS: R. v. PIRES; R. v. LISING

Neutral citation: 2005 SCC 66.

File Nos.: 30151, 30240.

2005: May 18; 2005: November 17.

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

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Criminal law — Interception of private communications — Entitlement of accused to cross-examine on affidavits — Accused denied leave to cross-examine peace officer who filed affidavit in support of wiretap authorizations — Whether accused entitled as of right to

Francisco Batista Pires *Appellant*

c.

Sa Majesté la Reine *Intimée*

et

**Procureur général de l'Ontario,
procureur général de la Colombie-
Britannique et Criminal Lawyers'
Association (Ontario)** *Intervenants*

- et -

Ronaldo Lising *Appellant*

c.

Sa Majesté la Reine *Intimée*

et

**Procureur général de l'Ontario,
procureur général de la Colombie-
Britannique et Criminal Lawyers'
Association (Ontario)** *Intervenants*

RÉPERTORIÉ : R. c. PIRES; R. c. LISING

Référence neutre : 2005 CSC 66.

N^{os} du greffe : 30151, 30240.

2005 : 18 mai; 2005 : 17 novembre.

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

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

Droit criminel — Interception de communications privées — Droit de l'accusé de contre-interroger relativement aux affidavits — Refus aux accusés du droit de contre-interroger le policier ayant souscrit l'affidavit à l'appui des autorisations d'écoute électronique —

At trial, the guilt or innocence of the accused is at stake. The Crown bears the burden of proving its case beyond a reasonable doubt. In that context, the right to cross-examine witnesses called by the Crown “without significant and unwarranted constraint” becomes an important component of the right to make full answer and defence: *R. v. Lyttle*, [2004] 1 S.C.R. 193, 2004 SCC 5, at para. 41. If, through cross-examination, the defence can raise a reasonable doubt in respect of any of the essential elements of the offence, the accused is entitled to an acquittal. Likewise, defence evidence, as a general rule, is only subject to exclusion where the prejudicial effect substantially outweighs its probative value: *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 611. The appellants rely heavily on these principles in support of their contention that they have a constitutional right to cross-examine the affiant who filed in support of the wiretap authorization.

Au procès, la culpabilité ou l’innocence de l’accusé est en jeu. Le ministère public a le fardeau d’établir la culpabilité hors de tout doute raisonnable. Dans ce contexte, le droit de contre-interroger les témoins cités par le ministère public « sans se voir imposer d’entraves importantes et injustifiées » devient un élément essentiel du droit à une défense pleine et entière : *R. c. Lyttle*, [2004] 1 R.C.S. 193, 2004 CSC 5, par. 41. Si la défense parvient, lors du contre-interrogatoire, à susciter un doute raisonnable à l’égard de l’un ou l’autre des éléments essentiels de l’infraction, l’accusé a droit à l’acquittement. De même, la preuve de la défense ne peut en règle générale être écartée que si son effet préjudiciable l’emporte substantiellement sur sa valeur probante : *R. c. Seaboyer*, [1991] 2 R.C.S. 577, p. 611. Les appelants se fondent en grande partie sur ces principes pour étayer leur prétention selon laquelle ils possèdent un droit constitutionnel leur permettant de contre-interroger le déposant ayant souscrit l’affidavit à l’appui de la demande d’autorisation d’écoute électronique.

However, the *Garofoli* review hearing is not intended to test the merits of any of the Crown’s allegations in respect of the offence. The truth of the allegations asserted in the affidavit as they relate to the essential elements of the offence remain to be proved by the Crown on the trial proper. Rather, the review is simply an evidentiary hearing to determine the *admissibility* of relevant evidence about the offence obtained pursuant to a presumptively valid court order. (I say “relevant” evidence because, if not relevant, its inadmissibility is easily determined without the need to review the authorization process.) As indicated earlier, the statutory preconditions for wiretap authorizations will vary depending on the language of the provision that governs their issuance. The reviewing judge on a *Garofoli* hearing only inquires into whether there was any basis upon which the authorizing judge could be satisfied that the relevant statutory preconditions existed. For example, in this case, where the authorization relates to participant or consent surveillance, the reviewing judge must determine

Cependant, l’audience en révision de type *Garofoli* n’a pas pour objet de vérifier le bien-fondé de l’une ou l’autre des allégations du ministère public concernant l’infraction. La véracité des allégations relatives aux éléments essentiels de l’infraction contenues dans l’affidavit reste à être prouvée par le ministère public au procès proprement dit. Au contraire, cette révision n’est qu’une simple audition de la preuve visant à déterminer l’*admissibilité* de la preuve pertinente relative à l’infraction obtenue en vertu d’une ordonnance du tribunal présumée valide. (Je parle de preuve « pertinente », parce que si la preuve n’est pas pertinente, on peut facilement en déterminer l’inadmissibilité sans avoir à examiner le processus d’autorisation.) Comme je l’ai déjà indiqué, les conditions légales préalables qui doivent être respectées pour obtenir une autorisation d’écoute électronique varient selon le libellé de la disposition en régissant la délivrance. La seule question que se pose le juge siégeant en révision à l’occasion d’une audience de type *Garofoli* est de savoir s’il existait des motifs qui permettaient au juge ayant accordé

whether there was a basis for the authorizing judge to be satisfied that:

(a) there are reasonable grounds to believe that an offence has been or will be committed;

(b) either the originator or the intended recipient of the private communication has consented to the interception; and

(c) there are reasonable grounds to believe that information concerning the offence will be obtained by the interception.

Hence, there is a relatively narrow basis for exclusion. Even if it is established that information contained within the affidavit is inaccurate, or that a material fact was not disclosed, this will not necessarily detract from the existence of the statutory pre-conditions. The likelihood that the proposed challenge will have an impact on the admissibility of the evidence will depend on the particular factual context. In the end analysis, the admissibility of the wiretap evidence will not be impacted under s. 8 if there remains a sufficient basis for issuance of the authorization.

l'autorisation d'être convaincu de la présence des conditions légales préalables pertinentes. Par exemple, dans la présente espèce où l'autorisation se rapporte à une surveillance participative ou consensuelle, le juge siégeant en révision doit déterminer s'il existait un fondement permettant au juge qui a accordé l'autorisation d'être convaincu :

a) qu'il existe des motifs raisonnables de croire qu'une infraction a été ou sera commise;

b) que l'auteur de la communication privée ou la personne à qui elle est destinée a consenti à l'interception;

c) qu'il existe des motifs raisonnables de croire que des renseignements relatifs à l'infraction seront obtenus au moyen de l'interception.

Par conséquent, les motifs justifiant l'exclusion sont relativement restreints. Même s'il est établi que les renseignements contenus dans l'affidavit sont inexacts, ou qu'un fait substantiel n'a pas été communiqué, cela ne réfutera pas nécessairement la présence des conditions légales préalables. La probabilité que la contestation envisagée ait une incidence sur l'admissibilité de la preuve dépendra du contexte factuel particulier. En dernière analyse, l'admissibilité de la preuve d'écoute électronique ne sera aucunement affectée par l'art. 8 s'il subsiste un fondement suffisant pour justifier la délivrance de l'autorisation.

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It is in this narrower context that the right to cross-examine, as an adjunct to the right to make full answer and defence, must be considered. There is no point in permitting cross-examination if there is no reasonable likelihood that it will impact on the question of the admissibility of the evidence. The *Garofoli* threshold test is nothing more than a means of ensuring that, when a s. 8 challenge is initiated, the proceedings remain focussed and on track. Even on the trial proper, the right to cross-examine is not unlimited. In *Lyttle*, the Court reiterated the principle that counsel are "bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose

C'est dans ce contexte plus restreint qu'il faut examiner le droit de contre-interroger en tant que complément du droit à une défense pleine et entière. Il ne sert à rien de permettre le contre-interrogatoire s'il n'existe aucune probabilité raisonnable que celui-ci ait une incidence sur la question de l'admissibilité de la preuve. Le critère préliminaire énoncé dans *Garofoli* n'est rien de plus qu'un moyen de s'assurer que, une fois la contestation fondée sur l'art. 8 engagée, l'instance demeure sur la bonne voie. Même au procès proprement dit, le droit de contre-interroger n'est pas illimité. Dans l'arrêt *Lyttle*, la Cour a réaffirmé le principe selon lequel les avocats « sont liés par les règles de la pertinence et [qu']il leur est

TAB 98

Thanh Long Vu *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Attorney General of Ontario,
Attorney General of Alberta,
British Columbia Civil
Liberties Association,
Canadian Civil Liberties Association
and Criminal Lawyers' Association
(Ontario)** *Interveners*

INDEXED AS: **R. v. Vu**

2013 SCC 60

File No.: 34687.

2013: March 27; 2013: November 7.

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

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Constitutional law — Charter of Rights — Search and seizure — Validity of search — Police obtaining warrant not specifying grounds for obtaining evidence of ownership or occupancy of residence and not mentioning search of computers and cellular telephones — Whether search warrant properly permitting a search for documents evidencing ownership or occupation — Whether warrant authorized search of computers and cellular telephone — If search was unlawful, whether evidence obtained should be excluded — Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

The appellant was charged with production of marijuana, possession of marijuana for the purpose of trafficking, and theft of electricity. The police had obtained a warrant authorizing the search of a residence for evidence of theft of electricity, including documentation identifying the owners and/or occupants of the residence. Even

Thanh Long Vu *Appellant*

c.

Sa Majesté la Reine *Intimée*

et

**Procureur général de l'Ontario,
procureur général de l'Alberta,
Association des libertés
civiles de la Colombie-Britannique,
Association canadienne des libertés
civiles et Criminal Lawyers' Association
(Ontario)** *Intervenants*

RÉPERTORIÉ : **R. c. Vu**

2013 CSC 60

N° du greffe : 34687.

2013 : 27 mars; 2013 : 7 novembre.

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

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

Droit constitutionnel — Charte des droits — Fouilles, perquisitions et saisies — Validité de la fouille — Obtention par la police d'un mandat ne précisant pas les motifs de la recherche de preuves confirmant l'identité des propriétaires ou occupants d'une résidence et ne mentionnant pas la fouille d'ordinateurs et de téléphones cellulaires — Le mandat de perquisition autorisait-il dûment la recherche de documents confirmant l'identité des propriétaires ou occupants? — Le mandat autorisait-il la fouille des ordinateurs et du téléphone cellulaire? — Si la fouille était illégale, la preuve obtenue devait-elle être écartée? — Charte canadienne des droits et libertés, art. 8, 24(2).

L'appellant a été accusé de production de marijuana, de possession de marijuana en vue d'en faire le trafic et de vol d'électricité. Les policiers ont obtenu un mandat les autorisant à perquisitionner dans une résidence pour y rechercher des preuves de vol d'électricité, y compris des documents identifiant les propriétaires et/ou occupants

for that of the issuing justice. In my respectful view, the Court of Appeal was on firm ground in reaching this conclusion.

[16] The question for the reviewing judge is “whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge”: *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 54 (emphasis deleted); *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 40. In applying this test, the reviewing judge must take into account that authorizing justices may draw reasonable inferences from the evidence in the ITO; the informant need not underline the obvious: *R. v. Shiers*, 2003 NSCA 138, 219 N.S.R. (2d) 196, at para. 13; *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 (Ont. Ct. (Gen. Div.)), at pp. 364-65; *R. v. Allain* (1998), 205 N.B.R. (2d) 201 (C.A.), at para. 11.

[17] The ITO set out facts sufficient to allow the authorizing justice to reasonably draw the inference that there were reasonable grounds to believe that documents evidencing ownership or occupation would be found in the residence: A.R., vol. II, at p. 112. In particular, the ITO referred to the premises to be searched as a “residence” and as a “two (2) story house” (p. 111). It also indicated that the appellant owned the property and that electricity was being consumed there (pp. 110-11). In my view, it is a reasonable inference that a residence would be the place to look for documents evidencing ownership or occupation. Where else would one expect to find such documents if not in the residence itself? Moreover, I think that the authorizing justice could reasonably infer that a place was being occupied as a residence from the fact that electricity was being consumed at that place and that it had an owner.

caractère suffisant de la preuve à celle du juge de paix qui avait décerné le mandat. À mon humble avis, cette conclusion de la Cour d’appel reposait sur de solides assises.

[16] Le juge qui siège en révision doit trancher la question de savoir « s’il existait quelque élément de preuve fiable auquel le juge aurait pu raisonnablement ajouter foi pour accorder l’autorisation, et non si, de l’avis du juge siégeant en révision, le juge saisi de la demande d’autorisation aurait dû y faire droit » : *R. c. Araujo*, 2000 CSC 65, [2000] 2 R.C.S. 992, par. 54 (soulignement omis); *R. c. Morelli*, 2010 CSC 8, [2010] 1 R.C.S. 253, par. 40. En appliquant ce critère, le juge siégeant en révision doit se rappeler que le juge de paix saisi de la demande d’autorisation peut tirer des inférences raisonnables de la preuve présentée dans la dénonciation; l’auteur de la dénonciation n’est pas tenu de souligner à grands traits ce qui est par ailleurs évident : *R. c. Shiers*, 2003 NSCA 138, 219 N.S.R. (2d) 196, par. 13; *R. c. Sanchez* (1994), 93 C.C.C. (3d) 357 (C. Ont. (Div. gén.)), p. 364-365; *R. c. Allain* (1998), 205 R.N.-B. (2^e) 201 (C.A.), par. 11.

[17] La Dénonciation énonçait suffisamment de faits pour permettre au juge de paix saisi de la demande d’autorisation d’inférer raisonnablement qu’il existait des motifs raisonnables de croire que des documents confirmant l’identité des propriétaires ou occupants seraient découverts dans la résidence : d.a., vol. II, p. 112. En particulier, la Dénonciation décrivait les lieux visés par la perquisition comme étant une [TRADUCTION] « résidence » et une « maison à deux (2) étages » (p. 111). Elle indiquait également que l’appelant était le propriétaire des lieux et que de l’électricité y était consommée (p. 110-111). À mon avis, il est raisonnable d’inférer qu’une résidence est l’endroit où il faut regarder pour trouver des documents confirmant l’identité de ses propriétaires ou occupants. À quel autre endroit pourrait-on s’attendre à trouver de tels documents, si ce n’est dans la résidence elle-même? Qui plus est, j’estime qu’il était raisonnable pour le juge de paix saisi de la demande d’autorisation d’inférer que la propriété était occupée en tant que résidence, compte tenu du fait que de l’électricité était consommée dans ce lieu et que celui-ci avait un propriétaire.

TAB 99

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 *Appellant*

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 (5^e 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 (5^e suppl.), art. 231.1(1), 231.2(1), 239.

know, however, that the lead alleged that the appellant had failed to report substantial income related to the 1990 and 1991 taxation years. Furthermore, the lead listed six Calgary art galleries that had purchased Mrs. Jarvis's art work from the appellant.

Although internal departmental policies identified all tax leads from informants as being the responsibility of the Special Investigations Section, the lead was in fact referred to the Business Audit Section. There, it was assigned to Donna Goy-Edwards, an experienced business auditor. Goy-Edwards took sole control over the file, reporting to her supervisor, John Moriarty.

On February 16, 1994, Goy-Edwards prepared an "Audit Plan," consisting of three separate tasks:

- 1) Clear lead.
- 2) Review disposition of all assets at date of death in Oct/90. Review all tax consequences.
- 3) Audit accordingly.

Not all leads received by the CCRA are substantiated; hence, "clearing" a lead refers to a process whereby the auditor reviews source documents for the purpose of determining the validity of the allegations contained in the lead. To this end, Goy-Edwards attempted on February 16 and 17 by telephone to reach the appellant and the accountant, Tom Burke, who had prepared the 1990 and 1991 tax returns. She was unable to reach either, but left two voice messages on the appellant's telephone answering machine.

Goy-Edwards then sent two letters to the appellant on February 17. The letters were addressed simply "General Delivery, Cremona, Alberta". One letter dealt with the appellant in his capacity as executor of his wife's estate, indicating that "[t]he file of the Late Georgia Jarvis has been selected for audit for the [1990] taxation year" and that "this letter will serve as a formal notice of the audit in

été produit en preuve. Cependant, nous savons que son auteur alléguait que l'appellant avait omis de déclarer des revenus substantiels pour les années d'imposition 1990 et 1991. Par ailleurs, cet indice énumérait six galeries d'art qui avaient acheté des œuvres de M^{me} Jarvis à l'appellant.

Même si les politiques ministérielles internes pré-cisaient que tous les indices fiscaux fournis par des dénonciateurs relevaient de la Section des enquêtes spéciales, l'indice a été acheminé à la Section de la vérification des dossiers d'entreprises et confié à M^{me} Donna Goy-Edwards, une vérificatrice d'entreprises d'expérience. Madame Goy-Edwards avait le contrôle exclusif du dossier, sous la supervision de John Moriarty.

Le 16 février 1994, M^{me} Goy-Edwards a préparé un « Plan de vérification » comportant trois tâches distinctes :

[TRADUCTION]

- 1) Contrôler l'indice.
- 2) Analyser la disposition de tous les biens à la date du décès en octobre 1990 et toutes les conséquences fiscales en découlant.
- 3) Effectuer la vérification en conséquence.

Tous les indices reçus par l'ADRC ne sont pas corroborés; c'est pourquoi le « contrôle » d'un indice s'entend du processus par lequel le vérificateur examine les documents sources pour déterminer la validité des allégations contenues dans l'indice. À cette fin, les 16 et 17 février, M^{me} Goy-Edwards a tenté de joindre par téléphone l'appellant et son comptable, Tom Burke, qui avait préparé les déclarations de revenu de 1990 et de 1991. Ne réussissant pas à les joindre, elle a laissé deux messages vocaux à l'appellant sur son répondeur.

Le 17 février, M^{me} Goy-Edwards a également envoyé deux lettres à l'appellant. Ces lettres étaient tout simplement adressées à : [TRADUCTION] « Poste restante, Cremona, Alberta ». L'une d'elles concernait l'appellant à titre d'exécuteur de la succession de son épouse et indiquait que [TRADUCTION] « [l]e dossier de feu Georgia Jarvis a été sélectionné pour vérification pour l'année d'imposition

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progress”. The other letter concerned the appellant in his personal capacity, and specified that his file had “been selected for audit for the taxation years 1990 & 1991”, adding again that the letter constituted formal notice of the audit. In each instance, the appellant was requested to make available certain enumerated books and records. Finally, the letters stated that the respective files would be held in abeyance for a 15-day period to allow the appellant “an opportunity to contact the writer and make arrangements to have the books and records made available for the audit”.

[1990] » et que [TRADUCTION] « la présente lettre tient lieu d’avis officiel de la vérification en cours ». L’autre lettre visait l’appelant personnellement et précisait que son dossier avait [TRADUCTION] « été sélectionné pour vérification pour les années d’imposition 1990 et 1991 », ajoutant également qu’il s’agissait d’un avis officiel de la vérification. Dans chaque cas, on demandait à l’appelant de permettre l’accès à certains livres et registres énumérés. Enfin, ces lettres précisait que chaque dossier visé serait laissé en suspens pendant une période de 15 jours pour donner à l’appelant [TRADUCTION] « la possibilité de communiquer avec l’auteur de la lettre et de prendre des dispositions afin de permettre l’accès aux livres et registres pour les besoins de la vérification ».

10 On March 7, 1994, shortly after the 15-day period elapsed without word from the appellant, Goy-Edwards commenced contact with third-party sources. She researched departmental library services for written information on Mrs. Jarvis’s art work, to obtain facts about her works and discover where they were being displayed. Through these efforts, she was able to locate three additional galleries, not listed in the lead, that had purchased art from the appellant. Goy-Edwards then personally contacted or visited all nine galleries. She identified herself as a Revenue Canada employee and requested that she be granted access to certain of their books and records pertaining to art sales.

Le 7 mars 1994, peu après la fin de cette période de 15 jours et voyant que l’appelant n’avait pas communiqué avec elle, M^{me} Goy-Edwards a pris contact avec des tiers. Elle a effectué des recherches auprès des services de la bibliothèque du ministère pour trouver des renseignements écrits sur les œuvres d’art de M^{me} Jarvis, obtenir des renseignements factuels sur ses œuvres et découvrir où elles étaient exposées. Grâce à ces efforts, elle a découvert trois autres galeries, dont l’indice ne faisait pas mention, mais qui avaient acheté des œuvres à l’appelant. Madame Goy-Edwards a ensuite joint ou visité elle-même les neuf galeries. Elle s’y est présentée comme une fonctionnaire de Revenu Canada et elle a demandé qu’on lui donne accès à certains des livres et registres relatifs aux ventes d’œuvres d’art.

11 Between March 7 and 16, Goy-Edwards was able to obtain information from each of the galleries regarding the sale of Mrs. Jarvis’s works. From the particulars contained in purchase invoices and cancelled cheques, the auditor determined that the appellant had grossed \$358,409 from sales to the nine galleries between October 23 and December 31, 1990. For the 1991 calendar year, the figure was \$221,366. Endorsements found on the reverse side of the cheques also disclosed information regarding the appellant’s banking arrangements. Independently, Goy-Edwards calculated that, for sales accruing to Mrs. Jarvis from January 1, 1990 until her death, the cost of sales was 29.5 percent of

Entre les 7 et 16 mars, M^{me} Goy-Edwards a pu obtenir des renseignements de chacune des galeries au sujet de la vente des œuvres de M^{me} Jarvis. D’après les renseignements figurant sur les factures d’achat et les chèques oblitérés, la vérificatrice a déterminé que l’appelant avait touché, entre le 23 octobre et le 31 décembre 1990, un revenu brut de 358 409 \$ au titre des ventes effectuées aux neuf galeries. Pour l’année civile 1991, ce revenu s’élevait à 221 366 \$. En outre, l’endossement figurant au verso des chèques fournissait des renseignements concernant les arrangements bancaires de l’appelant. De façon indépendante, pour les ventes imputées à M^{me} Jarvis entre le 1^{er} janvier 1990 et

documentation requested in the February 17 letters, and made arrangements to meet at the appellant's farm on April 11, 1994 to "commence a review of the books and records". The record indicates that the parties might have chosen this date in order to provide the appellant with sufficient time to amass the documentation, since many of his belongings were still packed up from his move.

qu'il devait rassembler les documents demandés dans les lettres du 17 février et elle a pris des dispositions pour le rencontrer à son exploitation agricole le 11 avril 1994 afin d'y [TRADUCTION] « commencer un examen des livres et registres ». D'après le dossier, les parties ont peut-être choisi cette date pour que l'appelant ait suffisamment de temps pour rassembler les documents, bon nombre de ses effets étant encore emballés en raison du déménagement.

15 Goy-Edwards made no mention of the fact that she had already contacted third party sources. In response to one of her questions, however, the appellant confirmed the \$58,000 figure relative to 1990 net art sales income. Finally, Goy-Edwards advised the appellant that she would be accompanied by an assistant during the audit. The appellant stated that he would not have any difficulties with this.

Madame Goy-Edwards n'a pas mentionné qu'elle avait déjà communiqué avec des tiers. Toutefois, en réponse à l'une de ses questions, l'appelant a confirmé qu'il avait touché un revenu net de 58 000 \$ au titre de la vente d'œuvres d'art pour l'année 1990. Enfin, M^{me} Goy-Edwards a informé l'appelant qu'elle serait accompagnée d'un adjoint au cours de la vérification. L'appelant a affirmé que cela ne posait aucun problème.

16 On April 11, Goy-Edwards was in fact accompanied to the appellant's residence by her supervisor, Moriarty, whom she introduced on this occasion as her "team leader". The judge at first instance expressly disbelieved Goy-Edwards' explanation that Moriarty came along to provide navigational assistance because of her lack of familiarity with the area in which the appellant lived. The supervisor was present in an observational role.

Le 11 avril, M^{me} Goy-Edwards s'est effectivement rendue à la résidence de l'appelant en compagnie de son superviseur, M. Moriarty, qu'elle a alors présenté comme son [TRADUCTION] « chef d'équipe ». Le juge du procès a dit expressément qu'il ne croyait pas l'explication de M^{me} Goy-Edwards selon laquelle M. Moriarty l'avait accompagnée pour lui indiquer le chemin parce qu'elle ne connaissait pas très bien la région où habitait l'appelant. Le superviseur était présent à titre d'observateur.

17 During the interview, Moriarty did not actively take notes. Moreover, Goy-Edwards took the lead in all discussions, with Moriarty interjecting only occasionally to obtain clarification.

Au cours de l'entrevue, M. Moriarty n'a pas activement pris de notes. Par ailleurs, c'est M^{me} Goy-Edwards qui a dirigé toutes les discussions, M. Moriarty intervenant seulement à l'occasion pour obtenir des précisions.

18 The appellant was not cautioned as to his rights. He answered all of the auditor's questions, which dealt primarily with the art sales but which also touched upon his farming operations. The appellant stated that all information pertaining to art sales was contained in the contracts and receipt books he kept. He provided information about his banking arrangements, and indicated that he would take steps to access the records pertaining thereto. In addition, the appellant signed a bank authorization for an account held with the Bank of Montreal, the existence of which he had not disclosed until

L'appelant n'a pas été informé de ses droits. Il a répondu à toutes les questions de la vérificatrice, qui portaient principalement sur les ventes d'œuvres d'art, mais aussi sur son entreprise agricole. L'appelant a déclaré que tous les renseignements se rapportant à la vente d'œuvres figuraient dans les contrats et les livrets de reçus qu'il conservait. Il a fourni des renseignements au sujet de ses arrangements bancaires et indiqué qu'il prendrait des mesures pour avoir accès aux registres s'y rapportant. L'appelant a de plus signé une autorisation bancaire relativement à un compte détenu auprès de

Goy-Edwards posed a question about it: the auditor knew of the account from her third-party source investigations. She agreed to hold the authorization in abeyance for a short while in order to give the appellant the opportunity personally to obtain the documentation.

Goy-Edwards enquired into the inventory of originals and prints at the date of Mrs. Jarvis's death, as well as the appellant's role in selling the art. Her purpose with these lines of questioning was to compare the responses given by the appellant to the information that she had previously obtained from the departmental library. Finally, the appellant provided the auditor with art sale-related materials, including the two receipt books tracking sales and a number of other receipts documenting expenses. Goy-Edwards removed these books and records for later examination.

A few days after the interview, on April 15, Burke telephoned Goy-Edwards for an updated report on the state of the file. Goy-Edwards briefed the accountant as to the April 11 meeting, and stated that she would keep him apprised of the audit's progress.

In late April 1994, Goy-Edwards obtained many of the records and much of the information requested from the appellant. Subsequently, she performed various calculations to determine whether all the income related to the art sales had been properly reported. As a result of these calculations, Goy-Edwards noted a discrepancy of approximately \$700,000 between the appellant's earned and reported income over the two taxation years in question. On this basis, the auditor concluded that the appellant had grossly omitted revenues, suggesting that fraud was a possibility, and that further action was warranted.

Therefore, rather than completing the audit, on May 4, 1994, Goy-Edwards prepared a "Form

la Banque de Montréal, dont il n'avait pas divulgué l'existence jusqu'à ce que M^{me} Goy-Edwards lui pose une question à ce sujet; cette dernière était au courant de l'existence du compte en raison des renseignements qu'elle avait recueillis auprès de tiers. Elle a accepté d'attendre un peu avant de se servir de l'autorisation, afin de permettre à l'appelant d'obtenir lui-même les documents.

Madame Goy-Edwards a posé des questions sur l'inventaire des originaux et des reproductions à la date du décès de M^{me} Jarvis ainsi que sur le rôle que l'appelant avait joué dans la vente des œuvres d'art. Par ces questions, elle visait à comparer les réponses données par l'appelant aux renseignements qu'elle avait obtenus auparavant de la bibliothèque du ministère. L'appelant a finalement fourni à la vérificatrice des documents relatifs à la vente des œuvres d'art, dont les deux livrets de reçus faisant état des ventes ainsi qu'un certain nombre d'autres reçus à l'appui de dépenses. Madame Goy-Edwards a emporté ces livres et registres pour examen ultérieur.

Quelques jours après l'entrevue, soit le 15 avril, M. Burke a téléphoné à M^{me} Goy-Edwards pour obtenir une mise à jour sur l'état du dossier. Madame Goy-Edwards l'a mis au courant de ce qui s'était passé à la rencontre du 11 avril et lui a dit qu'elle le tiendrait au courant de l'avancement de la vérification.

À la fin d'avril 1994, M^{me} Goy-Edwards a obtenu un grand nombre des registres et une bonne partie des renseignements demandés à l'appelant. Elle a par la suite procédé à divers calculs pour déterminer si tous les revenus au titre des ventes d'œuvres d'art avaient été correctement déclarés. À l'issue de ces calculs, M^{me} Goy-Edwards a constaté un écart d'approximativement 700 000 \$ entre les revenus gagnés et déclarés de l'appelant au cours des deux années d'imposition en cause. Sur la base de cette constatation, la vérificatrice a conclu que l'appelant avait omis d'importants revenus, ce qui laissait croire à la possibilité d'une fraude et à l'opportunité de prendre d'autres mesures.

Plutôt que de terminer la vérification, M^{me} Goy-Edwards a préparé un « Formulaire T134 », le

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T134” to refer the matter — along with her entire file, which contained records of all contacts, conversations, and calculations made in respect of the matter — to the Special Investigations Section of Revenue Canada. This latter division was charged in the present case with determining whether further investigation with a view to possible prosecution for tax evasion was merited. The record indicates that, in general, not every referral from the Business Audit Section necessarily results in charges being laid, and that files are on occasion returned to the Business Audit Section after Special Investigations makes a decision not to proceed with a criminal investigation.

23 Goy-Edwards did not attempt to contact the appellant or Burke to advise them that the file was no longer under her control. Two days later, on May 6, the appellant’s son Jim left a telephone message with the auditor, indicating that he would be sending the requested Bank of Montreal statements on the following Monday. The statements were in fact delivered on that date, and were passed on to Special Investigations. Again, the appellant, his son and his accountant were not notified that the appellant’s file had been referred to the investigative section.

24 Inside Special Investigations, the appellant’s file was assigned to investigator Diane Chang. Chang met with Goy-Edwards for one to two hours towards the end of May 1994 in order to discuss the file. At some point shortly thereafter, Chang had to contact Goy-Edwards again in order to clarify certain of the notations contained in the auditor’s file. There may have been one or two conversations of this nature, but there is nothing in the record that would suggest that Chang, or any other investigator, ever instructed or requested Goy-Edwards, under the guise of an audit, to obtain further information from or about the appellant.

25 The investigator then reviewed Goy-Edwards’s files, performed her own calculations and analyses, and gathered some information from other internal sources in order to determine if there were

4 mai 1994, pour renvoyer l’affaire à la Section des enquêtes spéciales de Revenu Canada — avec tout le dossier dans lequel étaient consignés en totalité ses communications, conversations et calculs antérieurs. En l’espèce, cette section s’est vue confié le soin d’examiner s’il y avait lieu de pousser l’enquête en vue d’éventuelles poursuites pour fraude fiscale. Le dossier révèle que, de façon générale, tous les renvois par la Section de la vérification des dossiers d’entreprises ne mènent pas au dépôt d’accusations, et qu’il arrive à l’occasion que des dossiers soient retournés à la Section de la vérification des dossiers d’entreprises lorsque la Section des enquêtes spéciales décide de ne pas procéder à une enquête criminelle.

Madame Goy-Edwards n’a pas tenté de communiquer avec l’appelant ou avec M. Burke pour les informer que le dossier n’était plus sous son contrôle. Deux jours plus tard, le 6 mai, Jim, le fils de l’appelant, a laissé un message vocal à la vérificatrice, lui indiquant qu’il allait envoyer le lundi suivant les relevés demandés de la Banque de Montréal. Ces relevés furent livrés le jour en question et transmis aux Enquêtes spéciales. Encore une fois, l’appelant, son fils et son comptable n’ont pas été informés du renvoi du dossier de l’appelant à la section des enquêtes.

Aux Enquêtes spéciales, le dossier de l’appelant a été confié à l’enquêteur Diane Chang. Vers la fin de mai 1994, M^{me} Chang a rencontré M^{me} Goy-Edwards pendant une à deux heures afin d’examiner le dossier. Peu de temps après, M^{me} Chang a de nouveau dû communiquer avec M^{me} Goy-Edwards pour obtenir des précisions sur certaines des notes contenues dans le dossier de la vérificatrice. Une ou deux conversations de cette nature ont peut-être eu lieu, mais rien au dossier ne donne à croire que M^{me} Chang, ou un autre enquêteur, aurait ordonné ou demandé à M^{me} Goy-Edwards d’obtenir d’autres renseignements de l’appelant ou à son sujet sous le couvert d’une vérification.

L’enquêteur a ensuite examiné les dossiers de M^{me} Goy-Edwards, procédé à ses propres calculs et analyses et recueilli certains renseignements auprès d’autres sources internes pour déterminer s’il

penal considerations must all exert some influence.

B. Contextual Approach to Charter Rights

At this stage, it is a firmly established principle that the *Charter* must receive contextual application. The scope of a particular *Charter* right or freedom may vary according to the circumstances: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1355-56, *per* Wilson J.; *McKinlay Transport*, *supra*, at p. 644; *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 793, *per* L'Heureux-Dubé J. (dissenting); *143471 Canada*, *supra*, at p. 347 (*per* Lamer C.J.) and at pp. 361-62 (*per* La Forest J., dissenting); *Comité paritaire*, *supra*, at p. 420, *per* La Forest J.

For present purposes, where ss. 7 and 8 of the *Charter* are at issue, it is instructive to note both that the requirements of fundamental justice relevant to the former section “are not immutable; rather, they vary according to the context in which they are invoked” (*R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361, *per* La Forest J.) and that context will determine the expectation of privacy that one can reasonably expect the latter section to protect (*Thomson Newspapers*, *supra*, at pp. 495-96, *per* Wilson J., dissenting, and at p. 506, *per* La Forest J.; *McKinlay Transport*, *supra*, at pp. 645 and 647; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, at p. 478, *per* Cory J.; *Baron*, *supra*, at p. 436, *per* Sopinka J.; *British Columbia Securities Commission v. Branch*, *supra*, at para. 51, *per* Sopinka and Iacobucci JJ.).

It is worth repeating that the appellant does not attack the constitutionality of ss. 231.1(1) and 231.2(1). Rather, his argument is that the admission into evidence in tax evasion proceedings of statements and documents that were compelled by Revenue Canada officials under these sections was a violation of his rights under ss. 7 and 8 of the *Charter*. He thus argues that the evidence should be excluded under s. 24(2) of the *Charter*. In *McKinlay*

lieu à des peines d'emprisonnement sévères. Une analyse contextuelle fondée sur la *Charte* ne saurait être convenablement réalisée, dans ces cas, sans l'attribution d'un certain poids à chacune des diverses considérations d'ordre réglementaire et pénal.

B. L'approche contextuelle à l'égard des droits garantis par la Charte

Il est maintenant solidement établi que la *Charte* doit être interprétée suivant une approche contextuelle. L'étendue d'un droit ou d'une liberté garanti par la *Charte* peut varier selon les circonstances : *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, p. 1355-1356, le juge Wilson; *McKinlay Transport*, précité, p. 644; *Symes c. Canada*, [1993] 4 R.C.S. 695, p. 793, le juge L'Heureux-Dubé (dissidente); *143471 Canada*, précité, p. 347 (le juge en chef Lamer) ainsi que p. 361-362 (le juge La Forest, dissident); *Comité paritaire*, précité, p. 420, le juge La Forest.

Il est intéressant de noter, pour les besoins de notre analyse, que lorsque les art. 7 et 8 de la *Charte* sont en cause, les exigences de la justice fondamentale propres à l'art. 7 « ne sont pas immuables; elles varient selon le contexte dans lequel on les invoque » (*R. c. Lyons*, [1987] 2 R.C.S. 309, p. 361, le juge La Forest) et que le contexte déterminera le degré de respect de la vie privée auquel une personne peut raisonnablement s'attendre en application de l'art. 8 (*Thomson Newspapers*, précité, p. 495-496, le juge Wilson, dissidente, et p. 506, le juge La Forest; *McKinlay Transport*, précité, p. 645 et 647; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1991] 3 R.C.S. 459, p. 478, le juge Cory; *Baron*, précité, p. 436, le juge Sopinka; *British Columbia Securities Commission c. Branch*, précité, par. 51, les juges Sopinka et Iacobucci).

Il vaut la peine de rappeler que l'appelant ne conteste pas la constitutionnalité des par. 231.1(1) et 231.2(1). Il plaide plutôt que l'admission en preuve, dans une poursuite pour fraude fiscale, de déclarations et documents que les agents de Revenu Canada ont obtenu par la contrainte au moyen de ces dispositions a porté atteinte aux droits que lui garantissent les art. 7 et 8 de la *Charte*. Il soutient donc que ces éléments de preuve doivent être

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Transport, supra, this Court considered whether the predecessor provision to s. 231.2, employed in conjunction with an income tax audit, infringed s. 8 of the *Charter*. Wilson J. held that, although the provision authorized a “seizure” for *Charter* purposes, it provided “the least intrusive means by which effective monitoring of compliance with the *Income Tax Act* can be effected” (p. 649). Wilson J. noted that the taxpayer’s privacy interest in the compelling records was also relatively weak, and ruled that the provision was constitutional. Faced with the *McKinlay Transport* decision, the appellant did not raise the constitutionality of ss. 231.1(1) and 231.2(1) at his trial, but instead invoked s. 24(2) of the *Charter* in order to “deprive from the Crown (for prosecution purposes) the fruits of their [*sic*] deception” (appellant’s factum, at para. 45).

écartés par application du par. 24(2) de la *Charte*. Dans l’arrêt *McKinlay Transport*, précité, notre Cour s’est demandé si la disposition qui a précédé l’art. 231.2, appliquée dans le cadre d’une vérification fiscale, contrevenait à l’art. 8 de la *Charte*. Selon le juge Wilson, même si la disposition en question autorisait une « saisie » visée par la *Charte*, elle était « la méthode la moins envahissante pour contrôler efficacement le respect de la *Loi de l’impôt sur le revenu* » (p. 649). Le juge Wilson a également précisé que le droit du contribuable au respect de sa vie privée à l’égard de documents dont la production peut être exigée est relativement faible et elle a conclu à la constitutionnalité de la disposition. Compte tenu de l’arrêt *McKinlay Transport*, l’appelant n’a pas soulevé la constitutionnalité des par. 231.1(1) et 231.2(1) lors du procès, mais il a plutôt invoqué le par. 24(2) de la *Charte* afin de [TRADUCTION] « priver le ministère public (pour les besoins de la poursuite) des fruits de sa tromperie » (mémoire de l’appelant, par. 45).

(1) Section 7

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Section 7 of the *Charter* reads as follows:

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

A court conducting an analysis under s. 7 must first determine whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination thereof. Next, the court must identify the relevant principle or principles of fundamental justice and, finally, determine whether the deprivation is in accordance with this principle or principles.

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It is beyond doubt that the appellant’s s. 7 liberty interest is engaged by the introduction of statutorily compelled information at his trial for the s. 239 offences, owing to the threat of imprisonment on conviction: see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 515, *per* Lamer J. (as he then was); *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123. The relevant principle of fundamental justice in the present case is the principle against self-incrimination, an elemental canon of the Canadian criminal justice system,

(1) L’article 7

L’article 7 de la *Charte* prévoit :

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

Lorsqu’il procède à une analyse fondée sur l’art. 7, le tribunal doit tout d’abord déterminer s’il y a atteinte réelle ou imminente à la vie, à la liberté, à la sécurité de la personne ou à une combinaison de ces trois droits. Il doit ensuite identifier le ou les principes de justice fondamentale applicables et, enfin, déterminer si l’atteinte est portée en conformité avec ce ou ces principes.

L’appelant risquant l’emprisonnement en cas de déclaration de culpabilité, il est indubitable que son droit à la liberté garanti par l’art. 7 entre en jeu lorsqu’on dépose, à son procès sur des infractions prévues à l’art. 239, des renseignements obtenus par la contrainte dans l’exercice de pouvoirs légaux : *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, p. 515, le juge Lamer (plus tard Juge en chef); *Renvoi relatif à l’art. 193 et à l’al. 195.1(1)(c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123. Le principe de justice fondamentale applicable en

[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. (2^e) 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.

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. n° 6268 (QL) (C.A.)), autorisation de pourvoi à la C.S.C. accordée, suivie d’un désistement : [2000] 2 R.C.S. ix).

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

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.

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.

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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.

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.

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

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.

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

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

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.

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*)?

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)?

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.

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.

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

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

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

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

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*

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

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.

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.

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.

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).

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

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

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.

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

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

and investigative powers that it grants to the Minister.

2. When, in light of all relevant circumstances, it is apparent that CCRA officials are not engaged in the verification of tax liability, but are engaged in the determination of penal liability under s. 239, the adversarial relationship between the state and the individual exists. As a result, *Charter* protections are engaged.
3. When this is the case, investigators must provide the taxpayer with a proper warning. The powers of compulsion in ss. 231.1(1) and 231.2(1) are not available, and search warrants are required in order to further the investigation.

VI. Application to the Facts of the *Jarvis* Case

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Whether or not a given inquiry is auditorial or investigatory in nature is a question of mixed fact and law. It involves subjecting the facts of a case to a multi-factored legal standard (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35) and, accordingly, Judge Fradsham's finding is not immune from appellate review.

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In our view, although Goy-Edwards's conduct throughout her dealings with the appellant and his accountant was not praiseworthy — and at points appears deceptive — we do not think that the record rises to support a finding that she obtained information under ss. 231.1(1) and 231.2(1) while conducting an investigation, the predominant purpose of which was a determination of Jarvis's penal liability. While Goy-Edwards did on several occasions mislead the appellant and his accountant as to the status of the file, she did not use misleading tactics in order to obtain information under ss. 231.1(1) and 231.2(1) for the purpose of advancing an investigation into penal liability. Moreover, there seems to have been but minor contact between Goy-Edwards and Chang from the moment when the file

distinction entre les pouvoirs de vérification et les pouvoirs d'enquête conférés au ministre.

2. Dans le cas où il est évident, à la lumière de toutes les circonstances pertinentes, que les fonctionnaires de l'ADRC ne procèdent plus à la vérification de l'obligation fiscale, mais essaient d'établir la responsabilité pénale du contribuable sous le régime de l'art. 239, il existe une relation de nature contradictoire entre l'État et le particulier. En conséquence, les protections garanties par la *Charte* s'appliquent.
3. Dans ce cas, les enquêteurs doivent donner une mise en garde appropriée au contribuable. Les pouvoirs de contrainte visés aux par. 231.1(1) et 231.2(1) ne peuvent plus être utilisés et il faut obtenir la délivrance de mandats de perquisition pour poursuivre l'enquête.

VI. Application aux faits de l'affaire *Jarvis*

La question de savoir si un examen constitue une vérification ou une enquête est une question mixte de fait et de droit. Elle commande l'examen des faits au regard d'un critère juridique comportant de multiples facteurs (*Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35); en conséquence, la décision du juge Fradsham n'est pas à l'abri d'un examen en appel.

À notre avis, bien que la conduite de M^{me} Goy-Edwards envers l'appelant et son comptable ne soit pas digne d'éloges, et semble avoir été parfois trompeuse, nous ne croyons pas que le dossier permet de conclure qu'elle a obtenu des renseignements au moyen des par. 231.1(1) et 231.2(1) dans le cadre d'un examen dont l'objet prédominant était d'établir la responsabilité pénale de M. Jarvis. Certes, M^{me} Goy-Edwards a induit l'appelant et son comptable en erreur à plusieurs reprises quant à l'état du dossier, mais elle n'a pas eu recours à des tactiques trompeuses afin d'obtenir des renseignements au moyen des par. 231.1(1) et 231.2(1) dans le but de faire progresser une enquête sur la responsabilité pénale du contribuable. En outre, il semble que les communications entre M^{me} Goy-Edwards et M^{me}

was transferred to Special Investigations on May 4, 1994. In brief, Goy-Edwards should undoubtedly have been truthful when asked about the status of the appellant's file, but there is no evidence to show that she used her audit powers to obtain information for prosecutorial purposes.

We do not think it was improper for Goy-Edwards to have brought her supervisor to the April 11 meeting in order to provide a "second opinion" as to whether the file should be sent to the investigative section. The auditor should not have asked if the appellant felt comfortable with the attendance of an "assistant" when that person was in fact a supervisor, but this did not change the fact that the referral to Special Investigations was the auditor's determination. So long as there has been no crystallization of the adversarial relationship, there is, in our view, nothing wrong with an auditor seeking the counsel of another before completing the transfer paperwork.

The record indicates that very little new information came to light as a result of the April 11 meeting. Goy-Edwards was seeking confirmation of a suspicion that she held that tax evasion may have occurred, but her goal in this was to determine whether to refer the file. There is no suggestion that she was seeking information to be used in an eventual prosecution, which fact is borne out by the conclusions of the Court of Queen's Bench and the Court of Appeal: much of the material that was relied upon in the Information to Obtain was already in Revenue Canada's possession. In this respect, as previously stated, it is clear that, although an investigation has been commenced, the audit powers may continue to be used, though the results of the audit cannot be used in pursuance of the investigation or prosecution.

We conclude that, on the facts of this case, the April 11 meeting did not constitute an investigation

Chang aient été très limitées à partir du moment où le dossier a été transféré aux Enquêtes spéciales le 4 mai 1994. Bref, M^{me} Goy-Edwards aurait certainement dû dire la vérité lorsqu'on lui a posé des questions sur l'état du dossier de l'appelant, mais rien ne prouve qu'elle ait cherché à utiliser ses pouvoirs de vérification pour obtenir des renseignements aux fins d'une poursuite.

À notre avis, il n'était pas irrégulier pour M^{me} Goy-Edwards de se faire accompagner par son superviseur à la rencontre du 11 avril afin d'obtenir une [TRADUCTION] « deuxième opinion » quant à savoir si le dossier devait être acheminé à la section des enquêtes. La vérificatrice n'aurait pas dû demander à l'appelant si la présence d'un « adjoint » l'incommodait, alors que cette personne était en réalité son superviseur; cependant, cela ne change rien au fait que c'est la vérificatrice qui a décidé d'acheminer le dossier aux Enquêtes spéciales. Dans la mesure où il n'y a pas eu cristallisation de la relation de nature contradictoire, à notre avis, il n'y avait rien de mal à ce que la vérificatrice obtienne conseil d'une autre personne avant de remplir les documents de transfert du dossier.

Au vu du dossier, la rencontre du 11 avril a révélé très peu de nouveaux renseignements. Madame Goy-Edwards cherchait une confirmation de ses soupçons quant à la possibilité qu'une fraude fiscale ait été commise, mais le but qu'elle visait alors était de déterminer si le dossier devait être renvoyé. Rien n'indique qu'elle cherchait à obtenir des renseignements qui seraient utilisés dans une poursuite éventuelle, ce que confirment les conclusions de la Cour du Banc de la Reine et de la Cour d'appel : la majorité des documents invoqués à l'appui de la Dénonciation en vue d'obtenir un mandat de perquisition étaient déjà en possession de Revenu Canada. À cet égard, comme nous l'avons déjà précisé, il est évident que l'on peut continuer d'avoir recours aux pouvoirs de vérification, même après le commencement d'une enquête, quoique les résultats de cette vérification ne puissent pas servir pour les besoins de l'enquête ou de la poursuite.

Sur le fondement des faits en l'espèce, nous concluons que la rencontre du 11 avril ne

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into Jarvis's penal liability under s. 239 of the ITA. It follows that, other than the paragraphs struck from the Information by the trial judge as being erroneous, nothing should have been omitted from the application for the search warrant, and the warrant was therefore validly issued. Based on the application of the relevant factors as discussed above, we differ with the courts below and find that there was no investigation into penal liability prior to May 4, 1994, when Goy-Edwards filled out the Form T134 and referred her file to Special Investigations. The record establishes that Chang's efforts to determine whether reasonable grounds to obtain a search warrant commenced upon her receipt of the file, and that she concluded shortly thereafter that such grounds existed.

constituait pas une enquête sur la responsabilité pénale de M. Jarvis sous le régime de l'art. 239 de la LIR. Il s'ensuit qu'aucun renseignement, à l'exception des paragraphes que le juge du procès a retranchés de la dénonciation à cause des erreurs qu'ils comportaient, n'aurait dû être omis de la requête visant l'obtention du mandat de perquisition, et que ce mandat a donc été validement décerné. Compte tenu des facteurs pertinents examinés précédemment, nous ne partageons pas l'opinion des tribunaux d'instance inférieure et sommes d'avis qu'aucune enquête sur la responsabilité pénale n'était en cours avant le 4 mai 1994, au moment où M^{me} Goy-Edwards a rempli le formulaire T134 et a renvoyé le dossier aux Enquêtes spéciales. Au vu de la preuve, dès qu'elle a reçu le dossier, M^{me} Chang s'est efforcée de déterminer s'il existait des motifs raisonnables d'obtenir un mandat de perquisition et elle a conclu peu après à l'existence de tels motifs.

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The searches of the appellant's residence, his accountant's residence, and Revenue Canada's Calgary office were therefore conducted pursuant to a valid warrant. The evidence obtained therefrom should be admissible in a new trial, if one is held. We point out, however, that some banking information was obtained pursuant to s. 231.2(1) requirement letters in early 1995. On the above analysis, this usage violated the appellant's s. 7 rights, since the investigation was at that point well underway. The respondent did not argue that the trial judge had erred in his application of s. 24(2) of the *Charter*, and we would therefore order that the banking records be excluded from any subsequent criminal proceedings against the appellant.

VII. Disposition

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Accordingly, we would dismiss the appeal, and uphold the Alberta Court of Appeal's judgment and order for a new trial.

Appeal dismissed.

Les perquisitions effectuées à la résidence de l'appelant, à la résidence de son comptable et au bureau de Revenu Canada à Calgary ont donc été effectuées conformément à un mandat valide. Les éléments de preuve alors obtenus devraient être admissibles au cours d'un nouveau procès, le cas échéant. Cependant, nous tenons à souligner que certains renseignements bancaires ont été obtenus au début de 1995 à la suite de demandes péremptives présentées sous le régime du par. 231.2(1). Selon l'analyse qui précède, cette façon de faire a porté atteinte aux droits garantis à l'appelant par l'art. 7 puisque l'enquête était alors bien en cours. L'intimée n'a pas soutenu que le juge du procès avait commis une erreur dans l'application du par. 24(2) de la *Charte*, et nous sommes donc d'avis d'ordonner que les registres bancaires soient exclus de toute procédure criminelle ultérieure engagée contre l'appelant.

VII. Dispositif

En conséquence, nous sommes d'avis de rejeter le pourvoi et de confirmer le jugement de la Cour d'appel de l'Alberta et l'ordonnance de nouveau procès.

Pourvoi rejeté.

CT-2024-010

THE COMPETITION TRIBUNAL**IN THE MATTER OF** the *Competition Act*, RSC 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:****THE COMMISSIONER OF COMPETITION****Applicant****- and -****GOOGLE CANADA CORPORATION AND GOOGLE LLC****Respondents**

RESPONDENT'S COMPENDIUM
(Google's Constitutional Challenge)

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